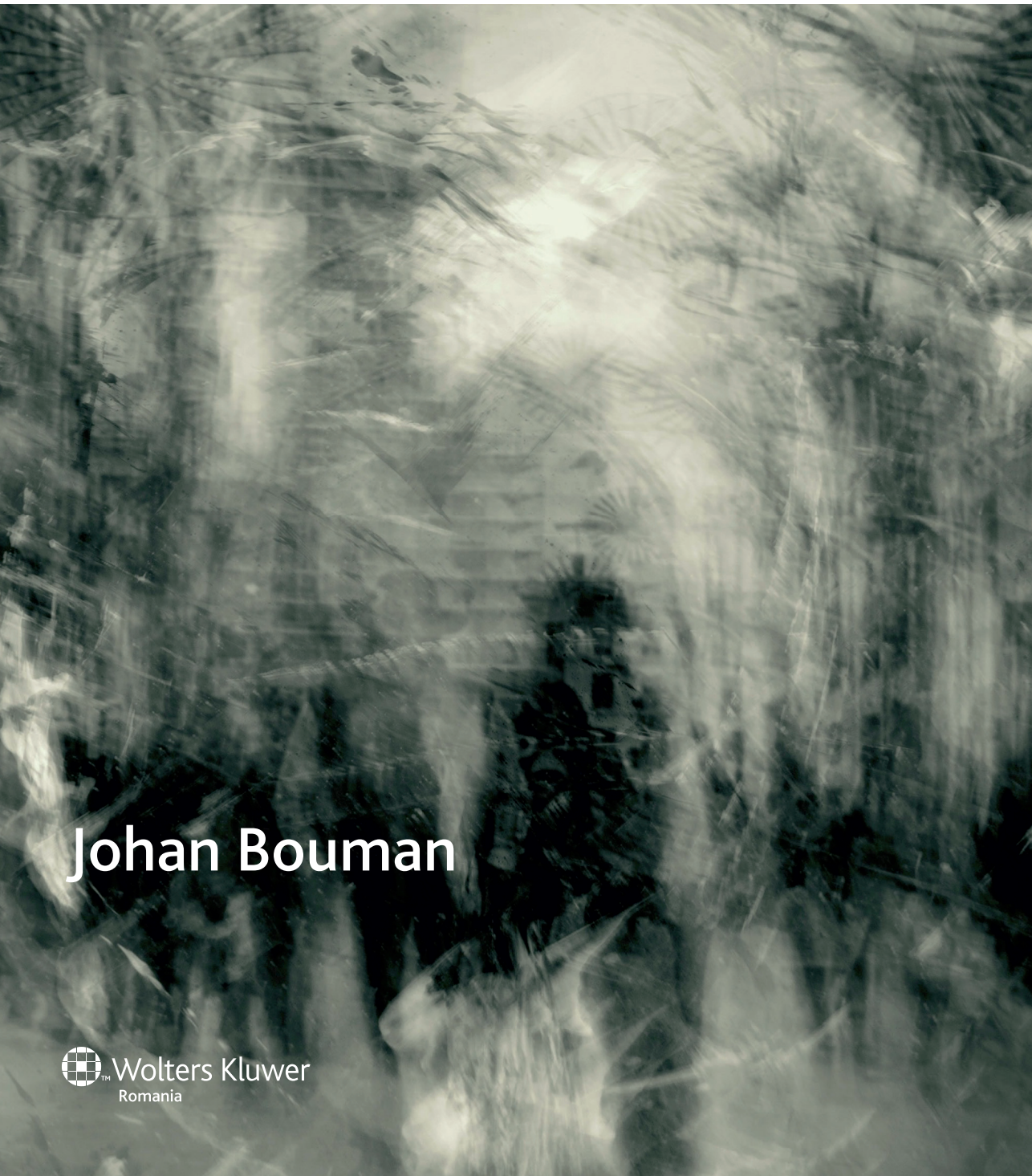
PREVENTING CORRUPTION OF CIVIL SERVANTS IN FRANCE, ROMANIA AND THE NETHERLANDS

A comparative study of law and policy



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(met een samenvatting in het Nederlands)

BUCUREŞTI, 2021

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Proefschrift

ter verkrijging van de graad van doctor aan de
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door

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geboren op 9 juli 1977
te Amsterdam

Promotoren:

Prof. dr. R. Nehmelman
Prof. dr. W. van der Woude

Preface and acknowledgements

At a conference in 2016, Romanian anticorruption expert Laura Ștefan was speaking about the rising numbers of dignitaries convicted for corruption in her country, when she remarked that it did not lead to a lower propensity for corruption among the convicted person's replacements, and what to do if you cannot put them all behind bars. I was taking notes. This is how the topic of prevention presented itself.

Four years later, here we are. I originally ambitioned to write the definitive study on corruption prevention, digging to the bottom of each and every possible subtopic. In that, I have failed miserably. I also wanted to dazzle the scientific world with brilliant new insights on how to end corruption before it starts. Another failure. So it is with considerably more humility than at the outset that I present this study to you. My current ambition is that readers will find it interesting and draw from it some inspiration for better prevention practice.

Four years would have become forty without the help of my wonderful Ana, who never complained about her antisocial husband hunched over his laptop. Another help was the warm encouragement and insightful comments of my supervisors at the University of Utrecht, Messrs. Nehmelman and Van der Woude.

Those who reviewed the draft deserve a special mention: Codru Vrabie, Thibaut Gigou, Adrien Roux, and Sofia Wickberg politely pointed out where it needed correction. And of course I would have been nowhere without the thirty experts who gave me their time for fine-tuning many aspects of policy 'on the ground' – their names are included in a special annex.

A final word of thanks to the eminent professors who have reviewed the manuscript and found it good enough to defend: the professors Auby (Sciences Po, Paris), Claes (University of Maastricht) Kummeling (Utrecht University) , Tofan (University of Bucharest), and Uzman (Utrecht University).

Bucharest, December 2020

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Summary

This study examines the laws and practices to prevent corruption of public officials, in Romania, France, and The Netherlands. The main question in this comparative analysis is how the legislation and implementation of it compare to each other in these three countries, and how they implement the relevant international legal instruments. Based on perception indexes, incidence ratings, and expert evaluations, Romania is considered to be a country with endemic corruption, France much less so, and The Netherlands is considered to be the least corrupt of the three.

The comparison between these countries, the first at this level of detail, is possible and useful because they have considerable differences but find themselves in the same framework of shared EU-membership, civil law structure, and cultural influences. The study is structured as follows: first the main international instruments (such as a UN convention, Council of Europe instruments, and EU instruments), national laws, national institutions and policies are presented. Then follow five chapters, each examining one or two major corruption prevention topics:

- Codes of conduct
- Information and training
- Appointments and promotions, screening
- Conflicts of interest
- Whistle-blowers
- Transparency
- Monitoring
- Use of new technology

Codes of conduct are a ubiquitous instrument to convey the principles and obligations of conduct for public officials. They are helpful as basis for further measures, but their usefulness as standalone instrument is doubtful; a public institution cannot claim that it prevents corruption by adopting a code of conduct. Organising information and training for newly recruited public servants and regular training for those in the service should be just as ubiquitous and mandatory, because the rules of conduct that underlie corruption prevention practice are complex and sometimes not intuitive. However, training numbers are low in Romania and France, and in The Netherlands left to individual managers which leads to large differences between similar institutions.

To prevent persons with specific risks or non-matching personal values from entering the public service, institutions in all three countries conduct background checks. Romania and France also use eliminatory exams to make recruitment less vulnerable to favouritism. The background checks are highly formalised in all three countries, and only cover part of past criminal behaviour to test a candidate's eligibility. Only candidates for exceptionally vulnerable positions or that involve state secrets are verified more thoroughly. This practice could be improved in all three countries, by diversifying entry barriers based on risk assessments.

Conflicts of interest, that endanger the civil servant by tempting him or her with private interest advantages to the detriment of public interests that they are tasked to promote, are the subject of extensive regulation. Dutch law leaves most of the choices to civil servants themselves, instituting few and mostly open rules and pointing out the positive effects of secondary activities for civil

servants. Romania has established the most stringent interdictions, while France has the heaviest procedural framework.

Whistle-blowers are valuable disclosers of otherwise hidden misconduct. They are protected by special laws in each of the three studied countries. In The Netherlands, there is even an entire institution dedicated to their protection, albeit with limited results so far. This study estimates however, that despite the many protective rules, now to be harmonised by a new EU Directive, personal risks for whistle-blowers are so great that they will probably remain a rarity and that anticorruption policy cannot proclaim them main weapons in the struggle, even with ideal protective measures in place.

Freedom of information, or transparency, is another topic on which special laws have been adopted in each of the three studied countries. Access to information about the doings of the civil service are a prerequisite for effective monitoring and detection of corruption by entities inside or outside the public sector. Following international standards, the three countries have similar laws to allow access to information held by the civil service. These laws enounce principles and establish procedures, but in reality it seems in all three countries that access is made difficult due to reluctance by the civil service. For real improvement, rules must be made and executed that really embody the principle of 'everything that is not secret, is public'.

Monitoring and oversight can be done by management, auditors and dedicated auditing authorities within the public sector, and by the media or civil society outside of it. The study finds that public sector monitoring is well established in all three countries, but hardly reports on corruption. Press coverage is less than expected and most of civil society monitors policy – behaviour of civil servants is less monitored.

The final chapter of the study is dedicated to the initiatives with artificial intelligence (AI) analysis of large amounts of data that are sprouting everywhere, although concrete deployment of AI to prevent corruption has not been seen yet in the three studied countries. It concludes that AI creates possibilities to further enhance monitoring and detection of corrupt behaviour, but that the acceptable privacy cost must be established in a democratic manner and framed according to principles presented at the end of the chapter.

Finally, this thesis presents conclusions and some recommendations. The most salient high-level conclusion is that the three countries have different levels of corruption but similar laws and policies, which means that legislation alone cannot explain these differences and that any lawmaker's claims to step up the fight with more regulation would be weak.

At the detail level, significant differences between the three countries can be found however. Some examples: The Netherlands do not incriminate conflicts of interest and influence trafficking, nor does it have a national anticorruption policy or dedicated authority, going against the recommendations of international bodies. France has launched new efforts starting 2017, to repair long-existing shortcomings. The effects are yet to be established. Romania has developed a burdensome but formalistic approach while remaining behind on staff training and funding.

Nederlandse samenvatting

In dit proefschrift wordt een analyse gemaakt van de wetgeving en de praktijk ter voorkoming van corruptie onder ambtenaren in Frankrijk, Roemenië en Nederland. De hoofdvraag in dit vergelijkende onderzoek is hoe de wetgeving en uitvoering daarvan in deze drie landen zich onderling verhouden, en hoe deze uitvoering geven aan de toepasselijke internationale rechtsinstrumenten. Op basis van perceptie-indexen, incidentiecijfers en beoordelingen door experts wordt Roemenië beschouwd als een land met endemische corruptie, Frankrijk veel minder, terwijl Nederland als het minst corrupt van de drie wordt gezien.

Het is mogelijk en ook nuttig om een vergelijking tussen deze drie landen te maken, hoewel nog niet eerder op dit detailniveau gedaan, omdat ze aanzienlijk verschillen maar zich allemaal in hetzelfde kader bevinden van gedeeld EU-lidmaatschap, het continentale rechtssysteem en gedeelde culturele invloeden. Het proefschrift is als volgt gestructureerd: Eerst worden de belangrijkste internationale instrumenten (zoals een VN-verdrag, instrumenten van de Raad van Europa en EU-instrumenten), nationale wetgeving, instellingen en beleid gepresenteerd. Daarna volgen vijf hoofdstukken die elk een of twee hoofdonderwerpen bespreken op het gebied van corruptiepreventie:

- Gedragscodes
- Voorlichting en training
- Screening van kandidaten en werknemers
- Belangenverstrengeling
- Klokkenluiders
- Transparantie
- Controle
- Gebruik van nieuwe technologie

Gedragscodes worden veel gebruikt om de beginselen en verplichtingen betreffende het gedrag van ambtenaren weer te geven. Hun nut als instrument op zich is onbewezen, maar ze kunnen als basis dienen voor verdere maatregelen. Een overheidsorganisatie kan niet beweren dat zij corruptie voorkomt door een gedragscode vast te stellen. Het organiseren van voorlichting en regelmatige training voor nieuwe en zittende ambtenaren zou ook overal moeten gebeuren, omdat de gedragsregels die ten grondslag liggen aan de corruptiepreventiepraktijk complex en niet altijd intuïtief zijn. De aantallen getrainde ambtenaren zijn echter laag in Roemenië en Frankrijk. In Nederland wordt training overgelaten aan individuele managers, zodat er grote verschillen tussen instellingen ontstaan.

Om te voorkomen dat personen met bepaalde risico's of niet-passende persoonlijke normen in publieke dienst komen, maken instellingen in alle drie landen gebruik van achtergrondcontroles. In Roemenië en Frankrijk worden ook toetredingsexamens gehouden, om het wervingsproces minder vatbaar te maken voor favoritisme. De achtergrondcontroles zijn in de drie landen sterk geformaliseerd en testen de geschiktheid van een kandidaat aan de hand van slechts een deel van het criminele verleden. Alleen kandidaten voor uitzonderlijk kwetsbare functies of waar met staatsgeheimen wordt gewerkt, worden grondiger gecontroleerd. Deze praktijk is in de drie landen voor verbetering vatbaar, door het diversifiëren van entreebarrières op basis van risicobeoordelingen.

Belangenverstrengeling bedreigt de ambtenaar door te verleiden tot het kiezen voor voordelen in eigen belang in plaats van voor het openbare belang dat hij of zij moet behartigen. Dit fenomeen

is in de drie landen uitgebreid gereguleerd. De Nederlandse wet laat de meeste keuzes over aan de ambtenaar zelf, door weinig en meest open regels en onder benadrukken van de positieve effecten van nevenactiviteiten voor ambtenaren. Roemenië heeft de strengste beperkingen, terwijl Frankrijk het zwaarste procedurele kader heeft opgetuigd.

Klokkenluiders zijn kwetsbare onthullers van wangedrag dat anders verborgen zou blijven. Zij worden in elk van de drie landen beschermd door speciale wetten. In Nederland is er zelfs een volledige organisatie aan de bescherming van klokkenluiders gewijd, hoewel tot dusver met beperkt resultaat. In dit onderzoek wordt echter ingeschat dat, ondanks de vele beschermende regels die nu ook met een EU-richtlijn worden geharmoniseerd, de persoonlijke risico's voor klokkenluiders zo groot zijn dat zij waarschijnlijk zeldzaam blijven. Corruptiebestrijdingsbeleid kan hen dus niet benoemen als belangrijk wapen in de strijd, ook al zijn de ideale beschermingsmaatregelen genomen.

Vrijheid van informatie, of transparantie, is een ander thema waarvoor speciale wetten zijn aangenomen in elk van de drie onderzochte landen. Toegang tot informatie over de activiteiten van ambtenaren zijn een voorwaarde voor doeltreffende controle en detectie van corruptie, door entiteiten binnen of buiten de publieke sector. In navolging van internationale standaarden hebben de drie landen vergelijkbare wetgeving op grond waarvan toegang wordt geboden tot informatie in handen van de overheid. Deze wetten bevatten beginselen en procedures, maar in werkelijkheid lijkt dat in alle drie landen de toegang wordt bemoeilijkt door terughoudendheid van de overheid. Voor daadwerkelijke verbetering moeten regels worden opgesteld en uitgevoerd die een daadwerkelijke belichaming vormen van het beginsel 'alles wat niet geheim is, is openbaar'.

Controle en toezicht kan gedaan worden door het management, door auditors of speciale controle-instanties binnen de publieke sector, en daarbuiten door de media of maatschappelijke organisaties. Uit het onderzoek blijkt dat controle weliswaar goed is ingebed in de publieke sector, maar dat er nauwelijks over corruptie wordt gerapporteerd. Berichtgeving in de pers is minder dan verwacht en de meeste maatschappelijke organisaties kijken naar beleid, minder naar ambtenarengedrag.

Het laatste inhoudelijke hoofdstuk van het onderzoek is gewijd aan de initiatieven met kunstmatige intelligentie en analyse van grote hoeveelheden gegevens die overal opkomen, hoewel concrete inzet van kunstmatige intelligentie ter voorkoming van corruptie nog niet in de drie bestudeerde landen is waargenomen. De conclusie is dat kunstmatige intelligentie mogelijkheden biedt om controle en detectie van corrupt gedrag verder te versterken, maar dat op democratische wijze moet worden vastgesteld welke prijs daarvoor mag worden betaald in de sfeer van het privéleven en dat er een beginselkader moet zijn zoals geschetst aan het eind van het hoofdstuk.

Aan het eind van het proefschrift staat een aantal conclusies en aanbevelingen. De meest opvallende algemene conclusie is dat de drie landen verschillende niveaus van corruptie maar vergelijkbare wetgeving en beleid hebben, hetgeen betekent dat wetgeving op zich geen verklaring kan vormen voor deze verschillen en dat een politieke stelling dat corruptie beter met meer wetgeving kan worden bestreden, zwak zou zijn.

Op onderdelen kunnen er echter zeker aanzienlijke verschillen tussen de drie landen worden vastgesteld. Een paar voorbeelden: In Nederland zijn belangenverstrengeling en handel in invloed niet strafbaar, en is er ook geen nationaal anticorruptiebeleid of een speciale instantie, in strijd met de aanbevelingen van internationale organisaties. Frankrijk is vanaf 2017 met nieuwe inspanningen begonnen om bestaande tekortkomingen te herstellen. De gevolgen moeten nog worden vastgesteld. Roemenië heeft een belastende maar formalistische aanpak, en blijft achter op het gebied van training en financiering.

Abbreviations

AFA	Agence Française Anticorruption (Anticorruption agency, France)
AMF	Autorité des Marchés Financiers (Authority for financial markets, France)
ANFP	Agenția Națională a Functionarilor Publici (National Agency for Public Officials, Romania)
ANI	Agenția Națională de Integritate (National Integrity Agency, Romania)
Aw	Ambtenarenwet (Law regarding public officials, Netherlands)
CADA	Commission d'accès aux documents administratifs (Commission for access to administrative documents, France)
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COVOG	Centraal Orgaan Verklaring Omtrent het Gedrag (organisation that emits declarations of good conduct, Netherlands)
EC	European Commission
ECJ	European Court of Justice
FCPA	Foreign Corrupt Practices Act (US)
FIU	Financial Intelligence Unit
GDPR	EU General Data Protection Regulation
HATVP	Haute Autorité pour la Transparence de la Vie Publique (High Authority for the transparency of public life, France)
JORF	Journal Officiel de la République Française (French official gazette)
MLPDA	Ministerul Lucrărilor publice, Dezvoltării și Administrație (Ministry of Public Works, Development and Administration). Previously called MDRAP.
M. Of.	Monitor Oficial (Romanian official gazette)
OECD	Organisation for Economic Co-operation and Development
OG	Ordonanță a Guvernului (Government Ordinance, Romania)
OUG	Ordonanță de Urgență a Guvernului (Emergency Government Ordinance, Romania)
Stb.	Staatsblad (Dutch official gazette)
Stcrt.	Staatscourant (Dutch official gazette)
UNCAC	United Nations Convention Against Corruption
VNG	Vereniging van Nederlandse Gemeenten (Association of Dutch municipalities)
Wnra	Wet normalisering rechtspositie ambtenaren (Law on standardisation of public officials' legal position, The Netherlands)

1. Introduction

1.1. Is there a problem?

The study of corruption prevention is of course only relevant if corruption itself is a real problem in terms of direct costs to society and other harm, such as loss of trust in the authorities. Several studies provide estimates for corruption costs. A paper commissioned by the European Parliament (Hafner et al., 2016) looks at direct and indirect effects and estimates the cost of corruption in the European Union between 179 and 990 billion EUR per year. With a total EU GDP of 14 800[1] billion EUR in 2016 this would be between 1,2 and 6,6 %. The range of the estimate indicates that the cost of corruption is hard to calculate. Still, even the low estimate is of the size of Romania's GDP in 2016. There is also evidence that corruption hampers economic growth (Mauro, 1995). A Transparency International paper from 2014 reviews a large number of scientific sources claiming that corruption lowers economic growth, investment, and tax revenues, and drives up the cost of business while also affecting income inequality.[2] Corruption may cost lives as well. In the European Union, journalists investigating corruption have been murdered in recent years.[3] In Romania, a producer of disinfectants allegedly bribed hospitals to buy their heavily diluted products, greatly increasing patients' risk of infection.[4] And calculations on earthquake victims reveal that the large majority of victims fall in 'anomalously corrupt' countries (Ambraseys & Bilham, 2011), suggesting a link between bribed building inspectors and collapsing structures.

Besides cost estimates, there are survey data about how citizens perceive corruption. To what extent do they consider corruption to be a problem? The Eurobarometer series published by the European Commission concludes that "the majority of Europeans believed that corruption was a major problem for their country and existed in institutions at every level."[5] The Global Corruption Barometer[6], an instrument organized by Transparency International, found in 2016 that 66% of Spaniards think that corruption is one of the three biggest problems facing the country. 49% of Romanian, 23% of French, and 17% of Dutch respondents were of the same opinion. The average score on this question was 33%.

[1] Source: Eurostat. Website: http://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/DDN-20170410-1

[2] The Impact of Corruption on Growth and Inequality, Transparency International paper, 2014. Website: http://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf. The website of the EU DG Home Affairs gives an estimate of 120 billion € per year without citing a source, see https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption_en.

[3] News article, 2018: https://www.euronews.com/2018/10/08/six-journalists-killed-in-europe-since-the-start-of-2017. Criminal investigation revealed alleged relatedness with the corruption reporting of some of these victims.

[4] See this news report from 2016: https://www.opendemocracy.net/en/can-europe-make-it/healthcare-horror-show-is-shaking-romania/.

[5] Special Eurobarometer 397, February 2014. Website: http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf. According to a 2011 Communication from the Commission, 78% of Europeans consider corruption to be a serious problem in their Member State, see COM(2011) 308 final.

[6] Website: https://www.transparency.org/whatwedo/publication/people_and_corruption_europe_and_central_asia_2016. This links to the 2016 report for Europe and Central Asia.

International organisations have picked up on the issue in the 1990s and are spending considerable energy on anticorruption, most notably the World Bank, the UN, the OECD and the Council of Europe (CoE). The main legal instrument with a worldwide scope is the United Nations Convention against corruption (UNCAC), from 2003. The World Bank has conducted many corruption-related studies, some of which will be used in this study. The OECD's main instrument is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[7]. The Council of Europe even has a special organisation devoted to the phenomenon, called GRECO (Group of States against Corruption).

Many individual states also find corruption to be an issue. The fact that 16 out of 28 EU member states have a specialised anticorruption body gives some indication of how serious governments are taking the problem.[8] Then one might ask: Can all this effort have any significant effects? Can corruption be reduced? International rankings like the Corruption Perceptions Index of Transparency International[9] show the differences between countries, and make it possible to measure the relative changes in perception over time. Romania is an indication that at least the perception of corruption can change significantly over time. The Corruption Perceptions index ranks Romania as follows (the rank is composed of the relative score and the total number of scored countries in that year's index):

Table 1: Romania's CPI rank

Year	Rank
1997	37/52
1998	61/85
2000	68/90
2010	69/178
2016	57/176

The recent jump coincides with a rising number of high level convictions (although more convictions can also lead to higher corruption perceptions by making it more visible, and consequently a lower rank). As another example, Italy increased its CPI score significantly over time: from 39 in 2010 to 53 in 2019. A thesis on the topic (Seldadyo Gunardi, 2008) based on comparative statistical data from 1984 to 2003 from World Bank and other sources, finds "strong evidence that corruption changes over time". The International Crime Victims Survey, run by the United Nations, reports for several countries in Eastern Europe, for which comparative data are available, a decline in the percentage of respondents who say they have been asked for a bribe in the past year (Dijk et al., 2007). We must not forget of course that also the reverse is possible: again measuring perceptions, the CPI score of Brazil has dropped from 43 to 35 between 2014 and 2019.

[7] France and The Netherlands have ratified it, Romania is not a member of the OECD but is preparing its candidacy.

[8] Reviewed in April 2017. Specialised anticorruption body is defined as a government body that has the fight against corruption as its primary mission. The member states with such a government body are (according to their own government websites): Poland, France, Romania, Bulgaria, Croatia, Slovenia, Slovakia, Austria, Czech Republic, Germany, The Netherlands, Latvia, UK, Spain, Italy, Malta, Luxemburg. The situation in the studied countries will be discussed in chapter 2.

[9] The worldwide Corruption Perceptions Index is published yearly by Transparency International since 1995. Website: http://www.transparency.org/research/cpi/. It is a 'meta-index' composed of some 30 indices, each with their own metrics. Another example is the Bribery Risk Index published by TRACE, a business association. Website: https://www.traceinternational.org/trace-matrix. The World Bank has a database that provides relative information on corruption metrics. Website: http://databank.worldbank.org.

We therefore see a relevance for research in the fact that corruption costs society a lot, that governments and international organisations have devised a large number of instruments to combat it and that it is possible to get results.

1.2. Central question

Having established that researching the topic is worthwhile, for this study a sliver of it has been selected. The following paragraphs state and justify the concrete object of investigation.

With the aim of improving national legislation, this study analyses corruption prevention rules in The Netherlands, Romania and France. The general theme or question can be worded as follows: *What are the differences and similarities of the administrative legal measures in the three studied countries to prevent corruption of civil servants?* The analysis can be structured along the following research questions.

1. What are the national rules addressed to civil servants (in the field of administrative law), to prevent corruption of civil servants? What is the context of those rules?
2. How do these rules compare, considering:
   a. Their goals and scope;
   b. Their structure, provisions, and generated obligations;
   c. Their implementation (implementing policies, control mechanisms, enforcement)?
3. How do the national rules compare to international legal instruments?
4. How do the national rules compare to international practice and theory? What areas are left unregulated in each of the countries? Are there better alternatives to existing rules?

The lessons learned from the 'how'-questions will be summarized at the end, in the form of recommendations to law- and policymakers. Please note that the word 'rules' refers to all the policies, mechanisms, procedures made binding by shaping them into legal rules. These are generally referred to as 'hard law', as opposed to 'soft law' which includes unwritten rules of organisational culture, although soft law can of course have the same effects as hard law if soft law rules are designated by hard law rules as the norm to follow.

1.3. Method and approach of the subject

The work for the text that follows is based on the qualitative analysis of legal instruments, including some case law, and policy documents. The legal texts were analysed directly, in the language of the respective country, in the most recent consolidated version. The methodology is a combination of analytical, functional and law-in-context methods as described in the literature (Van Hoecke, 2015). A complete list of the legislation consulted for the study is provided at the end. Official figures in government publications were generally assumed to be correct. Most of the sources were available online. Some sources were found in 2019 at the university libraries of Utrecht University, the University of Bucharest and the University of Paris I Panthéon-Sorbonne. Due to the coronavirus outbreak it was unfortunately not possible to visit the libraries again in 2020 before the cut-off date.

For background information and verification of assumptions, 30 interviews were held (see the list of Interviewed persons at the end). None of these persons is cited directly; statements in this study are based on documented evidence. The original setup of the study included a series of questionnaires aimed at civil servants in the three countries. It has however proven too costly, in terms of money

as well as time, to put that plan into practice. Therefore, any statements on officials' attitudes towards corruption prevention are based on existing documentary sources.

The study takes a legal viewpoint and concentrates on the prevention of corruption of civil servants in three EU member states. The comparative legal approach is not the most common and requires a justification:

- Why the focus on prevention?
- Why comparative law instead of sociology or administrative science?
- Why public officials instead of the private sector or elected officials?
- Why study The Netherlands, France and Romania?

1.3.1. The importance of prevention

It could be claimed that corruption, once prohibited by the criminal law, does not need other prevention. We do not give citizens courses about what is theft or murder and how not to do it. But one could ask if the difference lies in the fact that corruption is in fact normal human behaviour, contrary to murder and theft. From that perspective, it is not surprising that deterring public officials from such behaviour requires preventive efforts. Though sanctioning corruption through the criminal justice system has a role in deterrence and determines what is illegal conduct, it would be even better to prevent corruption altogether – or at least keep it under control. Although prevention comes at a cost, if successful it can free up considerable prosecution and jurisdictional budgets and lower the burden on business and society as a whole. Governments have taken a range of measures to prevent corruption, from codes of conduct and other integrity measures, to systems of checks and balances, and to transparency measures.

Prevention is also better than criminal repression because it enables policymakers to address issues that are not easy to incriminate. An example for this is the fact that corruption can be a network phenomenon (Slingerland, 2018) whereas criminal corrupt behaviour is a personal offense unless additionally the membership of a criminal organisation is proven. The preventive breaking-up of networks with a risk or even indications of corruption (through job rotation, for example) is an instrument available to the policymaker but not to the criminal judge.

The focus on prevention is shared by many institutions and academics. An OECD report (OECD, 2015) describes prevention as a `key tool' in the fight against corruption. The same report stresses that enforcement of the many recent preventive measures remains weak. Daniel Kaufmann (Kaufmann, 1997) argues that an excessive focus on enforcement can be counterproductive.

As for international instruments: The first of the Council of Europe's Guiding Principles is "to take effective measures for the prevention of corruption and, in this connection, to raise public awareness and promoting ethical behaviour"[10] The UNCAC devotes its entire Part II to preventive measures (this instrument will be discussed in some detail in chapter 2).

The choice for studying preventive measures entails an administrative law viewpoint, instead of a criminal one. As administrative law deals not only with the relation of the State with its citizens, but also with the functioning of the State itself, all measures aimed at prescribing and controlling the behaviour of civil servants will originate in this branch of law. That said, it will be necessary to look at other branches of law from time to time. In order to define what it is that we want to prevent,

[10] Resolution (97) 24 of the Committee of Ministers of the Council of Europe on the twenty guiding principles for the fight against corruption. Website: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc17c

we have to use the definitions of graft, bribery and other offences from the national criminal codes. Prevention and disciplinary measures aimed at non-appointed officials may require an excursion to labour law.

Corruption prevention measures may also be incorporated in legislation regarding other forms of illegal conduct, such as fraud and money laundering. Corruption prevention rules are often combined, as they should be, with detection and sanctioning measures. However, trying to highlight the prevention aspect will take us further in understanding how prevention is intended to work and how it actually works.

Then a few words on what is meant by prevention. Some government institutions see prevention as a human resources issue exclusively, meaning that prevention is information campaigns and trainings – all the rest is enforcement. This study takes a broader view by looking at a much larger set of prevention activities than training and education, regardless of which part of the organisation carries them out. The working concept of prevention in this study incorporates almost everything aimed against corruption that is not sanctioning.

1.3.2. Why comparative law?

The instrument of choice to prevent misconduct usually starts with a set of rules. Even if one chooses a different viewpoint than the legal one, analyses and recommendations will often point in a legal direction. Legal rules are transparent, verifiable and comparable across legal systems – non-binding recommendations, elements of informal organisational culture and mores much less so. Another argument is that the law is a system with a correction mechanism – disciplinary, criminal – so that the effectiveness of the rules in place can be checked through outcomes of transgressions (albeit with some caveats) in administrative or judicial procedures. A final argument is that legal science looks at actual conduct and not at thoughts or feelings, which makes the study data more tangible. This study will however use additional findings of sociological, economics, administrative and other research in some instances.

Within the EU and also in a broader context (CoE, OECD, UN), there is much collaboration between the different states in the field of corruption. There are standards, recommendations, but no overarching legal framework such as in the field of environmental law, competition law or consumer protection. Each state takes its own measures. This creates opportunities to learn from one another, taking into account of course the different local contexts of the rules to be compared.

Zooming in on three states within the same European framework, with highly different corruption statistics, this study aims to find out what the differences are and what administrative practices can be replicated in other member states. France and The Netherlands are EU founding members, while Romania has joined the Union in 2007. This creates a common context for corruption research and policies. All three countries have a shared legal 'Napoleonic' history. All three have developed a special status and labour law for civil servants. In all three legal systems, corruption prevention and sanctioning have administrative as well as criminal law approaches. They have also more or less extensive private law frameworks for corruption prevention, from which in a few sections material will be borrowed for comparison. We should keep in mind, however, that the literature warns against putting all countries in the same basket (Gnimassoun & Massil, 2019).

1.3.3. Why public officials instead of the private sector or elected officials?

This study is aimed at civil servants because they are instrumental to corruption prevention but have not been studied as intensely as members of parliament, government ministers, other elected officials, and members of the judiciary (judges, prosecutors). The core parts of the *trias politica* (executive, legislative, and judiciary) are always in the spotlights, while the doings of 'ordinary' officials remain under the radar. Except when a scandal erupts, but then it is too late. This choice excludes the activity of law-making and corruption proofing[11] from our scope. It also leaves out classic corruption topics such as party funding. The study also focus less on public sector activities that have been widely discussed already, such as police and customs or the judiciary. Instead, it concentrates on ministries and local government.

1.3.4. Why The Netherlands, France and Romania?

The comparison is based on three countries of varying size, wealth and corruption perception levels, but in the common framework of the EU and with similar legal systems. The same research questions can be asked in all three countries. When comparing systems however, we should of course bear in mind that answers and solutions in one country may not be repeatable in the other two.

Romania

Romania is a particularly interesting country for students of corruption. This Eastern European country with 19 million people, formerly under a communist dictatorship, frequently reaches international headlines because of systemic corruption and also because of its successful struggle against it, through criminal prosecution. This contrast makes it an ideal case study since both the problem and attempted solutions appear as under a magnifying glass.

The second poorest EU country has become a member in 2007, after having adopted a large number of anticorruption and other laws in quick succession. In the fast changing national political landscape, this may seem long ago. There is a desire in Romania to be accepted as the sizeable Member State that it is, the largest in South-Eastern Europe. But it has not been accepted into the Schengen area or the eurozone, and it has not yet escaped special scrutiny by the European Commission. The OECD has not let it in yet and the ECHR chastises it regularly. The reasons for all these issues vary of course, but they demonstrate how Romania, on the one hand, has made an immense progress in economic development and the rule of law, while on the other hand the final push towards 'normality' has not occurred.

In spite of many high-level convictions since the beginning of a prosecutorial surge around the EU accession year – many former ministers, a prime-minister and a party leader have received prison sentences – corruption remains endemic, 'part of the system'. It would appear that petty corruption has diminished in some sectors such as local government, partly thanks to higher salaries of public-facing officials. In other sectors, such as education and health, no such development can be identified.

The volume of obvious, brazen grand corruption may be diminishing in recent years. But this does not mean that the political or business climate has become cleaner. There has been a push back by politicians against the independence of the judiciary, judges and prosecutors. Initiatives for transparency have petered out. Anticorruption budgets are smaller. The press is struggling

[11] Checking for corruption risks in proposals of law (bills). See for a discussion the previously cited OECD report on prevention (OECD, 2015, p. 26).

financially and for a large part controlled by vested interests. NGO funding is down because attention has shifted further eastwards. The general public can gather in mass protests for a particular cause and oust governments, as they have done twice in recent years. But it seems that criminal convictions do not deter politicians and public officials from displaying identical behaviour. Trust in government and parliament is low.

However, there are signs that some corruption prevention efforts in the public sector have taken root and have led to greater awareness of the issue and of what can be done against it, to the view that corruption prevention is a management topic which cannot be ignored, and to a few well established procedures.

The Netherlands

This country (17 million inhabitants), on the other side of Europe, scores high on integrity indexes and is said to be a country that concentrates successfully on integrity and prevention (LWJC Huberts et al., 2016). This country might serve as a reflecting mirror for the other two on the subject of holistic integrity policies.

Corruption is no staple of Dutch politics or news coverage. It is a stable top ten country in corruption indices. Over the last twenty years, policy efforts have been concentrated on integrity promotion, putting the responsibility on the shoulders of individual institutions' leadership. In recent years, the parliamentary anti-corruption agenda has been dominated by the founding and the repeated malfunctioning of the dedicated Whistle-blower Agency. This agency was set up following news reports of whistle-blowers suffering emotionally and financially because they spoke out against corruption; a lack of legal protection lead to ruinous retaliation in some cases.

There have been high-profile corruption cases in The Netherlands in recent years, in the last decade about one per year, but these seem to be regarded as unhappy incidents by greedy dignitaries. Corruption prosecutions and convictions are also rare in the whole public sector.

Repeated scientific overviews come to the conclusion that very little corruption can be found, wonder why this might be, and include a word of caution to not let our guard down. But it might be the low incidence of scandals that has led to a political climate where it is deemed unnecessary to adopt strict rules on certain anticorruption issues, such as conflicts of interest or lobbying. Both these issues were reported by international reviews.

France

France was chosen as the third factor in the comparison because it has a corruption perception ranking broadly between the other two and because of its different scale – there are 65 million people living in metropolitan France. There are also strong similarities; France has shared much of its legal system with the other two countries, through military invasion and cultural leadership, which included influencing Romania (strongly) and The Netherlands (moderately) in administrative law.

The second largest and founding EU Member State is a rich and stable democracy. Corruption scandals at the top of the public sector and in politics have been a recurrent issue in France for many years. At the same time, public officials enjoy relatively high levels of trust and there are few corruption cases in the civil service.

A growing intolerance for these scandals in the public opinion has contributed to the adoption of new anticorruption laws in the second decade of the century, such as the 2013 law on the

transparency of public life, the 2016 'Sapin II' law that founded the anticorruption agency, and the law on 'transformation of the public sector' of 2019 that strengthened some prevention practices.

Recent years have also seen new civil society initiatives. NGO's fight corruption, within France and abroad, through the courts, and others reveal scandals through specialist reporting or stage mass protests.

Another recent trend seems to be a more active stance of corruption enforcement. While before the adoption of Sapin II no company was ever convicted of corruption in France, early 2020 saw at least a large settlement in the case against Airbus, the largest company in the European aviation industry.

In the public and private sector, new initiatives are now deployed that actively implement legal provisions regarding corruption and integrity, that were not given priority before. If integrity and anticorruption awareness becomes common practice in the public sector, outcomes may improve as well.

1.4. Scope

This section answers the question of what corruption prevention means here, which legislation and policy will be studied (material scope), and which types of public sector organisations will be taken into account for this study (personal scope).

Most people may have an idea about what corruption is, but defining it satisfactorily appears to be a challenge. Johnston (Jain, 2001, Chapter 2) noted a historical development of the term and saw a tension between the scientific definition and the public view, saying that definitions of corruption "…have come to seem incomplete, or even irrelevant to the episodes that spark public outcry". The same author interestingly points at two different layers of definition problems. There can be a debate about whether a certain conduct falls into the scope of a definition, but another layer is the debate, in some societies, about the extent to which the use of public power for private gain is illegitimate.

Some definitions are widely used, such as Transparency International's (TI): "the abuse of entrusted power for private gain".[12] The World Bank uses: "the abuse of *public office* for private gain", excluding corruption by persons or entities that do not hold public office.[13]

This study concentrates on the law as basis for actions, so that the definition must be a legal one. Therefore, 'abuse' is too broad and should be 'illegal use'. Illegal use is not restricted to receiving bribes, because this study concentrates on prevention. In- or excluding some forms of illegal behaviour is of lesser importance. Preventive measures are not devised specifically against one form of corruption while excluding others. There are no measures aimed at weeding out embezzlement while indifferent about fraud. Measures that go against collusion will also attack extortion; prevention is no sharp shooter, and should not be or we would have to devise different measures to prevent each crime. It would be illogical, for example, to exclude from the scope of preventive measures those cases of fraud that do not involve abuse of power, and include cases of fraud that do involve them.

[12] As stated on TI's website: http://www.transparency.org/what-is-corruption/#define

[13] This definition, with a discussion of several definitions, can be found on this World Bank website: http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm

It is, however, necessary to further narrow the definition. As discussed above, taking a legal perspective compels us to include only *illegal* corruption in our definition, as distinguished from other unethical, inefficient, or undesirable behaviour that is not sanctioned by criminal or disciplinary law. Then, because our subject is corruption where (some of the) actors are public officials, this aspect should also be included. Furthermore, it is unworkable for this study to include all forms of illegal use of public office. We will therefore only look at situations where the official had a certain power (privilege, influence) and made illegal use of it for private gain.

With these elements, we arrive at a working description for the targeted behaviour of the measures studied here, being *illegal use of the powers of public office for private gain*. This illegal use can be of a criminal or disciplinary nature. The sanctions are not necessarily criminal. They can also be disciplinary and/or civil law sanctions. The definition covers both grand and petty corruption[14], because both types can exist in public administration and many preventive measures target them both.

The following question is, what does this mean for the type of rules that will be studied. There is a distinction between corruption prevention as a way to enhance compliance, versus measures to promote integrity. Integrity can be seen as a set of values to aspire to, finding their source in the set of moral values of each public official – acquired on the basis of the established moral code, or code of conduct (or even more bottom-up: the code of conduct agreed upon by those addressed), whereas compliance can be seen as a top-down approach, where the behaviour of individuals is defined by the boundaries of the law. In practice, the resulting measures may be the same, for example: education and training about what gifts are allowed can be a way of promoting integrity and a way of enhancing compliance at the same time. Therefore, this study will not distinguish between corruption law compliance and integrity promotion as measure for which rules to include in the scope. There is also another aspect that makes the two approaches compatible: their enforceability. Once a set of integrity goals or values is established in such a way that officials are obliged to follow them or risk at least disciplinary sanctions, integrity has turned into compliance. Indeed, in the industry the term 'integrity compliance' is used for this. But the scope of an integrity policy can be much broader than the compliance with corruption prevention law. Integrity can be used by public organisations as an umbrella term, including disparate topics such as being friendly to the 'clients' of the civil service, information protection and clean desk policies and sexual harassment. While corruption is only one type of unaccepted behaviour (that is, unaccepted by the law), integrity breaches can be any kind of unaccepted behaviour (by the law, public opinion, local tradition or other sources of non-legal rules). Measures that target behaviour outside of our definition of illegal use of power for private gain would be outside of the scope. But as mentioned above, preventive measures tend to be indiscriminate. Therefore, integrity policy will be generally included in the scope.

It should not be overlooked that while in some organisations, those responsible for integrity policy also coordinate 'hard' or 'formal' preventive measures, such as access to software, or auditing, in (many) other organisations, this later type of preventive measures is the separate domain of those responsible for security. Corruption prevention in hiring and promoting activities can be designated as exclusive HR activities. In one Romanian ministry, the integrity experts were surprised at the notion that corruption prevention might include anything beyond education and training.

[14] Petty corruption usually refers to relatively small bribes taken by lower-level officials to perform a service, while grand corruption is seen as corruption by high level officials and politicians involving large payoffs that influence large transactions (such as important public acquisitions or privatizations) or policy.

The French anticorruption agency insisted that integrity policy and whistle-blower protection lie beyond its remit. There are institutional separations between corruption and integrity. But this study includes all preventive measures, regardless of the limits of organisational mandates.

As mentioned above, corruption prevention rules may have a variety of legal statuses, differ in scope and/or legal effects, and can be aimed at highly different groups of people in many different organisational and functional contexts.

This study takes into consideration all legislative and administrative acts that are obligatory for the administration and are sanctionable, either specifically or through a general sanction regime. They may be legislative or administrative in nature. They may be policy documents, provided that the policy binds the administration. They do not have to be obligatory *erga omnes*, local rules are also relevant for this study (keeping in mind of course that they cannot be applied to public officials outside the specified area). Non-binding initiatives and arrangements, with the potential to enhance trust, openness, or honesty, for example can be very important, but they remain outside of the scope.

Again, laws and other rules that bind civil servants may have a larger scope than just corruption prevention, or a different scope entirely. In this study, prevention refers to the *possible effects* of measures, not (only) at the intention of the lawmakers/rule-makers. It is thus very well possible that a measure aimed at preventing discrimination in the hiring process of public officials by introducing checks and balances and diminishing discretionary powers, does or can have a preventive effect on corruption. The risk with this approach is that a very large variety of measures must be studied. Indeed, to be complete one would have to study absolutely all measures and look for possible preventive effects. Therefore the studied legislation is necessarily a selection, based primarily on the criterion of international legal consensus expressed through international instruments.

Turning to the addressees of the measures discussed in this study, we will be referring to them as civil servants or public officials as synonyms and include a number of roles that are not formally part of the public administration but exercise public duties. They share the following characteristics:

- Appointed, employed through a labour contract or a service contract, but not elected or performing voluntary tasks;
- With powers/tasks of decision, control, supervision, and/or execution;
- Working for/with:
  - Central administration (ministries), or
  - Local administration (municipalities)

Purely for conciseness and not because of any material distinction, all other public institutions are out of scope, such as:

- Parliament and its staff;
- Cabinet ministers and their personal staff;
- Commercial enterprises where the State is a majority shareholder;
- Not strictly administrative roles of the State, such as judiciary/police, military, secret services, medical entities, educational entities.
- High bodies in the state such as the constitutional court, the legislative council, the court of auditors, the ombudsman;
- Decentralized services (prefect, inspectorates, civil engineering services for example);
- Public bodies (regulatory authorities) in general (central bank, sectoral authorities);
- Private organisations with a public mission.

Even within these limits, it will be impossible to study all measures by all actors. At the local level, small samples of municipalities will be used.

1.5. Outline and reading guide

After this introductory chapter 1 follow 7 material chapters, wrapped up at the end in a final discussion. The topics of these chapters are determined by the main existing legislative/policy topics regarding corruption prevention of civil servants in the three countries. A complete list of consulted legislation can be found in Annex 3. Chapter 2 is a basic legislative introduction which hasty readers could skip and reference later when reading the topical chapters. Each topical chapter can also be read separately, with some references to other chapters.

- Chapter 1: contains this introduction.
- Chapter 2 contains the basic working material: the main relevant laws of the three countries. It also contains a short section on the main policy elements and actors in each country.
- Chapter 3 discusses human resources policy: how to prevent corruption in the activities of selecting, appointing, managing, and promoting public officials.
- Chapter 4 concerns conflicts of interest, that can easily lead to misconduct.
- Chapter 5 describes the whistle-blower policies in the studied countries.
- Chapter 6 debates transparency and monitoring practices.
- Chapter 7 sketches the possible use of artificial intelligence for corruption prevention.
- Chapter 8: draws conclusions and offers recommendations.

The reference date for all legislation is May 1st, 2020. This is also the reference date for all the hyperlinks in the footnotes, unless mentioned otherwise. The study concentrates on the current status of legislation and does not delve into the history of the discussed laws, with the exception of draft laws that are likely to be adopted in the short term.

2. Legal and policy framework

2.1. Introduction

This chapter aims to present an overview of the most important legal provisions relevant to corruption prevention in the three studied countries, and of the relevant international legal instruments that these countries have committed themselves to. Many of these will return or be referenced in the following chapters; some do not but are mentioned here for completeness. Mostly criminal law, that does not have a place in the other chapters, is treated with a little more detail here.

Readers who are only interested in thematic topics can skip this chapter, and use the back references in following chapters for specific lookups under this one. Other readers, who prefer to see the main laws, policies, and institutions in the three countries related to corruption prevention grouped together, are welcome to analyse this chapter independently.

At the end of each country section, a brief overview of the main policies and institutions in anticorruption is included, to sketch a background for the thematic chapters that follow. Romania has a national anticorruption policy in place. In France, a preliminary plan was recently published. The Netherlands does not have a general policy plan, but there are several policy instruments aimed at civil servants that can be used for the following overview of current policy highlights.

For the overview of relevant laws, the following legislative categories are used, simply following legislative practice:

- international instruments,
- constitutional rules,
- sanctions,
- transparency,
- integrity.

These are the most important legal categories where prevention-related dispositions can be found. To keep a thematic approach, the categories do not coincide entirely with the classical division of criminal/administrative law because non-criminal and criminal sanctions are under sanctions (which we will not concentrate on further in the study because its subject is prevention) and the administrative category (on behaviour of the administration towards citizens and the administration internally) is split into two main branches: transparency provisions and integrity provisions. The five categories are introduced below.

The **international instruments** will only be described briefly, but some provisions will return more in detail in the following chapters. A critique of the instruments as such lies beyond the scope.

Regarding **constitutional law**, the question is to what extent the different constitutions sanction corruption, promote integrity and facilitate control (through transparency, strong institutions of control, and checks and balances). These rules sit at the top of the hierarchy, which makes them important, but their wording is often too general – see below – for individuals to invoke them directly.

The second category of **criminal, disciplinary and civil sanctions** is aimed at corruption but not principally aimed at prevention – criminal law is of course more concerned with repression than with prevention, although prevention remains one of the classical functions of punishment[15] by deterring would-be corrupt officials. Still, this category of rules is important for prevention, because without incrimination there would be no illegal behaviour to prevent. The application of criminal law to civil servants can be explicit, i.e. explicitly referring to public servants, or implicit when the provisions apply to all persons including public servants. This study looks at explicit provisions exclusively; rules regarding prevention of certain types of behaviour of persons in their capacity as civil servants, not as mere citizens.

Certain illicit behaviour that is or is not sanctioned by criminal law, can be sanctioned by disciplinary law. Disciplinary sanctions can be as mild as a reprimand and as drastic as immediate termination of an appointment or labour contract, accompanied by a damages claim. The sanctions are usually imposed by either superiors or an internal body of the organisation where the sanctioned person works. A civil law sanction is also conceivable, possibly in combination with a criminal and/or disciplinary sanction. These sanctions can range from cancelling a service contract to compensation claims in court. Other related (criminal law) rules that can be applied in corruption cases, such as those about asset recovery, do not concern prevention either but are deemed to have a preventive effect (Nicolae, 2013) and as such have some relevance here. The laws in this category are not further discussed in the study.

The rules that ensure **transparency** (active and passive) can be regarded as the instrument that makes external control possible, by international organisations and civil society. This category of rules usually implies an obligation for public bodies to disclose or permit access to information. Access to information is a condition for (external) control to function. The extent of this obligation varies between the three countries, as we shall see. Also relevant are limiting factors, such as discretionary powers to label certain information as secret and thus exempt from disclosure, or the existence of sanctions in case of non-compliance. These rules are further discussed in chapter 6.

The last category, labelled **integrity** law in this chapter, contains all legislation that promotes 'correct' behaviour, such as obligations to inform and educate civil servants on corruption, reducing incentives for corrupt acts, raising (technical) barriers for corrupt acts, making behaviour illegal when it could lead to corruption and gives the impression of conflicts of interest, such as revolving door practices or certain forms of lobbying. Another example of integrity law is the legal protection of whistle-blowers. Integrity law should for this study be viewed as separate from administrative instruments that do not have a sanction mechanism (soft law). However, if jurisdictional interpretations or legislative modifications lead to sanction options for what was first soft law, then it can be considered hard law for this purpose. The point is that there should be as clear a distinction as possible between hard and soft law, to make future comparisons possible. The term 'professional ethics' in later chapters is used as a synonym for integrity. One final remark about the term „integrity" itself: Its relation to non-corrupt behaviour is a relation part-whole, so that any non-corrupt behaviour is also behaviour with integrity but not vice versa. All law aimed at integrity is thus also aimed at non-corrupt behaviour. This broad category forms the subject of chapters 3, 4, and 5.

[15] An interesting overview of theories can be found here: Bedau, Hugo Adam and Kelly, Erin, "Punishment", The Stanford Encyclopedia of Philosophy (Fall 2015 Edition), Edward N. Zalta (ed.), URL: <https://plato.stanford.edu/archives/fall2015/entries/punishment/>

Only the main national legal instruments in each category are discussed in this chapter. Throughout the study, specific legislation is referenced at the topic level. An exhaustive list of consulted legislation is presented in Annex 3.

2.2. International Legal Instruments

The force of international instruments regarding corruption prevention depends largely on the question whether they can be directly invoked by citizens or groups of citizens against national rules. According to national law in The Netherlands, France and Romania, the national judge has the power to judge claims of individuals invoking rights based on international legal instruments (if the rights that these instruments contain are sufficiently concrete and attributed to citizens), and also to verify the legality of national legislation against international legal instruments. This includes EU legislation, which can also operate directly. The direct effect of EU law is conditioned by its method of law-making: Direct obligations for Member States such as those in the Treaties and in Regulations can more easily be invoked than obligations that give the Member States a measure of discretion such as in Directives. The direct effect also depends on the nature of the provisions (whether they are sufficiently precise, clear, and unconditional). Such procedural rules, for EU law established by an abundance of case law[16], do not exist for treaties such as the UN Convention against corruption, but in principle the same conditions apply. The discretionary powers given by treaties to legislators and executives cannot be challenged in court, unless abuse of those powers can be proven.

This section succinctly introduces the international legal instruments that apply to the three studied countries and that are frequently invoked in the literature and in national policy. On that basis, below can be found instruments from the UN, the CoE, the EU, and the OECD. Other instruments, such as the framework that the IMF adopted in 2018[17], the 2016 World Bank guidelines[18], or the ISO standard to prevent bribery[19] are not discussed (unless implemented in national law).

Depending on their scope, parts of the instruments below will be cited and discussed also in further chapters of this study.

2.2.1. United Nations Convention against corruption

In the United Nations Convention against Corruption (UNCAC), coordinated by the UNODC[20] , there is considerable attention for prevention in the public sector. Its first article states as the first of three purposes "to prevent and combat corruption more efficiently and effectively". This convention was adopted by the General Assembly in 2003[21] , ratified by Romania in 2004, by France in 2005, and by The Netherlands in 2006.

[16] Starting with the 1963 Van Gend & Loos judgment.

[17] See: https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/20/pp030918-review-of-1997-guidance-note-on-governance.

[18] See: https://policies.worldbank.org/sites/ppf3/PPFDocuments/40394039anti-corruption%20guidelines%20(as%20revised%20as%20of%20july%201,%202016).pdf.

[19] See https://www.iso.org/iso-37001-anti-bribery-management.html.

[20] United Nations Office on Drugs and Crime, headquartered in Vienna

[21] General Assembly resolution 58/4 of 31 October 2003. The Convention has entered into force on December 14, 2005. France, The Netherlands and Romania have not made any reservations or objections.

Chapter II of the Convention is dedicated to prevention[22]. The relevant articles are 5-10, 13 and 14. Chapter III deals with criminalization and law enforcement. Chapter VI is about technical assistance and information exchange – most relevant are the Articles 60 and 61. For the implementation of the Convention, Article 63 establishes a Conference of the States Parties (COSP) for capacity building and cooperation "to achieve the objectives […] and to promote and review its implementation". This Conference convenes every two years; the last session was in 2019. It has established a review mechanism (resolution 4/1 of the Conference)[23] . The review mechanism has established an Implementation Review Group (terms of reference, Article 42). Corruption prevention has not been reviewed yet by April 2020 (being in the 2nd review cycle). There already are reports about France, Romania and The Netherlands regarding criminalization (Chapter III of the Convention) and international cooperation (Chapter VI).

The definition of 'public official' appears to be a broad one, but is highly influenced by the national definitions of the parties to the treaty. (Art. 2 under (a)). It includes any person defined as a "public official" in the domestic law of the States parties to the Convention, anyone who performs a public function or provides a public service, as defined in the national law of the relevant state, and, regardless of national definitions, "any person holding a legislative, executive, administrative or judicial office […] whether appointed or elected, whether permanent or temporary, paid or unpaid, irrespective of that person's seniority." National legislators have the possibility of severely limiting the Convention's scope, even while formally implementing it completely, for example by linking the concepts of public function and public service to certain formal statuses.

The measures that the Convention urges to be taken by the parties are laid down in chapter II, as follows.

1. Develop and implement a coordinated anticorruption policy. The policy should cover the following concrete topics:
   a. Promote the participation of society
   b. Proper management of public affairs and public property
   c. Integrity
   d. Transparency
   e. Accountability
2. Develop corruption prevention practices and promote them;
3. Periodically evaluate their legal instruments and administrative measures, to determine their adequacy for the prevention of corruption;
4. Collaborate internationally against corruption;
5. Set up one or more corruption prevention organisations for coordinating and implementing policy, and inform the public about corruption prevention. The technical guide[24] to the UNCAC suggests a new body be set up, instead of expanding the tasks of an existing one;
6. Set up an appropriate preventive HR policy for the public sector, with elements such as job rotation;
7. Apply codes of conduct for public officials;
8. Establish corruption prevention measures in public procurement, for example through more transparency;

[22] See also the technical guide at https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf. There is also a legislative guide, at https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf

[23] https://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4-resolutions.html

[24] Online reference: https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf, page 28.

9. Enhance transparency in public administration (active/passive transparency as well as simplifying procedures);
10. Enhance participation of society;
11. Prevent money laundering;

This list is interesting because it represents the Convention's view on the types of actions that should be taken to prevent corruption. The Convention takes a holistic approach, which means that it should cover every significant policy/practice topic for prevention. Consequently, if a State Party to the Convention does not include some policies mentioned in the Convention, that State would not have fully implemented it.

2.2.2. Council of Europe Criminal Law Convention on Corruption

The main topic for this instrument is the uniform incrimination of forms of corruption for all States Parties. The Convention entered into force on January 7, 2002. France ratified it in 2008, The Netherlands and Romania in 2002.[25] France initially made a reservation to not establish trading in influence as a criminal offence when the influence is exerted on foreign officials or members of foreign public assemblies, but has incorporated this variety in its criminal code (see 0 below). Another French reservation regards a limitation of jurisdiction. The Netherlands, by its reservation, has opted out of the obligation to incriminate trading in influence altogether (see the national definitions in 2.3.2, 2.4.2, and 2.5.2, respectively). This country also made a jurisdiction reservation. Romania made no reservations.

The preamble of the Convention mentions the need for adoption of preventive measures, but contains no preventive measures as such. Like the 1997 EU convention on this matter, the Convention, complemented by an Additional Protocol, obliges the States parties to adopt legislation and 'other measures as may be necessary' to incriminate:

1. Active and passive bribery of public officials and magistrates, arbitrators and jurors, domestic and non-domestic;
2. Active and passive bribery in the private sector;
3. Trading in influence;
4. Laundering of money obtained from corruption offences;
5. 'Account offenses' – using false or incomplete accounting information or omitting information.

The Convention does not mention how the legislation and measures should look like, but there are a few provisions that give substance to the incrimination part such as a provision regarding whistle-blowers and witnesses (Art. 22) and the legislation of special investigative techniques to make the collection of evidence easier. This is of great importance when dealing with corruption offences: due to their secretive and often collusive nature, they are notoriously difficult to prove in court. Another important article is no. 18 on corporate liability for bribery, trading in influence and money laundering committed by natural persons with certain powers or authority over the legal person.

On the organisational level, the Convention obliges the Parties (Art. 20, 29) to ensure the existence of:

A. A central authority, responsible for cooperation requests under the Convention;
B. Persons and/or entities, specialised in the fight against corruption, armed with
    - The necessary independence in accordance with the legal system of the State party,

[25] Source: CoE website at http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173

- Free from any undue pressure, and with
- Adequate training and financial resources for their tasks.

Finally, Art. 24 institutes the monitoring regime of the Convention, to be executed by the Group of States against corruption (GRECO). This organisation was founded by Resolution 99(5) of the CoE Committee of Ministers of May 1, 1999. CoE member states are automatically also member of GRECO. The GRECO themed country reports offer a wealth of information about corruption prevention in the Council of Europe member states.

The GRECO approach is first to establish two or three topics for an evaluation round among all members. The next step is to form teams of three experts, send out a questionnaire to the authorities, then visit the country in question to talk to government representatives and relevant NGOs. A report is drawn up containing analysis, conclusions, and recommendations. 18 months later (according to the GRECO website), the team of experts follows up with the evaluated country to see if and how the recommendations have been implemented. This is called the *compliance procedure*. It should be noted, however, that even though all the recommendations may be implemented `in a satisfactory way', the corruption level may still be the same; the fate of any formal framework. GRECO only incidentally measures the effects of the implementations. Implementation of the recommendations may thus give a false (or unproven) reassurance that a country is doing well.

The evaluations started in 2000. So far there have been four evaluation rounds completed, a fifth is underway. In each round, all GRECO states are reported on. Each round concentrates on a few anticorruption topics.[26] The relevant recommendations will be used as reference when discussing specific anticorruption rules in the studied countries.

2.2.3. Council of Europe Civil Law Convention on Corruption and other instruments

This convention was adopted on 4.11.1999 and entered into force on 1.11.2003. France, The Netherlands and Romania have ratified it (reservations are not possible under this convention). The convention is aimed at civil remedies for damage resulting from acts of corruption. 'Corruption' in the sense of this convention, is limited to bribery. Besides from the damages provision, which may have a preventive effect just like similar measures that diminish the proceeds of corruption (asset recovery), and some provisions that double those in other conventions, there are several interesting provisions from a prevention point of view:

C. In national legislation must exist a joint and severable liability for damages arising from bribery, not only by joint offenders (according to the Explanatory Report, regardless of whether they knowingly co-operated)[27] but also backed up by State liability. The liability arises from intent or negligence;
D. The right to compensation is limited by culpability of the claimant. The Explanatory Report gives an example on p. 8 of an employer – which may be a public institution – that doesn't take proper measures to prevent or terminate corrupt behaviour and may not be awarded damages;
E. National legislation must provide that 'any contract or clause of a contract providing for corruption […] be null and void' plus a possibility to have the court declare a contract invalid

[26] A full list of all these topics can be found here: http://www.coe.int/en/web/greco/evaluations.

[27] See page 7 of the Explanatory Report at https://rm.coe.int/16800cce45

if the consent has been undermined by bribery. 'Providing for' refers to the cause of the contract, according to the Explanatory Report (p. 9);

GRECO also monitors implementation of the Civil Law Convention.

Other noteworthy instruments of the Council of Europe include its transparency convention (not entered into force, to be discussed in Chapter 6), a Recommendation on Codes of Conduct for Public Officials (Recommendation No. R(2000)10) containing a model code of conduct for public officials. Its status as recommendation notwithstanding, the implementation of this instrument will be monitored by GRECO. This and the fact that the Model code's provisions are phrased in such a way that they may be subject to a sanction regime (disciplinary, not criminal) makes one author include it under 'hard law' (Michael, 2012).

Finally, the 20 Guiding Principles for the fight against corruption (Resolution 97(24))[28] predate the two conventions and are meant to be the framework against which the CoE anticorruption efforts should be measured.

2.2.4. European Union instruments

The EU has an anticorruption policy dating back to the early 2000's[29]. With the 2010 Stockholm Programme[30], the Commission has received concrete policymaking attributes, now coordinated by the DG of Home Affairs. Anticorruption falls under the 'area of freedom, security and justice' with shared competences between the EU and Member States (TFEU, Article 4). The policy was structured by a reporting instrument based on the Commission decision[31] of 6.6.2011. According to recital 7 of this Decision, the "EU Anti-Corruption Report" should have a broader scope than the GRECO reports. On page 7, it mentions "synergies" with GRECO thanks to the EU membership of this organisation. In 2014 the Commission published its first report, only to discontinue the practice quietly in 2017[32]. The 2014 report, filed under COM(2014) 38 final, contains a chapter on 'Control mechanisms and prevention'. It highlights the active promotion of public sector integrity in The Netherlands, citing the evolution of local integrity policies. The specific instruments mentioned throughout the EU include the role of Courts of Audit, asset disclosure policies, and rules regarding conflict of interest.

Separately there exists a Cooperation and Verification Mechanism regarding Romania (and Bulgaria). This mechanism involves yearly progress reports[33] by the Commission. It does not apply to France or The Netherlands because it was part of the 2007 accession round negotiations, although it might be argued that each Member State should be subject to the same oversight.

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[28] Website: https://rm.coe.int/16806cc17c

[29] For example through the Commission communications 'On a Union policy against corruption', COM(97) 192 final, and 'On a comprehensive EU policy against corruption', COM(2003) 317 final.

[30] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF, point 4.4.5.

[31] (C(2011) 3673) final. See also COM(2011) 308 final, the Communication about fighting corruption in the EU, and COM(2014) 38 final, the report itself from 2014.

[32] See http://transparency.eu/wp-content/uploads/2017/02/20170130-Letter-FVP-LIBE-Chair.pdf

[33] See https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

The 1997 EU Convention on corruption of officials[34] obliges the Member States to incriminate active and passive bribery, and to apply this incrimination also to EU officials and to 'persons having power to take decisions or exercise control' from the private sector. The new Romanian Criminal Code of 2014, Article 294 under c) applies the incrimination of the various forms of corruption inter alia to "officials or persons whose activities are based on a labour contract or other persons who exercise similar duties, within the framework of the European Union."[35] The Convention also contains provisions regarding the collaboration between the Member States (matters of jurisdiction, cooperation in the prosecution phase, extradition, disputes between Member States). The Convention has entered into force on 28.9.2005. This instrument does not mention prevention and lies purely in the domain of criminal law.

On the topic of asset recovery, that would deter corrupt behaviour by removing the rewards of such behaviour, the Union's main instrument is Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[36]. France, The Netherlands, and Romania have all reported various transposition measures in their criminal legislation. The newer Directive EU 2017/1371[37] on combating fraud is not concerned directly with corruption but more with organised crime.

Other instruments include Directive 2019/1937 regarding whistle-blowers adopted in 2019[38], and the Framework Decision regarding private sector corruption[39] and a money laundering instrument, Directive (EU) 2015/849, JO L 141 of 5.6.2015. Regulation (EU) No. 1303/2013[40], Article 125 requires for managing authorities of EU funds to "put in place effective and proportionate anti-fraud measures taking into account the risks identified". Fraud is not the same as corruption but fraud prevention measures can have a large overlap with corruption prevention measures.

EU instruments specifically aimed at integrity in the member states (not the EU institutions themselves) include the so-called Integrity Pacts, a policy instrument being piloted since 2015 which strives to enhance integrity when spending EU funds, with as a novelty monitoring of the tender and its execution by Transparency International.

2.2.5. OECD instruments

The Organisation for Economic Co-operation and Development (OECD) boasts a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted

[34] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, (OJ C 195, 25.06.1997 p. 0002 – 0011)

[35] My translation.

[36] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014.

[37] Directive (EU) 2017/1371 of the European Parliament and Of The Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198 of 28.7.2017. Transposition deadline: 6.7.2019. On 5.5.2020, only France had not reported any transposition measures.

[38] Directive of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

[39] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31/07/2003 p. 0054 – 0056)

[40] Regulation (EU) no 1303/2013 of the European Parliament and of the Council of 17 December 2013, OJ L 347/320.

on 17.12.1997 and entered into force on 15.2.1999. The instrument doesn't mention prevention. For OECD member states France and The Netherlands, the Convention has entered into force in 2000 and 2001 respectively. Romania is not a member but has expressed interest in becoming a candidate. It has not signed the Convention.[41]

Due to the overlap with other instruments, obliging states parties to incriminate bribery of foreign officials, the Convention itself is not so relevant here. However, the OECD has set up working groups and has produced tens of instruments on relevant topics such as good practice guides against bribery, guides for multinational companies, and regulation quality programs.[42] These instruments are used in several chapters of this study as reference for the evaluation of national implementation of anticorruption rules.

Mostly the UNCAC and EU policies will return in more detail in the next chapters. We now turn to the national legislation section.

2.3. Romania

2.3.1. Constitution

Romania's Constitution[43] guarantees the equality of all citizens before the law (Art. 16) with no privileges for anyone. Article 31, under the heading 'Right to information' (*dreptul la informație*) prohibits the impediment of access to any information of 'public interest'[44] (except in the interest of minors[45] or of national security) and obliges the authorities to inform the public and individuals 'correctly'. Members of Parliament are granted some immunity by the Constitution, but appointed or hired officials do not. Article 52 lays the foundation for redress in cases where the rights or legitimate interests of persons are violated by administrative acts. Law 554/2004[46] further elaborates this notion. Public administration is organized by Art. 116 through 123 of the Constitution. This chapter does not contain any provisions relevant to integrity, control or sanctioning of illegal conduct, with the exception of Art. 123 (5), which gives the Prefect (provincial representative of the government) the right to challenge and thereby suspend any local acts if he/she considers them illegal. Chapter VII of the Constitution deals with the Judiciary and its independence. Article 140 of the Constitution describes the role of the Court of Auditors (*Curtea de conturi*) as controllers of the public finances. The Court of Auditors reports to Parliament and its members are appointed by Parliament. It is independent, its members cannot be transferred and the Court is subject to the same incompatibility rules as judges.

[41] Status of May 2020.

[42] For an overview, see http://www.oecd.org/cleangovbiz/Inventory-of-Integrity-and-Anti-Corruption-Related-Bodies-Instruments-and-Tools.pdf

[43] As amended by Law 423/2003 of 29.10.2003.

[44] This concept is elaborated in Law 544/2001 and case law.

[45] The text speaks of 'young people' (tineri).

[46] Legea 554/2004 a contenciosului administrativ (Law on administrative liability and procedure), Monitorul Oficial of 7.12.2004.

2.3.2. Criminal law

Civil servants and those who, for this study, are considered civil servants (see section 1.4) may not be the same as those to whom the Romanian Criminal Code applies – like in the French and Dutch legal systems, the criminal law uses an autonomous definition.

In Romania, corruption of public officials is investigated by regular prosecutors, or in some cases by the anticorruption unit of the national prosecution service (*Direcția Națională Anticorupție,* DNA). The DNA has received praise in EU reports[47] for the conviction of many prominent dignitaries, convincing the international community that Romania takes anti-corruption enforcement seriously. Under EU law[48], the three countries have also established entities and procedures for the reporting of suspicious financial transactions, with considerable potential for the detection of possible corruption cases.

The Criminal Code

The Criminal Code[49] provides a definition of 'public official' in Article 175.[50] There are several articles in the Criminal Code (in the second, 'special' part) sanctioning corruption-related behaviour. The list[51] does not include 'general' issues such as obstruction of justice, fencing[52] or perjury.

- Title IV, Art. 267 Failure to report: Public officials who learn about a criminal act, related to the public service where he/she fulfils their duties, and fail to report those acts to the prosecution service, may be fined or imprisoned, even if the failure to report is not intentional.
- Title V, Art. 289 Passive bribery: Public officials who solicit or receive money or other undue benefits or accept a promise of such benefits, directly or indirectly, for themselves or for others, in relation to the performing, not performing, speeding up or delaying of any action that falls within their professional duties, or in relation to the performance of an action contrary to their professional duties. The sanction is 3-10 years imprisonment.

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[47] See the 2017 report under the Cooperation and Verification Mechanism: https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf.

[48] Currently Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141, 5.6.2015.

[49] *Codul penal*, M. Of. 510 of July 24, 2009.

[50] "Art. 175: Public official

(1) Under criminal law, a public official is a person who, permanently or temporarily, with or without remuneration:

a) exercises duties and fulfils responsibilities established on the basis of the law, with the aim of executing the prerogatives of the legislative, executive, or jurisdictional power;

b) holds the office of public dignitary or a public office of any kind;

c) alone or with other persons, exercises powers related to the scope of its activity, within an autonomous public organisation, another economic agent, or a legal person whose stock is fully or in majority owned by the State.

(2) Any person who delivers a service of public interest for which he/she has been invested by the public authorities or which is controlled or subjected to oversight by the public authorities in relation to the execution of said service, is also considered a public official.

Art. 176: Public

The term 'public' is understood as everything related to the public authorities, public institutions or other legal persons who administrate or use goods that are public property."

[51] Adaption by the author of the translation that the Romanian Ministry of Justice published in 2012.

[52] Dutch: heling, French: recel, Romanian: tăinuire.

- Title V, Art. 290 Active bribery: This is defined as promising, offering or giving money or other benefits in the situations described in Art. 289. The bribe-giver receives no punishment if he/she reports their actions to the prosecution service, before that service has been otherwise informed of them. Sanction: 2-7 years in prison.
- Title V, Art. 291 Influence peddling (also called trading in influence or influence trafficking): Soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties. Sanction: 2 to 7 years in prison.
- Title V, Art. 292 Buying of influence: The promise, the offering or the giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties. Sanction: 2 to 7 years in prison. The buyer of influence receives no punishment if he/she, like in Art. 290, reports the facts to the prosecution services before they have become aware of those facts in some other way.
- Title V, Art. 293 and 294 explicitly make the provisions of this chapter applicable to arbitrators in commercial arbitration cases and to cases related to foreign officials, implementing the OECD convention on this subject (although Romania is not party to it).
- Title V, chapter II, Art. 297 Abuse of office: Any public official who, acting in office, causes damage or infringes upon the rights of a (legal) person by not or defectively (illegally) performing his/her duties. This 'safety net' provision can be used as a proxy in corruption cases, when specific corrupt acts cannot be proven.
- Title V, chapter II, Art. 301 Use of position to favour a person: A public official who, in the exercise of his duties, acted to obtain a monetary benefit to himself, his spouse, or a family member in the first or second degree, except when emitting, approving or adopting normative acts, or when exercising a legal right or fulfilling a legal obligation (this article was modified in 2017 from a much broader definition).

Law 78/2000 on corruption[53]

This older law supplements the penal code[54] on the subject of corruption. Its *expunere de motive*[55] (explanatory memorandum) mentions a broad range of inspirational international and national instruments, among which the French law no. 83-122 on corruption from 1993 and the CoE criminal law convention on corruption which was then not yet adopted.

Law 78/2000 contains a non-criminal part in Art. 2-4, which applies to a broader group of individuals than the Criminal Code. According to its Article 1, besides public officials stricto sensu and anyone with a decision making or decision influencing power in public or private sector

[53] Legea 78 din 8 mai 2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (Law no 78 of 8 May, 2000, on prevention, discovery and sanctioning of acts of corruption), Monitorul Oficial nr. 219 of 18 May, 2000.

[54] It was meant to supplement the old criminal code, from the communist period. But in 2009 the Romanian Parliament adopted a new criminal code so that this law 78/2000 does not fit completely in the legislative logic anymore.

[55] This document is not available online, it can be obtained from the archives of the Romanian Ministry of Justice.

organisations, also political party officials, union leaders, leading members of any association or foundation, persons with a function of specialist or management in financial services and 'other persons as defined by the Law' all have the obligation to 'protect the rights and legitimate interests of citizens, without abusing their positions, powers or tasks to acquire, for themselves or others, money, goods or other undue benefits'.

Article 7 of Law 78/2000 raises by a third the maximum sanction for corruption offenses for certain categories (dignitaries, judges, prosecutors, judicial police officers and others. Article 13^1 and 13^2 do the same for blackmailing and abuse of office in certain circumstances. Articles 10-13 add the following offenses as 'equal to corruption' offenses:

1. Any person with decisional powers who establishes a price lower than the market value in commercial transactions regarding state property;
2. Establishing subventions 'in an illegal way';
3. Using subventions or loans from public funds for a different scope than what they were established for;
4. Any person with powers regarding supervision, control, reorganisation, or liquidation of a private legal person, who facilitates transactions of that private legal person or finances it during his/her mandate or up to 5 years after ending the mandate, and obtains undue benefits from those actions;
5. Any person who carries out commercial operations or financial transactions that are incompatible with their powers or tasks, using information obtained thanks to these tasks or powers, if carried out to obtain money, goods or other undue benefits;
6. Using non-public information in any way, or granting access to it to unauthorized persons
7. Persons with a management role in a political party, a union or an employers' organisation or in a non-profit organisation, who use their influence or authority to obtain, for themselves or others, money, goods or other undue benefits.

Public servants are most likely to commit 1, 2 or 6, unlikely in the other cases. Articles 18^1 to 18^5 incriminate fraud with European Union funds.

Asset recovery

Established by Law 318/2015 which transposes EU Directive 2014/42/EU[56], Romania has a specialised agency[57] for the management of frozen criminal assets since the end of 2015. This agency also tracks down recoverable assets, a task which, according to news outlets, the national tax service failed at.[58] The scope of Directive 2014/42/EU includes the offence of bribery, not influence trafficking, but the Member States are free to extend confiscation measures to those offences. It obliges the Member States inter alia to introduce third party confiscation and extended confiscation (of proceeds owned by a convicted person that are not necessary originating from the related offence.

The Criminal Code puts confiscation in the chapter of 'security measures', with measures such as obligatory internment. According to Art. 107, the stated scope of these measures is to eliminate a state of danger [to society] and to prevent criminal acts. Article 112 lists seven categories of

[56] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, OJ L 127 of 29.4.2014. on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

[57] See https://anabi.just.ro/en/The+mission+and+the+tasks+of+the+Agency

[58] http://stirileprotv.ro/stiri/actualitate/dosare-uitate-in-sertare-cum-au-inchis-ochii-in-fata-unor-tunuri-de-milioane-de-euro-politicieni-magistrati-si-politisti.html

goods that may be confiscated. Goods owned by unknowing (bona fide) third persons may not be confiscated, but then other goods of the same value will be confiscated. If the confiscated goods have produced added value (such as interest, or dividends), that will be confiscated as well. Extended confiscation in Article 112[1], can be applied under the following conditions, cumulatively:

1. A convicted person has obviously more possessions than he/she could have accumulated with his/her legal income;
2. The Court is convinced that the goods are proceeds from one of the specified offences, among which corruption and assimilated offences (but also tax evasion and other offences);
3. The criminal acts could have produced material benefits;
4. The minimum custodial sentence for the offence is 4 years

The Code of Criminal Procedure governs in Title V, Chapter III, the procedure for confiscation but not their sale, a few special cases excepted. According to Law 318/2015, the special agency (ANABI) sells the mobile goods, the tax authority sells the real estate.

2.3.3. Non-criminal sanctions

Misconduct that is not incriminated can still be sanctioned by the employer/appointing institution. This form of sanctioning is much less transparent than a corruption case in court; the sanction appears in the statistics, but not the details of the case or the reasoning of the Disciplinary Committee, because they are not public information. The Administrative Code and the Labour Code contain the provisions regarding disciplinary procedures against public officials and contract workers, and establish how they are liable for their conduct under the administrative or civil law.

The Administrative Code (see also section 2.3.5) dedicates Part VII to liability and sanctions in general. Title IV of this part describes the right to bring claims against public bodies before the administrative judge (the district courts, the appeals courts and the supreme court all have distinct administrative chambers), and the responsibility *in solidum* of the natural persons and institutions involved. Also, there is no liability for legally performed acts. If the official respected the law and the administrative procedures, he/she cannot be held liable for damages. Culpability is a condition for liability. In principle, this does not exclude 'objective' liability for the institution as a legal person.

Title II of Part VII defines misconduct as a breach of professional duties. But disciplinary rules are already detailed in the previous Part VI, Title II (Statute of public officials), Chapter VIII (Disciplinary sanctions and liability). Art. 492 limits the definition by giving an exhaustive list of 13 sanctioned breaches of duty. Other legislation may contain supplementary causes, but the *nulla poena*-principle obliges that they be explicit. The most related to corruption are the following:

a) To intervene or insist regarding the processing of a request [from a citizen] outside of the legal framework;
b) To breach provisions regarding conflicts of interest;
c) To breach incompatibility provisions, if the public official does not act to end the incompatibility within 15 days from when it started;

Article 79 of Law 161/2003 specifies the types of conflicts of interest and Article 94 of the same law, the incompatibilities[59]. Returning to Article 492 of the Administrative Code, it also provides the disciplinary sanctions:

1) a written reprimand;

[59] See section 2.4.4.

2) reduction in salary of 5-20%, maximum three months;
3) reduction in salary of 10-15%, maximum one year;
4) suspension of the right to salary raises or promotion, for a maximum of 3 years;
5) demotion, maximum 1 year;
6) dismissal.

Sanctions are coupled with specific violations, so that for violation a) above, the first two (the lightest) sanctions cannot be applied. A conflicts of interest violation can be sanctioned with any of the sanctions in the list, but incompatibility can only be sanctioned with dismissal. This is because conflicts of interest can range from relatively harmless issues of which the violating official not even might have been aware, to intentional conflicts with a great social peril that also lead to criminal liability. Incompatibilities, on the other hand, must simply be terminated. If the official does not end the conflicting activity or status, then he or she must cease to be an official.

In case of concurrent criminal investigations or a criminal trial on the one hand, and disciplinary investigations on the other hand, which will often be the case when a public official is caught for corruption offenses, the disciplinary procedure is suspended pending the criminal one.[60] Under the old law, the public official was automatically suspended when the case was brought to trial, but the Administrative Code provides that the official, if they can influence the disciplinary or criminal proceedings, must be moved to another position.

With the exception of the written reprimand and with dismissal for incompatibility, the sanctions can only be applied[61] – by the official who also has the power to appoint the official in question – on a proposal by the disciplinary committee and the fulfilment of several procedural guarantees. According to Art. 19 of Government Decision no. 1344/2007[62], the committee cannot start an investigation on its own initiative. Any person who consider that they have suffered harm by the acts of a public official, may seize the committee (Art. 27). This cannot be done anonymously, and the time limit is 18 months from the date of the contested acts. If the committee decides not to pursue the case, the plaintiff can seize the court.

The sanctioning official may follow the committee's proposal, or deviate from the proposed sanction, but this must be explicitly motivated. The sanctioned official can appeal to the administrative judge to annul the sanction (and sue for damages, if appropriate). Disciplinary sanctions are recorded in a special register (*cazier administrativ)*. For a limited number of appointments, an extract from the register has to be presented. Sanctions are stricken from the register after 3 years, in case of dismissal, 6 months in case of a written reprimand, or the period of the application of the sanction, in other cases. This means that a sanction for corruption-related misconduct automatically leads to having some career options blocked temporarily.

[60] Article 492 (9) provides that the disciplinary procedure continues when the case does not lead to a conviction, but provides nothing for when it does. The legislator may have assumed that the conviction always includes an interdiction to exercise a public office so that a disciplinary procedure loses its object, but this is not always the case, for example with the offense of influence trafficking.

[61] The sanction must be applied within 2 years from the date of the facts, except for incompatibility sanctions that have a term of 3 years, because a different law applies (Law 176/2010). Law 176/2010 regulates the procedure before the national integrity agency (ANI). Confusingly, even though ANI handles both conflicts of interest and incompatibilities, for the first violation the term is 2 years and for the second 3 years, because in the first case the Administrative Code does not refer to Law 176/2010, only in the case of incompatibilities.

[62] Hotarirea 1344/2007 privind normele de organizare și funcționare a comisiilor de disciplină, M.Of. 768 of 11.13.2007. This decision was not abrogated by the Administrative Code of 2019.

The civil liability of public officials (related to their duties) is governed by Art. 499 which states that public officials are liable for damages to the institution where they work. It also provides that damages paid by the public body to a third party based on a final court decision can be claimed from the public official. An example of the last case would be where the public institution and the official have been sentenced to a criminal fine or compensation payments, the institution has paid, and claims the money back from the official.

Contract workers in the public sector, who do not have the status of public official, are governed by the Labour Code with its distinct sanction regime. Title XI of that code deals with liability. The sanctions are almost identical with the ones for public officials, but in labour law the employer can decide with much larger discretionary powers which violation of legal or internal rules, or dispositions by superiors, warrants disciplinary action[63]. There are some procedural safeguards to counterbalance the employer's liberty, such as the possibility to contest the sanction in court. Similar to the public regime, the employer can reclaim from the employee the sums that the former paid due to illegal conduct of the latter.

2.3.4. Transparency law

Local administration

The general law that governs local administration (Romania has municipalities and provinces) is the Administrative Code[64]. Its Article 243 enumerates the tasks of the Secretary, a senior official at the head of the secretariat for the local council. Article 243, under e) provides that the Secretary "ensures transparency and communication to authorities, public institutions and interested persons of [local Council decisions]"[65]. Another transparency obligation under this law can be found in Article 138 that provides the public character of local council meetings and the obligation to publish all decisions within three days of their adoption.

The law on Access to information

Law 544/2001[66] regarding access to information will be discussed more amply in Chapter 6. It provides a general transparency obligation, stating in Article 4 that all public authorities and institutions must organize a dedicated department to inform the public, and that the task of informing the public must be detailed in the internal regulation (*regulamentul de organizare și funcționare*) of the organisation in question. The definition of 'information of public interest' as defined in Art 2, b) is a broad one, including `all information regarding or resulting from the activities of a public authority or institution, regardless of the medium'. Law 544/2001 is accompanied by implementing rules[67] (*norme metodologice*) that serve as an official, binding interpretation of the Law.

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[63] Labor code (Law 53/2003, M.Of. 2.5.2003, later republished), Art. 247.

[64] Previously Law 215/2001, abrogated by the Administrative Code.

[65] 117 e) asigură transparența și comunicarea către autoritățile, instituțiile publice și persoanele interesate a actelor prevăzute la lit. a), în condițiile Legii nr. 544/2001 privind liberul acces la informațiile de interes public…

[66] LEGE nr. 544 din 12 octombrie 2001 privind liberul acces la informațiile de interes public, Official Journal no. 663 of 23.10.2001

[67] Norme Metodologice din 2002 de aplicare a Legii nr. 544/2001 privind liber acces la informațiile de interes public, Official Journal no. 167 of 8.3.2002, approved by Government Decision no 123/2002.

Law on transparency and corruption prevention

There is a law (Law 161/2003) on public (and private) sector transparency related to the prevention and punishing of corruption offenses.[68] It should be noted that this law was not abrogated but made partially obsolete by later legislation, however the new Administrative Code still refers to it. The first book of the law (the second only concerns modifications of other laws) contains some interesting provisions.

- Title II: Transparency in the management of public information and services through electronic means provides for the creation of a National Electronic System for all kinds of electronic services. The most important implemented service is the electronic tender portal, e-licitatie.ro, and a system for online tax payments.
- Title III: Conflicts of interest and the rules regarding incompatibility while exercising public office and public services.
  a. A legal definition of conflicts of interest can be found here: "The situation where a public dignitary or official has a personal interest of a pecuniary nature, that might influence the objective fulfilment of their duties" (Art. 70). See also section 4.2.
  b. Article 79 describes conflicts of interest of civil servants (those who hold public office), for example when a civil servant sits on the same official committee as his/her spouse. It also describes what should be done if such a conflict arises (withdrawal by the person in question or by his/her superior) and indicates that sanctions may range from disciplinary to criminal, depending on the case.
  c. Article 94-98 provide the rules for incompatibility of civil servants. Articles 99 and 100 provide rules for various offices such as advisors to the President of Romania or members of the Court of Auditors (*Curtea de conturi*).

Aspects of this law will be discussed more thoroughly under the topic of conflicts of interest and incompatibilities (Chapter 4).

Transparency in decision making

Law 52/2003 regarding transparency in decision-making in public administration[69] organizes participation of the public in the preparation of Acts and in decision making. A number of relevant provisions:

- Public authorities have the obligation to publish any draft bills (any Acts that will be generally obligatory) on their website (Article 7 (1)).
- Public authorities are obliged to organize public debates about draft bills, if this was requested by an NGO ('a legally founded association'). The NGO does not have to prove an interest.
- Public meetings of the authorities (city council, for example, or a certain policy committee) have to be announced, participants from the general public must be given the occasion to speak, media access may not be limited because of lack of space in the meeting room. The meetings have to be recorded, and the recordings have to be made available on request.

[68] Legea 161/2003 privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice şi în mediul de afaceri, prevenirea şi sancționarea corupției, Official Journal 279 of 21.04.2003.

[69] Legea 52/2003 privind transparența decizională în administrația publică – republicată, Official Journal no. 749 of 3.12.2013

2.3.5. Integrity law

Law 176/2010 regarding integrity

Law 176/2010[70] modifies law 144/2007, the original law that founded the integrity agency, ANI (see below under Institutions) and establishes the obligation for (elected) dignitaries and officials, to disclose their interests and assets in a yearly declaration. Article 1 sums up 39 categories. They include all public officials.

Law 176/2010 further details the procedure and requirements for declarations of assets in Article 8-26, dealing also with (suspected) cases of incompatibility and conflict of interest. The law establishes some sanctions for non-compliance. There is a maximum fine of about € 400 for not submitting the declaration of assets. The inspectors of ANI can request documents and other information from any person, legal or physical, private or public. For asset verification, ANI can also order verification by a third party expert. Noncompliance with requests of information from integrity inspectors may cost the (legal) person in question about € 40 per day. The integrity agency does not, however, have the authority to impose fines or other sanctions itself. For every such measure they have to go through the courts.

The Administrative Code

This Code applies from July 3, 2019. It was introduced by way of an emergency ordinance (OUG 57/2019)[71]. It replaces Law 188/1999 regarding the statute for public servants[72] and lays down the "general framework for […] public administration". Its chapter on sanctioning was discussed under section 2.3.3. Part VI of the Code contains many of the provisions of the old law, with significant modifications. The new Code also incorporates part of the abrogated Law 7/2004 regarding the Code of Conduct for public officials and the law regarding the Code of Conduct for contract personnel. See section 3.2 for a discussion on codes of conduct.

Article 371 of the Administrative Code defines a public official as someone who "has been appointed in a public office". Annex 5 contains a list of all the public offices. This list is not exhaustive, as (in some areas of activity) new offices may be created. Article 373 names transparency and impartiality as principles underlying the public function. Articles 430-450 describe the duties of public officials. The most relevant duties are the following:

- Respect the law and comply with restrictions of freedoms because of their status as official;
- Act with objectivity, impartiality and independence;
- Ensure administrative transparency to gain and keep the public's trust;
- Respect the confidentiality of information;
- Abstain from representing or advising private persons in litigation against public institutions;
- Follow orders from superiors;

[70] Legea nr. 176 din 1 septembrie 2010 privind integritatea în exercitarea funcţiilor şi demnităţilor publice, pentru modificarea şi completarea Legii nr. 144/2007 privind înfiinţarea, organizarea şi funcţionarea Agenţiei Naţionale de Integritate, precum şi pentru modificarea şi completarea altor acte normative, Official Journal no. 621 of 2.9.2010.

[71] Such an ordinance must be confirmed by a law voted by Parliament, but this law is still in preparation. See http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=18090 for progress. Status of May 7, 2020. It should also be noted that the new Code was contested before the Constitutional Court, which by the same date had reached no decision. See also the comments regarding Law 7/2004 in section 3.2.2.

[72] This law was almost completely abrogated, except some provisions on the evaluation of top executive officials and on internships.

- Not accept or ask for any gifts or benefits for themselves or for others, directly or indirectly (except when this is part of their duties, as protocol);
- No private activities during work time or use of the institution's facilities;
- Not buy, use or rent goods from the State if they had inside knowledge, helped with the sale, or can influence it;
- Actively prevent (the appearance of) incompatibilities and conflicts of interest, and respect other rules regarding them;
- Respect the rules of conduct;
- Submit a declaration of assets and interests;
- Not promise some decision by their institution or other public officials or grant privileges in the exercise of their duties;

What happens if superiors approach their staff with illegal requests? Article 437 (3) states that

– public officials "have the right to refuse, in writing with motivation, to fulfil a task that was given to them by a superior, if they consider them to be illegal";
– the official involved has the obligation to report "this kind of situations" to the superior of the official who has given the task;
– if the task turns out to be legal, the refusing official "is liable according to the law".

Article 465 of the Administrative Code lays down the requirements for becoming a public official. Among requirements that the candidate be a Romanian citizen, has the right studies and be apt physically, this article provides the following conditions related to the subject of this book:

- No conviction for crimes against humanity, the State or public authority, crimes related to (public) office or corruption, crimes against the fulfilment of Justice, falsifying documents or declarations, or any intentional offense that would make the candidate incompatible with holding public office, except after the rehabilitation period;
- The candidate has not been released from public office or he/she has not been terminated for disciplinary reasons in the past 3 years.

It should be noted that public sector workers who are not public officials, can be hired after a corruption conviction. Article 464, 466 and 467 provide the legal basis for the obligatory exam, the 'concurs' (similar to the *concours* in France) for all public officials at entry and promotion.

Whistle-blowers

Law 571/2004[73] aims to protect persons who report alleged illegal actions by 'persons' (not public officials per se) in the public sector. There is an extensive enumeration of categories of institutions to which this law applies, in Article 2. The protection takes the form of a presumption of good faith (until evidence to the contrary), and other measures such as when the whistle-blower is being investigated by an internal disciplinary board, he may request the presence of the press and union representatives at the proceedings and this request must be complied with (Article 7). Furthermore, when a report is made about the reporters superior, the reporter benefits from witness protection measures with a hidden identity.

[73] Legea 571/2004 privind protecția personalului din autoritățile publice, instituțiile publice şi din alte unități care semnalează încălcări ale legii, Official Journal no. 1214 of 17.12.2004.

2.3.6. Main policy instrument and institutions

Anti-corruption strategy

The Romanian government has developed a comprehensive national anti-corruption strategy, adopted by Government decision. The first strategy was published in 2001. The strategy covers the entire public sector and is coordinated by an office reporting to the Minister of Justice.[74] The mechanism by which the European Commission monitors Romanian (and Bulgarian) strengthening of the rule of law (CVM, cooperation and verification mechanism) frequently refers to this strategy in its reports.[75]

The current strategy runs from 2016-2020. Its introduction lists 22 of "weak/priority points" resulting from the evaluation of the previous period (2012-2015). Below is a selection of relevant points for the subject of this study:

- Lack of knowledge of integrity standards;
- Lack of funding and of interest for information/education efforts;
- Low salaries;
- Designated local prevention officials must find time next to their other duties;
- Lack of funding for e-Government solutions;
- Reluctance of civil servants to report abuse and corruption;
- A formalistic approach to corruption prevention in local administration;

The strategy contains 6 general policy objectives, each with a list of subgoals. The subgoals have actions (141 in total), many with set timeframes, responsible institutions and budget estimates. The actions can be simple, such as 'Publish campaign finance data in open format' or complex, such as 'adopt legislation necessary for ex ante controls by the national integrity agency'. The objectives are:

1. Transparency culture at national and local level;
2. Inclusion of corruption prevention in management plans and performance evaluations;
3. Integrity and corruption risks in specific sectors, such as health, education, and the judiciary;
4. Knowledge of integrity standards by civil servants and the public;
5. Combating corruption through criminal and administrative law;
6. Enhancing compliance with anti-corruption policy by public institutions.

These topics were the top anticorruption priorities for the Romanian government for the years ahead. Despite the fact that they do not include salaries or other funding, one of the main issues from the evaluation of the previous strategy, salaries have significantly increased for a large number of civil servants (see 3.4.5). Developments on the other points may be evaluated at the end of the current cycle, and there are some intermediary assessments. The yearly internal evaluation by the Ministry of Justice lists the implemented actions, concentrating on the Ministry itself, unfortunately without mentioning to what degree the deliveries contributed towards the objective.[76] The Ministry

[74] The Romanian term is *Strategia națională anticorupție*. See the dedicated website: http://sna.just.ro/Default.aspx.

[75] All reports can be found here: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en.

[76] See: https://sna.just.ro/docs/pagini/56/Raport%20monitorizare%20SNA%202019%20MJ%2002%2004%202020.pdf. An example of an action is: 5000 brochures explaining rights of persons will be distributed. This gives concrete and measurable information about the implementation of an objective, but does not evaluate whether this actually helps attaining it.

of Public Works, Development, and Administration monitors the implementation of some SNA actions by local authorities. Its latest report (by April 2020) was from 2018. It stated that 25% of local authorities had an integrity plan and 17% had a risk assessment (both mandatory).[77] The October 2019 CVM report from the EU Commission states on the strategy that, while "the implementation […] has continued at a technical level […] corruption prevention has not been seen to be an important political priority".

Institutions

Romania has a dedicated national integrity agency, ANI (*Agenția Națională de Integritate*)[78]. It is well-known by the public because of its litigation against public office holders regarding cases of conflicts of interest. The organisation and the activities of this agency are governed by Law no. 144/2007[79]. The integrity inspectors of ANI check asset declarations and investigate possible cases of incompatibility and conflicts of interest. Based on its Article 4, ANI can start investigations of their own initiative or after having been contacted by third persons about a possible issue. Article 19 states that the Senate appoints the President and Vice-President of the agency, so it is an organisation that is directly controlled by Parliament. Parliament also approves the yearly budget of the agency, which is included in the general state budget.

On ANI's website[80], visitors can view millions of declarations of interests. From members of the government to presidential counsellors to professors of public law to junior policy officers, all officials must complete these declarations by hand and send them to ANI for registration, scanning and disclosure. The website also offers a feature where visitors can search for officials who were banned from a certain position or office due to a conflict of interests.

The processing of declarations of assets and interests is the chief task of the Agency. It has a budget of around 22 million RON (around 4,6 million EUR) remained stable 2017-2019 after a drop from around 30 million RON in 2016. To some extent – handwritten declarations make automated, statistical analysis very difficult – the publication of all these declarations reinforces public scrutiny of officials' integrity risks. If an official has a business interest in an area where he/she is also called upon to make decisions of public policy, journalists and citizens can easily look them up. But other types of integrity risks are also targeted by publishing these declarations: If an official's declared assets are disproportionally large compared to their official income, ANI (and the public) can start asking questions. If an official lives in a house or drives a car that are not mentioned in any declarations, again questions may be asked.

According to its main policy document[81], the Agency has a threefold mission to prevent and sanction

1) conflicts of interest,
2) incompatibilities and
3) unjustified assets.

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[77] See all reports here: https://www.mlpda.ro/pages/rapoartedemonitorizare.

[78] Legal basis: Law 144/2007 and Law 176/2010. See under2.4.5.

[79] LEGE nr. 144 din 21 mai 2007 privind înființarea, organizarea si funcționarea Agenției Naționale de Integritate - Republicare, Official Journal no 843 of 8.12.2007. This law was heavily modified by Law 176/2010.

[80] http://integritate.eu.

[81] https://www.integritate.eu/Files/Files/StrategiaANI_2016-2020/2016-06-14_StrategiaPtrPrev&SanctConFLInt&Inc&AveriNejust_2016-2020.pdf

The main source for all three tasks is the submitted declarations by public officials.

It employs 'integrity inspectors' (48 in 2017, 44 in 2020). According to the annual report (available on the institution's website) for 2019 they finalized 1,859 case reports (1,991 in 2017) – evaluations can be initiated *ex officio* or following a report. The fact that ANI had to fine 700 officials in 2019 for irregularities regarding the completion of declarations, shows that the procedure of declaring assets and interests is not (yet) observed by everyone. The same annual report shows that in 2019 there were 37 conflicts of interest discovered (90 in 2017). There were 129 cases of incompatibility in that year (160 in 2017). Most cases of conflicts of interest and incompatibilities regarded senior management as opposed to officials in non-management positions. Section 2.4.5. below details who must submit declarations and the procedure followed by ANI.

The ANI's main task, the verification of declarations, is comparable to that of the French HATVP but on a much larger scale. ANI does not verify anticorruption procedures and policy of individual institutions like the AFA does in France, but it participates in assessments under the national anti-corruption strategy. ANI advises when contacted with questions and incidentally publishes guides and brochures.

There are some other organisations with integrity or corruption prevention as their task:

- The *Agenția Națională a Funcționarilor Publici* (National Agency for Public Officials, ANFP).[82] This organisation is the Romanian government's HR coordinator, comparable to the DGAFP in France, but it has a more concrete role in integrity compared to that organisation. As such, one of its tasks is to "regulate and monitor the application of regulations regarding the conduct of public officials and the activities of ethics counsellors in public authorities and institutions" (Administrative Code, Art. 401). This monitoring was structured by Law 7/2004 regarding the Code of Conduct for public officials, but that law was abrogated in 2019 without replacement rules for the reporting and monitoring practice (see also 3.2). Besides the annual reporting (that seems to have been interrupted with the demise of the formal obligation in the old law), the ANFP organizes awareness and education projects on professional ethics.[83]
- *Direcția Generală Anticorupție* (General Anti-corruption Directorate) of the Ministry of the Interior[84]. This organisation is not reviewed in this study because it concentrates on police personnel, outside our scope. It develops awareness and educational initiatives, publishes analyses, and has an office in each province. Citizens are encouraged to report through a hotline. But this directorate-general is equally tasked with criminal investigations (lead by a public prosecutor, not subordinate to the Minister of the Interior), of personnel suspected of corruption offenses.
- The Ministry of Public Works, Development, and Administration, that coordinates local authorities in a number of policy areas, has an integrity directorate, the *Direcția Integritate, Bună Guvernare și Politici Publice* (DIBGPP). This directorate develops integrity policy and instruments such as risk assessments, for local authorities. It also initiates awareness and education projects from time to time.
- The *Curtea de Conturi* (Court of Auditors), the supreme audit institution of Romania. See also section 6.4. Its mission is to perform ex post controls of the way public money is spent and report to Parliament. The audit reports are accessible for the general public. The law (nr. 94/1992) that governs the Court has been modified many times, including the way

[82] Website: http://www.anfp.gov.ro/

[83] For example, a project to improve the implementation of integrity rules in the public sector: https://respectreciproc.ro/.

[84] Legal basis: OUG 63/2003, as amended by Legea 161/2005.

litigation following audit reports is handled. The Court checks the annual accounts of any public institutions, including state-owned enterprises. It also organizes 'performance audits' to see if public funds are spent cost-effectively. This is relevant because relatively high expenses can be a sign of leakage of funds through corruption. When auditors learn of facts that indicate illegal conduct, they have an obligation to report this to 'the competent authorities'. According to its annual report of 2015, this has happened 158 times in the course of that year.[85] The annual report is published in the *Monitorul Oficial*, the official publication for legislation. The Court can suspend policy measures and block public spending if it finds irregularities.

- The Audit Service of the Prime Minister[86], the Directorate of Public Internal Audit at each ministry, and audit units at a large number of (local) authorities or institutions. These institutions are relevant but less transparent; most of these do not have an obligation to make their reports publicly available on their own initiative. They are all coordinated (on a functional level) by a unit of the Ministry of Finance, in order to harmonize all audit activities.[87]

2.4. The Netherlands

2.4.1. Constitution

The Dutch Constitution contains no provisions related to the prevention of corruption. It does regulate incompatibility of provincial and local council members (not public officials) and provides that there should be a law on transparency. This constitutional rule has been implemented in the transparency law (see 2.4.4). There is no mention of principles of good government, integrity, or checks and balances.

2.4.2. Criminal law

At the institutional level, the *Rijksrecherche* (internal affairs criminal investigations) researches public officials but is not involved in prevention. The public prosecution service has no unit specialised in corruption. The FIOD (*Fiscale inlichtingen- en opsporingsdienst*), the tax intelligence and investigations service, is the investigational department of the Tax authority. It has an anticorruption unit, focusing on private sector corruption.

Criminal Code

Dutch law incriminates corruption of public servants in the Criminal Code, under the section Offenses in office (*ambtsmisdrijven)*, without mention of the word corruption. Articles 363-364 are dedicated to passive bribery and 177-178 to active bribery. Article 380 also applies; a conviction for corruption can entail an interdiction to be a legal guardian, an interdiction for any public office can be applied to the bribe-giver but not to the bribe-taker. Article 355 lays down a special criminal liability for 'heads of ministerial departments' (for example, taking decisions or enforcing them, knowing that they are illegal). Abuse of power is regulated by Article 365, as a specific form of extortion: 'the public official who, by abusing his power, forces someone to do, to forego, or to suffer something'. Article 364 concerns the judiciary which is outside the scope of this study. There

[85] The report can be found here: http://www.curteadeconturi.ro/Publicatii/Raportul%20public%20pe%20anul%202015.pdf

[86] *Corpul de Control al primului-ministru*, based on Emergency ordinance 25/2007, see its report on 2016 here: http://control.gov.ro/web/wp-content/uploads/2017/04/Raport-CCPM-2016.pdf

[87] The relevant law is Law 672/2002 on public internal audit, with implementing rules.

is a separate provision (Art. 328 ter) on corruption of other persons than public officials. Influence peddling is not incriminated in The Netherlands (see section 6.3 for its relation to lobbying). Article 366 incriminates extortion (*knevelarij).* Article 376 regulates the direct or indirect participation in public procurement for public officials who had the responsibility to manage or oversee that procurement, which is punishable by maximum 6 months in prison.

The incriminated behaviour under bribery is for a national or foreign public official, former public official or candidate public official (provided they get the appointment) to request or accept a gift, promise or service because of something he/she did or omitted, or request/accept a gift, promise or service while knowing or reasonably suspecting that it was offered to convince him/her to do or omit something. The 'something' has to be related to their professional activities (*in zijn bediening)*.

Asset recovery

The Guidelines for Recovery[88] that entered into force on January 1st, 2017, replacing older rules, proclaim the recovery of criminal assets to be a core justice task. The document lists a number of options for prosecutors, ranging from demanding confiscation, a special fine, compensation of damages, to a settlement with recovery of assets. The guidelines also mention the possibility of recovery under civil law, tax law and administrative law. The criminal law deprivation measures are all grounded in the Criminal Code and the Code of Criminal Procedure. Interestingly, the guidelines do not mention bribery or other corruption offences. Offences that receive special attention are for example tax evasion or social security fraud.

There was a special office that facilitates the prosecution's efforts in this field[89]. This office is now incorporated in the larger *Functioneel parket,* a specialist division of the national prosecution service.

2.4.3. Non-criminal sanctions

Before the new law entered into force, the disciplinary law for officials appointed by the State was laid down in a special regulation. Now that since 2020 the labour law applies to public officials (with some exceptions, but these exceptions are out of scope for this study), disciplinary sanctions can be found in a negotiated instrument, the *CAO* (*collectieve arbeidsovereenkomst*, collective employment agreement) that applies to all labour contracts of public officials. There is a *CAO* for officials of the central government and a separate one for officials of local government.[90]

The breach of duties that can lead to a sanction has not changed in essence. The official's duty is to be a 'good official', just as it was under the previous law. See also under section 2.4.5. The concept of duties does not only refer to formally detailed duties in writing, but also to actions or omissions of an abstract 'good public official, in similar circumstances'. Unlike in Romanian law, illegal conduct is thus described in a general way.

The *CAO* for central government employees contains sanctions, its equivalent for local authorities does not. The sanctions are:

- Written reprimand

[88] Aanwijzing afpakken, Stcr. 2016, 68526.

[89] This was the *Bureau Ontnemingswetgeving Openbaar Ministerie* (Office confiscation legislation public prosecution, BOOM). See the website of the new organisation: https://www.om.nl/organisatie/functioneel-parket.

[90] See for the central government agreement, CAO Rijk: https://www.caorijk.nl/ and for the local government agreement, CAO Gemeenten: https://www.caogemeenten.nl/.

- Reduction in supplemental pay
- Exclusion of periodical pay raise (maximum 4 years)
- Transfer to another position
- Fine (if explicitly provided in the institution's internal regulation)
- Termination of the labour contract (subject to the Civil Code, Book 7, Articles 667-686a)

Local authorities, for which no disciplinary measures are included in the *CAO,* can of course also apply the Civil Code for termination when the public official breaches their duties. Fines and other sanctions are not regulated in the law, so for public officials working for local authorities it must be included in the individual labour agreement which sanctions can be applied in which conditions. Pending the procedure, the employee may be suspended with pay, if necessary. A dispute arising from sanctions can be submitted to a dispute committee (*geschillencommissie)* and if the parties do not come to an agreement, to the civil law judge (*kantonrechter)*.

Civil liability of individual public officials is in principle excluded. Art. 9:1 of the general law on administration (*Algemene wet bestuursrecht*, Awb) states that actions (or omissions) of persons working under the responsibility of a public body, are considered to be actions of that public body. If a person has suffered damage through corrupt but not incriminated behaviour of a public official (for example, by the illegal award of a contract), he or she must sue the legal person having 'responsibility' for the official who acted illegally. This does not, however, exclude the possibility of private law recourse ('*regres')* of the public body against the official, for example in case of material or reputation damage.

2.4.4. Transparency law

The law on transparency of public administration (*Wet Openbaarheid van bestuur*, Wob[91]) provides the framework for 'passive' transparency – providing information at the request of (groups of) citizens. According to its Article 1a, this law applies to Ministries, local government (provincial, local administration and their subsidiaries) and other organisations with a public administration task. There are more than twenty regulations plus a number of policy documents implementing this law. For example, each Ministry has a procedure for responding to requests for information.

There is currently a bill in Parliament that significantly changes the premises of the law. The new law would be called the Law on Open Government (*Wet open overheid*, WOO).[92] The bill's explanatory memorandum[93] states that the transparency culture in the public sector must be changed and that the principle must be active transparency: relevant information must be published online by the relevant public authority, instead of waiting for requests from the public. After fears that implementation of the law would be too expensive, the bill was changed in 2019 and now provides less obligations for public authorities, for example publication of a searchable register with the institution's documents was scrapped, and gives them more time to implement the new law. But the law is not adopted yet.[94]

Other transparency-related legislation regards mostly financial transparency: private financial institutions, but also public tenders such as the so called 'wet Bibob'[95] regarding the integrity

[91] Stb. 1991, 703

[92] The collection of documents regarding the discussion by Parliament can be found here: https://zoek.officielebekendmakingen.nl/dossier/33328.

[93] See: https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vkutrtdx1uzp

[94] Situation of May 10, 2020.

[95] Wet bevordering integriteitsbeoordelingen door het openbaar bestuur, Stb. 2002, 347.

control by the (local) government of citizens interacting with it for subventions or permits – before granting contracts, subventions or permits, the authorities must, in certain circumstances perform a check whether the involved person has not become ineligible because of certain criminal convictions or a certain relation with criminal activities.

2.4.5. Integrity law

The Netherlands does not have one integrity law as such, but integrity is made a part of several important laws and regulated more in detail at the institutional level. There have been institutions dedicated to integrity for a few years, such as the Office for promotion of integrity in the public sector (*Bureau integriteitsbevordering openbare sector*, BIOS), and its successor since July 1st, 2016, the Whistle-blower Authority (see below and Chapter 5).

The list below covers the main broad public sector laws with provisions on integrity:

1. The General law on public administration[96] (*Algemene wet bestuursrecht*). This law contains in Article 2:4 the provision that administrative bodies should fulfil their duties without bias and that the administrative body should prevent 'persons who are part of or working for the administrative body' who have a personal interest, influence decisions;
2. The Law on local administration (*Gemeentewet*)[97] contains a number of relevant provisions, such as the obligation of disclosure of ancillary positions by members of the local council (Article 12), incompatible functions and activities for council members (Article 13 and 15), oath taking for council members(Article 14), the obligation to abstain from voting in case of personal interest (Article 28) and the prohibition of extra monetary compensation – other benefits may be granted following proper procedure – from the local budget (Article 99);
3. The law regarding public officials (*Ambtenarenwet 2017*)[98], see also above under sanctions, with considerable changes from January 1st, 2020, contains obligations regarding integrity policy. Article 4 contains the obligation for all public-law bodies to have an integrity policy, a code of conduct (*gedragscode*) and for yearly integrity reporting. Article 5 contains an obligation for various integrity-related aspects to be regulated by each individual public sector employer, regarding oathtaking[99], disclosure of ancillary activities, incompatibility rules, special reporting rules in cases where there is a risk of insider trading or a conflict of financial interests, and a whistle-blower procedure. A more general article that may be used for integrity purposes is Article 6, obliging the public official to fulfil their duties and 'behave like a good official'.

Rules on integrity and behaviour of public officials

Integrity rules are the specific rules aimed at stimulating ethical (including non-corrupt) behaviour and preventing unethical (corrupt) behaviour. The Code of Conduct for State officials[100] gives best

[96] Stb. 1992, 315.

[97] Stb. 1992, 96

[98] Stb. 2017,123. It replaces a law with the same name, from 1929.

[99] A dedicated implementing decision contains all the used formulas for oaths in public institutions: See https://wetten.overheid.nl/BWBR0042692/2020-01-01. Some authors consider oath-taking to be stimulating integrity. See for example Verhoeven, A.: Rechten en plichten van de ambtenaar, Maklu, 2008, p. 74. See also section 3.4.4.

[100] Gedragscode Integriteit Rijk 2020. This is an obligatory instrument for State officials with a minimum set of rules. Individual public bodies can extend the rules. See: https://zoek.officielebekendmakingen.nl/stcrt-2019-71141.html.

practices and mandatory rules for State officials, which will be discussed at length in section 3.2. Those who work for independent administrative bodies or local government have their own codes of conduct.

Regarding background checks: The Law regarding public officials opens the possibility to conduct background checks on candidates for any employer who deems it necessary. There is also a Decision regarding recruitment[101]. This ministerial decision mentions in Art. 19 the possibility to do background checks on candidates but does not give the conditions for applying these checks. There are two types of safety checks, one involves a check of judicial records and the most severe is a comprehensive check by the Dutch intelligence service. The functions for which the comprehensive background check is necessary are decided per Ministry[102]. There are national guidelines[103] but individual institutions remain responsible. At the employer's request, the background check can be repeated after 5 years.

Whistle-blowers

There is a special organisation to aid whistle-blowers, see below under Institutions.

For central government officials, there is a general Regulation regarding whistle-blowers[104] on which internal rules at ministries are based. According to this act, suspicions of misconduct can be reported to a superior or a specially assigned confidential adviser. If this is impossible, the whistle-blower can go to the central authority or other relevant authorities (such as the police). Anonymous reporting is not possible. Reporting misconduct is not an obligation, except when the misconduct is a criminal offence.

Protection against retaliation is ensured by the Civil Code, Art. 658c, provided that the whistle-blower acts in good faith, reports to her employer or a competent authority and follows the procedure set in the law regarding the Whistle-blower Authority. See also section 5.3.

2.4.6. Main policies and institutions

Policy

The most recent GRECO report on The Netherlands[105] notes an absence of government strategy for corruption prevention or integrity. It also sees a diminishing attention for the subject of public integrity issues. The Dutch government did set up a whistle-blower facility (see below under actors) but closed the more broadly mandated integrity office (BIOS).[106]

[101] This implementing decision was abrogated with the new Law regarding standardisation of the legal position of public officials, but according to correspondence from the implementing team of the new law, it is still being applied by public institutions until a replacement has been adopted (situation of May 10, 2020).

[102] This power is attributed by the law on safety checks, the Wet veiligheidsonderzoeken, Stb. 1997, 24.

[103] https://www.aivd.nl/onderwerpen/veiligheidsonderzoeken/documenten/publicaties/2014/09/08/leidraad-aanwijzing-vertrouwensfuncties

[104] Interne klokkenluidersregeling Rijk, Politie en Defensie, Stb. 2016, 542.

[105] Published in February 2019. See https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680931c9d.

[106] Bureau Integriteitsbevordering Openbare Sector (office for the promotion of integrity in the public sector), active from 2006 to 2016. The Onderzoeksraad Integriteit Overheid (OIO) was also disbanded at that time.

A recent letter from the Dutch Government to Parliament shows the fragmented nature of Dutch anticorruption efforts.[107] In the letter, the Minister of Justice responds to opinions in the press by detailing what the government does against corruption. A few aspects in this letter draw attention. In the first place, the Minister of Justice replies and not the Minister of the Interior, who is responsible for public sector integrity. Second, and possibly because of that, integrity policy regarding public officials is not mentioned in the letter. The Dutch government seems to view civil service integrity (prevention policy) and combating corruption as separate, even though both are objectives of the UNCAC (Article 1), one of the instruments cited in the letter. In the third place, the instruments mentioned in the letter are mostly repressive: setting up special police and prosecution teams, adopting rules for data sharing in criminal investigations, and combating money laundering. Other measures in the letter are the whistle-blower facility and the publication of gifts received by members of Parliament. There is no overall policy and the measures give a fragmented impression, each designed to address a specific topic but missing a relation to other instruments. The Dutch integrity policy regarding public officials within the scope of this study[108] was last broadly reviewed by the Ministry of the Interior in 2016[109] and 2014[110]. The reports show a focus on the following policy topics:

- Awareness raising, showing the importance of integrity and prevention for the public sector;
- Focus on stimulating positive values and much less on assessment of policy effects/ enforcement/sanctioning. The Ministry does evaluate periodically;
- Measures are preponderantly responses to incidents;
- Responsibility of management.

The principle of subsidiarity is broadly applied in the Dutch public sector, which may explain the focus on integrity/corruption prevention at the institutional or even sub-institutional level. This practice leads to 'large differences in the way that integrity policy is shaped and implemented' (the 2016 report) and also to difficulties in central monitoring and knowledge sharing.

The general observation can be made that in all three countries there is a policy focus on awareness raising. This may seem strange, given the fact that integrity and anti-corruption have been on the political agenda for more than 15 years in each country. Surely they did not wait 15 years before starting with awareness raising? An explanation might be that awareness is not self-sustaining and that it requires continuous attention from policymakers. Another possible explanation is that efforts in the past have been insufficient, qualitatively or quantitatively. Chapter 3 will shed some light on this issue.

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[107] See https://www.rijksoverheid.nl/documenten/kamerstukken/2020/02/06/tk-reactie-op-het-bericht-nederland-is-corrupter-dan-we-denken.

[108] However, integrity in the former colonies, military, police, immigration service, scientific bureau of the Justice department, the tax authority, and various local authorities have been the subject of dedicated government reports 2016-2020.

[109] See https://kennisopenbaarbestuur.nl/rapporten-publicaties/monitor-integriteit-en-veiligheid-openbaar-bestuur-2016/

[110] See https://kennisopenbaarbestuur.nl/media/172298/2014_Rapport_Beleidsdoorlichting_DEF_incl-voorkant.pdf. A more recent report but with a narrower scope, was published in 2018 by FNV, a worker's union: https://www.fnv.nl/getmedia/10b91980-a702-4adf-b1de-259ba421e5f8/FNV-Integer-handelen-rapport.pdf.

Institutions

There is no central organisation in The Netherlands dedicated to corruption prevention or the promotion of integrity. A few municipalities, such as the city of Amsterdam, have an office dedicated to integrity. The Ministry of the Interior (*Binnenlandse Zaken en Koninkrijksrelaties,* BZK*)* is responsible for integrity policy regarding public officials. Since 2015, it runs an informal standing committee with representatives of all the ministries, the IPIM (*Interdepartementaal Platform Integriteitsmanagement*, interministerial platform integrity management). This platform discusses integrity practice and produces policy recommendations. It is concerned with integrity in the narrow sense, excluding monitoring and detection of corruption.[111]

The Netherlands does have a dedicated organisation for whistle-blowers: the *Huis voor klokkenluiders* (Whistle-blower Authority).[112] In 2016, the Dutch parliament adopted a special law to ensure, according to its recitals, 'legal protection for whistle-blowers'. This law[113] established the Whistle-blower Authority as an independent administrative body (*zelfstandig bestuursorgaan*, ZBO). The independence of the House is strengthened by the fact that it does not have to report individual case data to a Ministry (Article 3). The law applies to both public and private sector, all types of workers, and all organisations with over 50 employees must have a procedure in place for reporting irregularities. See chapter 5 for whistle-blower protection practice in all the three studied countries. The Dutch Whistle-blower authority has three roles:

1. Advising (potential) whistle-blowers;
2. Researching misconduct revealed by a whistle-blower;
3. Assisting organisations with integrity measures.

Combining these three roles in a dedicated whistle-blower organisation appears to be rare. Many countries in the EU, including France, leave the support and advice role to one organisation, such as the Ombudsman, and the investigative role to other organisations – the administrative and criminal investigative authorities.

Regarding monitoring and control, the Dutch Court of Auditors (*Algemene Rekenkamer)* monitors public spending and publishes reports about, broadly speaking, the legality and accountability of the State finances and the efficiency and efficacy of the public sector. The role of the Court is laid down in the *Comptabiliteitswet 2001* (Law on public accounting), Chapter VII. Its members are appointed by the Government, on the recommendation of Parliament.

2.5. France

2.5.1. Constitution

The French constitution of 1958 (latest modification: January 2015) provides some incompatibilities (for example in Article 23: a member of Government cannot be member of Parliament, like in The Netherlands, but unlike in Romania) but these lie outside the scope of this study. Of more significance may be the Articles XIV and XV of the Declaration of Human and Civic Rights, of 1789.

[111] For information on IPIM, see the report regarding 2018 of the central integrity coordinator at the Ministry of the Interior: https://www.rijksoverheid.nl/documenten/rapporten/2019/03/27/jaarrapportage-centrale-integriteitscoordinator-2018.

[112] See the English website: https://www.huisvoorklokkenluiders.nl/english.

[113] Stb 2016, 196. URL: http://wetten.overheid.nl/jci1.3:c:BWBR0037852&z=2016-07-01&g=2016-07-01

These articles give 'citizens', or 'society', respectively, the right to verify how their tax money is spent and to 'demand reckoning from all public agents regarding their administration'. This incorporates a principle of accountability in French public law. And of course, 'corruption' is mentioned in the first sentence of the Declaration as a consequence of disregarding human rights.[114] This significance of the Declaration is not symbolic: The French constitutional court (the *Conseil constitutionnel*) has ruled in 1971 that the preamble of the Constitution (and thus the texts to which it refers, one of them being the Declaration) carry enforceable legal weight.[115] This means that, in principle, any law organizing control of the people over public spending and public administration may be checked against the Declaration.

2.5.2. Criminal law

To investigate corruption, there is a special division of the national prosecution service, the *Parquet National Financier*, and an investigative unit of the national police specialised in corruption and fraud.[116]

Criminal Code

The French Criminal Code[117] sanctions passive bribery and influence peddling in Articles 432-11, in Title III - Offenses against the authority of the State/Chapter II – Offenses against public administration by persons exercising a public office/Section III – Infringements of integrity (*probité* – note that this term has a slightly different nuance than *integrité* or *déontologie* but will be used as synonyms here). The text defines the receiver of bribes as 'a person holding public authority' (*une personne dépositaire de l'autorité publique*) or 'a person with a public service task' (*chargée d'une mission de service public)*, a functional definition of public official (the same article also includes elected officials as bribe-takers). These persons may not illegally request or accept any kind of advantage for themselves or for others, for any action or inaction related to their office, mission, or mandate. The maximum sentence is 10 years of imprisonment (plus ancillary sanctions).

Articles 435-1 and 435-2 sanction the same behaviour for public officials (in case of influence peddling: 'any person') abroad or in an international organisation (including the EU). There are separate articles regarding judicial officials (judges, clerks, arbitrators). Private sector corruption is sanctioned separately, by Article 445-1.

Other relevant articles are:

- 122-9: A person divulging secrets cannot be held criminally responsible if he/she is a whistle blower as defined by Art. 6 of Law 2016-1691 (see chapter 5 on whistle-blowers);
- 432-1: A public official who takes measures destined to impede the execution of the law (432-2 if he succeeds). This offense is categorized under Section 2: Abuse of authority against the Administration;

[114] "*Les Représentants du Peuple Français, constitués en Assemblée Nationale, considérant que l'ignorance, l'oubli ou le mépris des Droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements*…" The meaning of the word 'corruption' in this context is broader than current criminal law definitions, it refers to incompetence and promoting of self-interest, similar to the term integrity.

[115] Décision 'Liberté d'association', no. 71-44 DC. See also the decision `Société Eky' of the *Conseil d'État* (highest administrative judge) of 12.02.1960.

[116] This is the Office central de lutte contre la corruption et les infractions financières et fiscales (OCLCIFF, central office for combating corruption and financial/fiscal crimes).

[117] Code pénal (the new criminal code as entered into force on March 1st, 1994.)

- 432-10: '*concussion*' - knowingly requesting or receiving undue tax payments by public officials (extortion) or granting undue (fiscal) advantages, regardless of personal benefit;
- 432-12: Illegal business interests – public officials who take, receive, or keep 'any interest' (by taking decisions, for example) in a corporation or business operation that they must supervise, administer, liquidate or pay (with some exceptions);[118]
- 432-14: Public procurement – providing or attempting to provide an unjustified advantage, contrary to legal provisions aimed at protecting the free access and equality of participants in public tenders and concessions.
- 432-15 and 432-16: The chapter on offenses against *probité* concludes with embezzlement: Destroying, misappropriating, or removing money, titles, deeds or securities, or 'any other object' in the care of the public official.

Active corruption is regulated in Art. 433-1, mirroring the description for passive corruption. It should be mentioned that, for private individuals (active corruption, Art. 433-2-1) as well as for public officials (the passive variety, Art. 432-11-1) there is a clause that reduces the prison sentence if the perpetrator warns the authorities and thus helps stopping the offense from happening or helps identifying other participants.

Offences in other laws

The general law on the rights and obligations of public officials (some articles are also applicable to contract workers) is the *Loi Le Pors* from 1983[119], see section 2.5.5. It contains a criminal sanction for officials of a certain rank who must submit declarations of financial interests and properties and fail to do so, or omit a substantial part. The sanction is a fine of maximum 45 000 EUR or a prison sentence of maximum 3 years.

Asset recovery

Similar to Romania and The Netherlands, there is a dedicated office in France to support the criminal authorities in seizing and managing criminal assets: the AGRASC (*Agence de gestion et recouvrement des avoirs saisis et confisqués*, Agency for the management and recovery of seized and confiscated assets)[120].

The legal basis for asset recovery is the Code of Criminal Procedure, title XXIX-XXXI in book IV. Confiscation is always a complementary sanction in France. The general conditions for the application are determined by Art. 131-21 of the Criminal Code. If we take the example of passive corruption (Criminal Code, Art. 432-11), the maximum sentence for this offence is 10 years imprisonment plus a fine, which puts it in the category where (movable or immovable) also goods of which the acquisition cannot be justified can be seized, as well as goods that were used for the offence or goods that are the product of the offence.

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[118] Case law shows that interests can be also private interests of friends, for example, and that the provision applies even if the interest-taking were also in the public interest.

[119] Loi no. 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires, JORF of 14.07.1983

[120] See Loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale, JORF 158 of 10.7.2010, further implemented by circular of 22.12.2010 (internet : http://www.textes.justice.gouv.fr/art_pix/JUSD1033251C.pdf) and of 3.2.2011 (internet : http://www.textes.justice.gouv.fr/art_pix/JUSD1103707C.pdf). There is also a platform for the identification of criminal assets (PIAC), dating back to 2005, with a similar mission (internet: https://www.interieur.gouv.fr/content/download/7777/73338/file/INTC0700065C.pdf).

2.5.3. Non-criminal sanctions

Law 84-16[121], which forms together with law 83-634 and law 84-53[122] the Statute for public officials, provides the disciplinary sanctions that can be imposed on public officials. Law 83-contains the procedure in Art. 19 and in Art. 29 it provides that 'any violation by a public official in the exercise or while exercising their duties, may lead to a disciplinary sanction, without prejudice to criminal law'. Suspension of duties pending the investigation can only be ordered in case of serious violations (Art. 30). The sanctions can be divided in four groups. For contract workers, there are 4 distinct sanctions (Article 43-2 of Government Decision 86-83[123]). The combined picture is shown in the table below:

Table 2: Disciplinary sanctions French officials

Group 1	Warning and reprimand
Group 2	Contract suspension (only contract workers), suspension of advancement, demotion in pay, exclusion max. 15 days, forced relocation (the last one does not apply to officials working for local authorities)
Group 3	Demotion, exclusion from 3 months to 2 years (does not apply to contract workers)
Group 4	Forced retirement, dismissal (termination in case of contract workers)

Temporary exclusions can be a suspended sentence, and all sanctions except the first one are included in the personnel file of the official in question (for a limited period of time). The sanctions are applied by the authority that appointed the official in question. It is mandatory to take into account the opinion of the disciplinary committee, except for sanctions of the first group. An appeal is possible.

In France, there are administrative courts called 'financial courts', among which the *Cour de discipline budgétaire et financière*, CDBF (Court of budgetary and financial discipline)[124]. The members of the Court are also members of the *Conseil d'Etat* (State Council) or the *Cour de Comptes* (Court of Auditors). Only Ministers, the presidents of the chambers of Parliament, the Court of Auditors and public prosecutors can bring charges before this Court. The 2019 activity report[125] lists only 238 decisions since the beginning of operations in 1948, which reflects the limited number of persons who can bring charges but also the fact that Ministers cannot be tried under the law, and if their signature is on a decision, the officials involved cannot be tried either (Art. L313-9 of the law). The Court can impose only financial sanctions on public officials for corruption-proxy offences such as:

- Obliging the State for expenses without respecting the applicable rules on financial control (Art. L313-1);
- Charging a cost to a wrong cost centre to hide a budget overrun (Art. L313-2);

[121] JORF of 12.1.1984.

[122] Loi n° 84-53 du 26 janvier 1984 portant dispositions statutaires relatives à la fonction publique territoriale, JORF of 27.1.1984.

[123] Décret n° 86-83 du 17 janvier 1986 relatif aux dispositions générales applicables aux agents contractuels de l'Etat pris pour l'application de l'article 7 de la loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat, JORF of 19.1.1986.

[124] See the Code des juridictions financières, title I of book III, JORF 172 of 26.7.1995.

[125] See https://www.ccomptes.fr/fr/documents/51456, p. 11.

- Obliging the State for expenses without having the authority to do so (Art. L313-3);
- Provide (pecuniary or other) benefits to third parties in disregard of one's duties thereby causing a prejudice (Art. L313-6).

In some instances (Art. L313-4), not only the person signing for the expense but also those who illegally perform actual financial operations (*comptables de fait)* can be charged before this court.

2.5.4. Transparency law

In France, there is a dedicated public authority handling transparency of the activities of elected officials and some appointed officials: the HATVP (see also below). This institution is governed by Law 2013-907 on transparency in the public sector[126]. The Authority's organisation has its legal basis in Decree no. 2013-1204.[127] Its President is appointed by the President of the Republic.

While Article 3 handles conflicts of interest, Article 4 of Law 2013-907 institutes an obligation for members of government to declare their assets. The Authority sends these to the Tax Authority for verification and then makes them public (except for a few details, to protect the privacy of those involved). Article 11 lists a large number of categories of elected and non-elected officials who also have to provide declarations of assets to the Authority. For example: Assistants of the President of the Senate and the National Assembly, members of committees with the right to impose sanctions, directors of government watchdogs such as the *Autorité des Marchés Financiers* (Authority for financial markets, AMF), directors of state-owned enterprises, and many more. There is a maximum sanction of 3 years in prison for those who do not declare, omit parts of their declarations, or submit false declarations.

From July 1st, 2017 has entered into force a new section 3 bis of this law regarding the transparency of relations between lobbyists (*représentants d'intérêts)* and the authorities (*les pouvoirs publics)*, establishing a public directory online, in open format, where all lobbyists have to be registered. This section also establishes a set of rules of conduct for lobbyists (Article 18-5) and regulates the supervision by the *Haute Autorité*. Article 18-5 contains specific rules for those who lobby governmental, administrative and local authorities.

The Code regarding relations between the public and the Administration[128] regulates, among other aspects, the exchanges of information between the public and public institutions (for example: formal rules governing petitions) and most important for our subject, access to administrative acts and reuse of public information. This Code also contains the general rules concerning appeals on administrative decisions, first in an administrative stage (*recours gracieux)* and then a judicial one (*recours contentieux)*[129].

2.5.5. Integrity law

The aforementioned law 83-634 called *Le Pors* after its initiator, is the general law on the rights and obligations of public officials and, with all the modifications by later laws, the main law on the

[126] LOI n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique, JORF 12.10.2013.

[127] Décret n° 2013-1204 du 23 décembre 2013 relatif à l'organisation et au fonctionnement de la Haute Autorité pour la transparence de la vie publique, JORF 24.12.2013.

[128] Code des relations entre le public et l'administration, by Ordonnance no. 2015-1341 of 23.10.2015. This law partially replaced the initial French transparency law, *Loi n° 78-753* that also established the CADA.

[129] These rules are complementary to the Code of Administrative Justice (*Code de justice administrative, JORF no. 0107 of 7.5.2000.)*

integrity of public officials. This law was significantly amended by law 2016-1691, called *Sapin II*, and law 2016-483, but we will refer to it as *Le Pors* meaning the current version of the law with all its modifications. This law is the legal basis for the anticorruption agency and added whistle-blower protection to French legislation It also provides rules for private sector corruption prevention and rules on lobbying. Because of its diverse range of topics, the main provisions introduced by the law *Sapin II* are treated in their respective chapters. The same approach will be used with the latest changes to the law *Le Pors*, through the new Law 2019-828 on the transformation of the public sector (*Loi de transformation de la fonction publique)*[130]. It changes many HR-related provisions, which are out of scope for this study, but also some provisions on disciplinary procedures and on private activities by public officials. It also disbands the old integrity committee, its role now being filled by the HATVP.

The law *Le Pors* does not apply to military personnel, magistrates, or officials working for Parliament. Chapter IV of this law is entitled 'On obligations and professional ethics.' Interesting articles (where relevant also applicable to contract workers, based on Art. 25 nonies and 32 of the law):

1. Protection of whistle blowers: Article 6 ter A. See next section;
2. Article 16 gives the general rule of recruitment by *concours*, the exam that should provide impartial access to public jobs. This method of recruiting counters corruption in the form of cronyism;
3. The general obligation to act with integrity is provided in Art. 25. Also, management (*chef de service)* are obliged to ensure the respect of this principle by their employees;
4. Conflicts of interest are the subject of Article 25 bis. This law uses a broad definition: any interference of a public interest on the one hand, and a public or private interest on the other hand, that influences or appears to influence the independent, impartial and objective exercise of the official's duties. Public officials have the obligation to abstain from entering in any situation that would imply, in their opinion, a conflict of interest;
5. For some positions, before being appointed, officials must declare all their interests to the appointing organisation. The declaration has to be renewed whenever the interests change significantly (Art. 25 ter)[131];
6. Public officials of a certain rank, with economic or financial responsibilities must relinquish his/her control (*droit de regard)* over their financial instruments (bonds, shares, derivatives, etc.) within two months after his/her appointments (Art. 25 quater);
7. Public officials whose duties or rank justify such an obligation have to submit a declaration of assets within 2 months after their appointment and another one within 2 months after the end of their appointment. During the appointment, a declaration of assets must be submitted if the assets change 'substantially'. The declarations are not disclosed to third parties and will not be included in the official's records (Art. 25 quinquies);
8. Article 25 sexies: Irregularities (omissions, refusal, lack of justification or false declarations) regarding the declarations in Art. 25 ter, quater, quinquies, are criminal offenses for which the maximum penalty is 3 years in prison and a fine of 45 000 EUR. Also, the disclosure of these declarations is a criminal offense;
9. Article 25 septies creates a general incompatibility of the public service with any private commercial activities – with some exceptions, for example for part-time employees or

[130] JORF 182 of August 7, 2019.

[131] The list of relevant offices is established by Décret n° 2016-1967 du 28 décembre 2016 relatif à l'obligation de transmission d'une déclaration d'intérêts prévue à l'article 25 ter de la loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires.

those who create intellectual property. Apart from disciplinary sanctions, violation of this article leads to a pay cut equal to the prohibited revenues;

10. Article 25 octies: Provides that the HATVP produces opinions on request and recommendations regarding the application of legal provisions. The HATVP also advises on the admissibility of certain commercial enterprises undertaken by public officials and evaluates the compatibility of the professional or commercial activities planned by persons leaving the public service with their status as former civil servant (to prevent *pantouflage*);
11. Article 28: Insubordination is only admissible if the task or order given by the superior is 'clearly illegal and by its nature susceptible of gravely compromising a public interest';
12. Article 28 bis: Every public official may consult an ethics counsellor (*référent déontologue*).

Whistle-blowers

Chapter II of Title I of Law 2016-1691 is dedicated to the protection of whistle-blowers, defined by Article 6 as 'natural persons who, in good faith and without interest, reveals or alerts [regarding]' a 'crime' or 'délit' (the 2 most serious categories of offenses, corruption offenses being a 'délit') or grave and clear violation of international legal rules, or a threat or grave harm to the general interest, of which he or she has direct knowledge. Military secrets, medical secrets or information to which lawyer-client confidentiality applies are excluded from the protection.

Articles 7 and 10 of this law provide that whistleblowing cannot lead to criminal liability, and whistle-blowers cannot be sanctioned or fired from their place of work. In litigation about work sanctions, a reversal of burden of proof applies: The employer must justify any sanctions.

Articles 9 and 13 impose criminal sanctions on those who illegally disclose the identity of a whistle-blower or hinders in any way the transfer of alerts by a whistle-blower.

Regarding disciplinary sanctions for public officials, Law 83-634 provides in its Article 6 ter A protection for those officials who 'relate or testify, in good faith, to the judiciary or administrative authorities, facts that constitute a criminal offense or that may qualify as a conflict of interest, of which he/she has learned in the performance of their duties'. No 'measures' may be taken against these officials. Whistleblowing is explicitly protected in the 2nd sentence of this Article. Acts or decisions violating this article are void. In case of litigation, the burden of proof is reversed.

2.5.6. Main policy and institutions

New Policy

The first French 'National multi-year plan to fight corruption'[132] for the period 2020-2022 was published in January 2020. It was published by the French national anticorruption agency (AFA) as part of its mission to 'participate in the administrative coordination' against corruption. AFA participates, however it is unclear who the coordinating authority is: the Minister of Justice and the Minister of the Budget are both supervising the Agency, and the Minister of Finance and Public Administration coordinates administrative integrity policy efforts through its Directorate-General

[132] See the English version: https://www.agence-francaise-anticorruption.gouv.fr/files/files/PlanVAnglais.pdf. The legal basis for the plan is Article 1 of Décret n° 2017-329 du 14 mars 2017 relatif à l'Agence française anticorruption, stating that the plan must concern 'the fight against corruption, influence trafficking, extortion (*concussion)*, illegal interest-taking, embezzlement and favouritism.

for the Public Service[133]. Equally unclear are the scope and status of the plan: Does it apply to the entire public sector? Only to ministries? Is it mandatory, or rather a wish list? In the absence of legal statements, the plan is probably the expression of a series of policy objectives whose execution will be subject to the political will and available budget of the actors involved. The press release[134] expresses the desire for a broad consensus by mentioning that all (local) administrations contributed were consulted and that civil society will be consulted on the first results of the plan at the end of 2021.

The plan contains four policy priorities:

1. Better data analysis for understanding/detecting corruption (lacking statements on what should be analysed, by whom, with what purpose);
2. Training and awareness raising in the public sector (for high-risk positions and for those who help combat corruption, such as ethics officers);
3. 'Actions':
    a. Stimulating the development of policies at entity level, for ministries and local authorities (despite a legal obligation since 2017, very few entities have these policies. The goal is that all larger entities have a policy by 2022, the AFA has developed policy guidelines in 2017[135]);
    b. Promoting integrity in sports (France is hosting the Olympics in 2024);
    c. Providing guidance to businesses (but without any concrete measures);
    d. Evaluate and improve enforcement (data on administrative/criminal sanctions is lacking and the OECD found that there are no foreign bribery convictions of legal persons);
4. Improving international collaboration.

There are no financial provisions and few metrics for implementation in the plan, reflecting the AFA's role as an agent for change that must work by convincing others to act, without the power to command or finance third party actions. It also reflects how France analyses its current position in combating corruption. The focus on data collection, on training/awareness raising, and on calling public and private entities to action indicates that the French anticorruption authorities see themselves as standing at the beginning of a new effort (despite the fact that a central anticorruption service has existed since 1993, see 2.5.5). The plan is mainly a plan for 'preliminary diagnosis' as it is called in the UNODC guide for anticorruption strategies that the French plan explicitly references.[136] Furthermore, the priorities in the plan reflect the outcomes of the survey that the AFA held in 2018 (see 3.3.3), for example that currently very few public officials have had any integrity or anticorruption training. It is also addressing the need for more comprehensive data on policy implementation and disciplinary enforcement, a need that was felt while researching for this study. As the French policy itself indicates, the first results will be probably be ready for evaluation in 2021.

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[133] According to a parliamentary report from 2018 (see http://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b0611_rapport-information). The DGAFP (Direction Générale de l'Administration et de la Fonction Publique) coordinates human resources policy for the French government. See also next section.

[134] See https://www.agence-francaise-anticorruption.gouv.fr/files/files/CP%20plan%20national%20de%20lutte%20contre%20la%20corruption.pdf

[135] See the English version: https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf.

[136] The UNODC is the United Nations Office on Drugs and Crime. The Guide can be found here: https://www.unodc.org/documents/corruption/Publications/2015/National_Anti-Corruption_Strategies_-_A_Practical_Guide_for_Development_and_Implementation_E.pdf.

Institutions

France is the only of the three countries that boasts an entire organisation dedicated to combating corruption. Law 2016-1691[137] replaces the former *Service central de prévention de la corruption* (Central corruption prevention service) based on a law from 1993 with the new *Agence française anticorruption* (AFA, French Anticorruption agency). The new agency was officially opened on March 23, 2017 by President François Hollande. The chapter of the law that governs the Agency is the first one in the Title 'On the fight against breaches of integrity' (*De la lutte contre les manquements à la probité)*. Its mission (Article 1): To aid the competent authorities and implicated persons to prevent and detect corruption, influence trafficking, concussion, acquiring illegal interests, embezzlement (or rather, illegal misuse[138]) of public funds and favouritism.

The main tasks of the organisation are laid down in Article 3 of the law:

- "Participating in" the coordination of anticorruption efforts
- Disseminate information on corruption prevention and detection (targets are public authorities but also business and the general public)
- Develop and regularly update recommendations on corruption prevention/detection for public and private sector entities, taking into account organisation size and risk profile;
- Audit the "quality and efficacy" of anticorruption procedures in the public sector, by own initiative or at the request of certain other authorities;
- Audit the mandatory anticorruption measures by larger entities in the private sector.

The AFA also coordinated the policy plan described in the previous section. In 2018, the AFA performed 47 audits. Auditing representatives of the Agency have the power to interview any relevant persons confidentially, request any documents from entities and to verify their exactitude on site. The findings of the audit are reported to the audited entity and to the requesting authority, if that is the case. The Anticorruption Agency may, in case of a violation by *private sector* entities of the prescribed anticorruption measures in Article 17 of the law, issue a warning, force the violating entity to amend its procedures, impose a fine (up to a million EUR for legal persons), and order publication of any sanctions. Non-compliance with these sanctions can lead to criminal prosecution. While the AFA can only sanction private sector entities, the list of mandatory preventive procedures could also serve as a template for public sector entities.

The law contains several legal measures to guarantee independence. The AFA is headed by a magistrate; magistrates also make up the committee that imposes sanctions to private sector entities, and form part of the staff. The head of the AFA is appointed by the French president for a single term of six years. The law states explicitly that the head of the AFA cannot receive instructions from anyone related to audits.

Besides the AFA, there are several other actors relevant to the object of this study:

- The *Haute Autorité pour la Transparence de la Vie Publique* (High Authority for the Transparency of Public Life, HATVP). This organisation has a double role, in transparency (see below under 2.5.4) and in evaluating private sector incompatibilities of public officials (since February 1st, 2020; previously this was the task of the disbanded Integrity Committee for the public sector[139]).

[137] LOI no. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JORF 10.12.2016.

[138] As defined by the French criminal code, Art. 432-15.

[139] Commission de déontologie de la fonction publique. See https://www.fonction-publique.gouv.fr/la-commission-de-deontologie.

- The DGAFP (see note 133 and the text on French policy, above) coordinates measures regarding integrity and conflicts of interest in the public service[140]. However, the DGAFP sees this role as purely facilitating and as operational helpdesk (same note). On its website, no concrete policy actions have been published.
- The Ombudsman (*Défenseur des droits)* helps whistle-blowers who do not know whom to contact with advice (see 5.3.2 and 5.4).
- The Court of Auditors (*Cour de Comptes)*, regulated by the aforementioned *Code des juridictions financières*, performs also in France the role of checking the State finances and the efficiency and efficacy of public policy. It regularly publishes reports on its websites and collaborates with the French open access initiative (see section 6.2.4).

2.6. Closing remarks

If Mr. A would bribe Mr. B, holding any kind of position related to public sector activities, they would be prosecuted and tried under very similar rules in all three studied countries. Purely looking at the legislation described in this chapter, the similarities far outweigh the differences.

This may be due to the implementation of the international instruments of anticorruption, introduced in this chapter. The United Nations Convention against corruption (UNCAC), referenced throughout the study, as well as the Council of Europe Criminal Law Convention on Corruption, have prompted many countries to adopt or adapt legislation covering, in the first place, incrimination of corruption.

Each country incriminates all forms of bribery using broad definitions. A notable exception in the similarity regarding corruption offences is influence trafficking (a public official offers or accepts to intervene with the administration on behalf of a third party), which is not a criminal offence in The Netherlands. But in all three countries, the law sanctions conflicts of interest.

Integrity legislation is also detailed in all three studied countries, although in different form: Romanian law includes it in the Administrative Code, French law has adopted a much similar solution, and Dutch law gives a central principle with implementing rules. Integrity practice differs however from country to country, as we shall see in Chapter 3.

They all have extensive legislation on active and passive public transparency, with similar rights and facilities for those outside the public sector who wish to obtain information about its actions. We shall see in Chapter 6 that they also have similar shortcomings.

Checks and balances are shaped in a similar way, limiting the discretionary powers of officials regarding appointments, promotions, and dismissal of officials, the awarding of permits, and regarding spending decisions, such as tender or subsidy awards (more details also in Chapter 6).

One of the most obvious differences between the countries is the granularity of rules on most topics – Romania's corruption prevention rules are more detailed, the rules of The Netherlands are less detailed, and those of France are in between. This may be rather a matter of 'legal culture' than of specific legislative preferences. Another difference is that Romania has an established corruption prevention institution, France a budding one, and The Netherlands none.

The high degree of similarity is a precondition for comparing implementation of legislation. It is only possible to compare implementations, if that which is implemented is comparable in the first place. A detailed comparison on the different topics will be the subject of the next chapters.

[140] Legal basis: Article 1 of the Décret n° 2016-1804 du 22 décembre 2016 relatif à la direction générale de l'administration et de la fonction publique et à la politique de ressources humaines dans la fonction publique, JORF 298/23.12.2016.

3. Human resources

3.1. Introduction

While in the previous chapter the description of relevant legislation followed the main legislative themes, starting with this chapter we shift to a narrower prevention perspective, leaving aside criminal law and other sanctions.

Corruption is the work of individuals or groups of individuals. Their conduct is determined by intrinsic values, motivation, opportunities and inhibiting factors (Gorsira et al., 2018; Graycar & Prenzler, 2013; Zhang et al., 2019). Organisational human resources policies are powerful tools to shape these determinants, and while many influences are outside of the employer's reach to change (upbringing, environment, determining life events) their effects can be observed through monitoring, tests and screenings.

In this chapter, we follow the legal and policy topics of corruption prevention in human resources management. The first paragraph discusses codes of conduct. We then look at information and training for public officials. The final section of this chapter is dedicated to anticorruption interventions in the officials' careers, followed by a summary.

A preliminary observation is that the preventive measures discussed in this chapter are aimed at individual officials, leaving groups of colleagues and management, two other influential entities, out of the picture. It may be useful, based on the findings of other disciplines such as psychology and sociology, to investigate which explicit legal rules could be developed that are specifically directed at honest and transparent group dynamics, as an additional corruption prevention tool. Regarding management, it might be possible to introduce a more explicit responsibility for managers or management teams for taking preventive measures and for ensuring a transparent and honest work practice within their public institution. A step in this direction is that in the Romanian national anticorruption strategy, corruption is explicitly labelled a management failure. Measures could be devised in analogy to how in the United States, private employers may be held liable for 'negligent hiring' if they do not perform the necessary checks.[141] However, this element is largely missing from the practice in the three studied countries; practice is aimed almost exclusively at individuals.

3.2. Codes of conduct

The practice of establishing codes of conduct is widespread and they are used as anchors for national and organisational integrity/anticorruption policy. This section discusses the notion itself, and describes some different approaches to codes of conduct in practice.

3.2.1. Merits and appearance in international instruments

All three studied countries use codes of conduct[142] as prominent instruments of integrity policy, aimed to prevent corruption and other unwanted behaviour. From a legal perspective, codes of

[141] See this academic brief: http://www.law.columbia.edu/sites/default/files/microsites/public-integrity/balancing_integrity_with_privacy_interests.pdf

[142] There is a difference between 'codes of conduct' as an instrument in itself, and 'ethics rules' which may include anything from the reporting of financial interests (usually not to be found in codes of conduct) to decent online behaviour to the respectful treatment of women and minorities (included in codes of conduct but unrelated to this study). This section is about codes of conduct as an instrument.

conduct (also called codes of ethics[143]) are ambivalent instruments. All laws are codes of conduct, but not all codes of conduct are laws. They can be made into law or established by a public authority and thus given formal status, directly or indirectly. A direct way is for Parliament to adopt a detailed law regarding the conduct of public officials, such as in Romania until 2019. An indirect way is the Dutch example – referring to it in legislation as norms that should be followed, without giving the actual code this formal status.

In the absence of a formal status, such as when the department of a public institution discusses rules of behaviour in meetings and distribute them via e-mail as guidelines, it can be unclear to which degree they are mandatory or what their relation is to other rules governing the behaviour of the same public officials. The same is true when there are 'unofficial' (i.e. not adopted by a formal authority) additions to existing codes.

As a semantic aside, this terminology of 'code' of conduct, or ethics, harks back to 'moral codes' that are personal or group rules, referring to such concepts as honour, trust, forgiveness, oaths, loyalty and honesty, only partially overlapping the legal realm and in any case not formally established but grown from tradition. The fact that some of these values, such as loyalty, can lead to 'choosing the wrong side' in conflicts of interest is certainly relevant. For example, there was a manager for the City of Amsterdam who awarded contracts to the company of a person she had romantic relations with.[144] But there is a distinction between moral rules and those of professional ethics, the morality of the workplace, and codes of conduct fall in the latter category.

The compatibility of these informal and personal rules with the formal and professional character of the public administration is questionable. Why would the State use codes of conduct? Research shows that moral codes, or 'sets of personal values' influence[145] one's actions and in turn are influenced by life experiences and social context. But those are personal values, not 'official' values. Is this what the State is seeking to do, influence the behaviour of their officials through codes of conduct by making these codes seem less formal and top-down – and thus more 'personal' – than they really are? No evidence of such motives could be found; it may be unintentional. A code of conduct could be a set of shared personal values, shared and adhered to by all those concerned. That would be truly 'bottom-up'. Related to this is the concept of integrity in contrast to compliance: integrity is then bottom-up, while compliance is top-down. But there is a conflict here. In the research for this study, no examples of codes of conduct in the public sector have been found that are implemented bottom-up. Rather, a set of norms is established, after officials have or have not been consulted, as being 'the way everyone in our organisation should behave' and then enforced. It then becomes an imposed obligation rather than a contract one adheres to, while claiming to be the latter. The use of codes of conduct can also be viewed as an attempt to 'capture' existing personal values of public officials, thereby fixating them and making them visible. A codification of morals, as it were.

A parallel can be drawn with codes of conduct in the private sector. Departing (at least vocally) from Milton Friedman's adage that the social responsibility of business is to increase its profits[146], many businesses adopt codes of conduct that contain rules for the behaviour of their employees in

[143] The OECD distinguishes between a code of conduct (rules-based) and a code of ethics (values based). The two terms are used as synonyms here.

[144] News article: https://nos.nl/artikel/2190646-amsterdam-ontslaat-radicaliseringsambtenaar.html (in Dutch).

[145] See for example (Finegan, 1994), Fritzsche & Oz, 2007, and with the cultural factor, Roccas & Sagiv, 2010

[146] See his New York Times essay from 1970 (subscription): https://www.nytimes.com/1970/09/13/archives/article-15-no-title.html

interaction with each other, clients, competitors, the environment, and social groups. If these codes are only used as an outward sign of corporate social responsibility, they are no more than marketing statements. Corporations can also choose to actively implement and enforce them. In the latter case, they complement[147] the law – on bribery and lobbying, for example. The public sector can also benefit from good publicity to gain the public's trust. But the behaviour of public institutions and their officials is already heavily regulated, because of their special powers and tasks in society.

The use of codes of conduct may hide diverging approaches: On the one hand the 'administrative' approach, a hierarchical view on the conduct of public officials, in which they certainly have rights and discretionary powers but otherwise must follow instructions by their superiors. In this view, there is no place for horizontal agreements regarding the behaviour of officials and a code of conduct is not to be adhered to but to be complied with. On the other hand, there is the 'collaborative' approach, a view on human resources according to which public officials work best if they work together based on shared 'identities', 'values', or a sense of 'belonging to a group', so that they decide together on a code of conduct to facilitate collaboration. Take for an example of the second viewpoint one of the conclusions from a cross-EU study of public sector ethics policies (Demmke & Moilanen, 2012), that the "regulatory top-down approach to integrity in government must advance beyond the bad person model of law and policy. Instead, we should look at the social psychology of organisational life and at the ability of individuals and leaders to understand and to be critical of their own behaviour." This discussion, not to be developed here, is related to the one about the role of civil servants in society and to what measure they are individually and collectively accountable to the public (instead of to the Government) in their official role of governing that public.

Knowing that, in the public sector, codes of conduct are mandatory and at least in theory enforced, one could find this discussion useless on the grounds that these codes are just another name for binding rules. For individual public officials, it matters little whether these rules are called laws, decrees, instructions, or codes, except when they conflict with each other and a hierarchy must be applied. The Romanian and French code of conduct comes in the form of a law – slightly confusing, but no more than that. Such a view, however, would disregard the principle of transparency (clarity, simplicity). If codes of conduct originally were non-legal complements to the law applicable to private sector employees and entities but have become part of the law applicable to public officials, keeping the name appears like an unnecessary confusion, that could even lead to a perception of these codes in the public sector as soft law while they are not.

There is a long running scientific discussion regarding the role and the use of these codes. Do they work? What is their added value? When Huberts (1998) questioned 259 experts worldwide about effective anticorruption methods, 73% of them considered 'codes of ethics for politicians and civil servants' to be effective or very effective. This is similar to the views of the interviewed integrity professionals for this study. The OECD Integrity Framework[148] from 2009 gives an overview of research on the impact of ethics codes and concludes that "the findings are very mixed". One study from 2011 (Garcia-Sanchez, Rodriguez-Dominguez, & Gallego-Alvarez) looked for a correlation between having codes of conduct and corruption levels and found an "absence of any influence of codes on corruption problems in the public context". While this last study may have oversimplified the control variables, it can be stated that the enthusiasm for codes of conduct is considerable

[147] Only between contracting parties, of course.

[148] Towards a Sound Integrity Framework: Instruments, Processes, Structures and Conditions for Implementation, OECD, 2009, p. 35

but their positive effects are not proven. However, as usually pointed out in relevant studies, anticorruption (and, more in general, integrity) policy requires a framework, of which the code of conduct is just one part.

Related to this is the question whether norms in codes of conduct regarding 'civil' behaviour influence 'correct' behaviour in the narrower sense of non-corrupt behaviour. Does it help to stimulate politeness, respect towards women and minorities and a collaborative attitude between colleagues and towards the public? Does that lower corruption? This is a separate discussion, related to the 'broken windows' crime prevention theory.[149] But this type of norms can also be an end in itself and many codes of conduct have a much broader scope than non-corrupt behaviour. This study focuses on norms that aim to influence non-corrupt behaviour in the narrower sense.

Regardless of the scientific debate, the studied countries may be forgiven the adoption of codes of conduct because they have become a standard tool. Transparency International's 'National Integrity System' framework sets codes of conducts and their implementation at the top of the list of evaluation questions.[150] International legal instruments stress the importance of codes of conduct. The above-mentioned OECD integrity framework calls them an "essential part of existing international instruments" (p. 34). The UNCAC's Article 8, with the heading "Codes of conduct for public officials", obliges the States Parties to "endeavour to apply […] codes or standards of conduct" but according to the accompanying Technical Guide (p. 22), the legal status of such a code is for the States Parties to decide. The same guide goes on to stress the importance of actual implementation of the code and of having an 'oversight body' that monitors implementation. Note that none of the three countries has such an oversight body with the explicit task to monitor the implementation of codes of conduct (although the Romanian MDRAP and the French AFA did publish a report with this information, see section 3.2.2). The same Article 8 includes provisions regarding whistle-blowers and asset declarations, which the studied countries have dedicated specific legislation to. This reflects the growing interest for these topics since the adoption of the Convention in 2005. As a template, the article specifically refers to the International Code of Conduct for Public Officials[151].

The European Commission has adopted in 2000 a code of conduct that applies to all its officials[152], following its White Paper on administrative reform of the same year. Separately, there are guidelines on gifts and hospitality[153] This "Code of good administrative behaviour" is subtitled 'relations with the public', stressing its outward role. The internal Staff regulations, first adopted in 1962 and regularly updated, contain a section on rights and obligations including prohibitions of bribery and conflicts of interest and an obligation to report illegal activities. The Code is binding to all officials (but not contractors) and proclaims the general principles of lawfulness, non-discrimination and equal treatment, proportionality, and consistency.

[149] A theory developed in the 1980s, widely applied in the United States and also in Europe, postulating that an aggressive police response to minor misconduct would prevent more serious crime. However, not much scientific evidence has been found to support it. See for example this article by Harcourt and Ludwig, Chicago Law Review 271, 2006: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2473&context=journal_articles.

[150] See https://www.transparency.org/files/content/nis/NISIndicatorsFoundations_EN.pdf, page 43.

[151] Adopted by UN General Assembly resolution 51/59 of 12 December 1996 (annex)

[152] OJ L 267, 20.10.2000. The European Parliament and other institutions, such as the ECB, have their own codes. The Commissioners have their own code, the latest from 2018. There is a transparency register with its separate code of conduct for lobbyists.

[153] SEC(2012) 167 final.

The Council of Europe model is discussed in detail below.

A legal critique at first view condemns the redundancy in many codes of conduct, repeating provisions already enshrined in law. To the extent where codes of conduct duplicate the law, they are only useful as implementation guides and should be treated as such. If not, they are adding to the law on (depending on the case) a different regulatory level. In practice, however, guidelines and lower level regulations are a common practice in many areas of public administration, corruption prevention being no exception. The mixture of elements from the criminal law (bribery) with provisions on 'decent behaviour', presented on the same level, could still be confusing because they appear to have the same importance while this was not the intention of the legislation. Another issue is the mixture of hard and soft law, leading to confusion in case of enforcement or conflicts. But many codes of conduct for public administration, including the ones for the three studied countries, mitigate this risk by clearly stating their binding character.

Adding a layer of explanation, however, may only place issues on a lower level. The Dutch code for the central government, meant to clarify the law, states for good reasons that officials must always use their own judgment in concrete situations. Local codes are similar. One interviewed integrity official gave the example of a code prohibiting accepting any gifts, not even after the performing of a service. But if an old lady delivers a homemade cake to the local passports office to thank them for their quick service, the offers must weigh the importance of good relations with the public against this principle. But how should they react if another lady comes in with an expensive cake from the shop? No code of conduct can provide for these daily dilemmas. Another example is the principle of honesty and transparency, which must be promoted. It is perfectly honest to inform management on Monday morning that Susan drunkenly fell into a ditch after Friday drinks with colleagues, but will it enhance the team culture or its performance? Maybe not. Public sector managers in all three countries make use of dilemma games to help officials deal with practical cases, which shows that administrations acknowledge this issue and act upon it. The 'impact study'[154] for the French legislative modification introducing the leading principles stresses that "the application of these obligations will be evaluated *in concreto* by the administrative jurisdictions". But it is debatable whether codes of conducts help reduce dilemmas or create new ones instead. Probably both. It follows that a thorough understanding of the concepts behind them is necessary for officials to be able to apply those concepts in unforeseen situations.

There is also an enforcement issue with stressing the use of officials' common sense. Can the official be held responsible, based on a code of conduct, that she weighed conflicting principles differently than the manager? When is there sufficient ground for disciplinary action? The debate whether the law is equipped for these conditions exceeds the scope of this study, but its premises should be carefully considered when drafting codes of conduct. At the very least, officials must know that with the freedom to decide comes the responsibility to justify their actions.

The similarities and differences between national codes are discussed below. Forms of implementation such as distributing the code and using it in integrity training, are mentioned in section 3.3.

[154] See: https://www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=14D9F6CB3B1D04A58994746680166336.tplgfr27s_3?idDocument=JORFDOLE000027721584&type=general&legislature=14.

3.2.2. Three different approaches

Legal form and scope

Codes of conduct may appear to be soft instruments, but the terminology is misleading: Detailed sections with rules of conduct are included in laws in France and Romania, while in The Netherlands they become law through a backdoor, where the law (*Ambtenarenwet,* Art. 6) obliges officials to be "a good official", which is defined by the code of conduct, by local codes, and by case law[155]. The code refers to itself as "giving substance […] to the notion of good official" (section 2.2 of the code). It is thus an implementation of that notion.

Romania's code of conduct was adopted at the highest level in the form of law 7/2004. With the adoption of the Administrative Code, entered into force on July 6, 2019, it was abrogated. As a consequence, there is no dedicated code of conduct law anymore. However, the new Administrative Code contains two detailed sections on rights and obligations of public officials, with much the same content as in the old law[156], so it can be stated that the new Administrative Code includes to a great extent the old Code of Conduct law. But local codes of conduct still refer to the old law as legal grounds, and the new administrative code has been challenged before the Constitutional Court and at the time of writing in May 2020, its fate is unclear. If the code is declared unconstitutional, the old law will re-enter into force (see also section 2.3.5).

The Administrative Code is applicable to public officials in central and local government, as well as autonomous administrative bodies. It also applies *mutatis mutandis* to contract workers and anyone "paid from public funds" (Art. 365). However, the provisions do not apply to contract workers who do not "exercise prerogatives of public power" (Art. 382), such as secretaries and other support staff. The employee rights and obligations from the Labour Code apply to them. Local codes of conduct usually apply to both officials and employees on a labour contract.

In the Netherlands, there is no code that applies to all public officials. The Dutch code of conduct for officials of the central government[157] takes the form of a decision of the Minister of the Interior. Its first version was published in 2006 as a model code. Later versions have dropped the word 'model' and it is now called G*edragscode integriteit Rijk*. This code is not applicable to contract workers, but it mentions in Article 1.2 that the code 'must explicitly be brought under the attention of' trainees, contractors, and other 'external' workers, who must be asked to declare in writing that they will comply with the code. The code includes a model declaration of adherence for these groups.

France does not have a code of conduct with national scope. However, the national reference in the literature and in official communications is Chapter IV of Law 83-634 (called *Le Pors*), in the version after it was substantially modified by Law 2016-483 on professional ethics (*déontologie*). While this law could also be compared to the Romanian Administrative Code and the Dutch Law regarding public officials because it is the general law regarding public officials, it contains

[155] An example of case law on the consequences of behaviour violating a code of conduct: ECLI:NL:CRVB:1999:AA3987.

[156] In Part VI, Title II, Chapter V, sections 1 and 2.

[157] See chapter 2, section 2.5. The Minister of the Interior has a coordinating role in Dutch integrity policy as part of HR policy, but it is not sure whether a decision from this ministry can be generally applicable without explicit adherence from each individual ministry by decisions of their own. Especially since the law makes each institution (*bevoegd gezag)* responsible for establishing a code (*Ambtenarenwet*, Art. 4). It is possible that the Minister of the Interior is considered *bevoegd gezag* in this domain, because of its central HR powers based on the coordinating decision regarding organisation and management (*Coördinatiebesluit organisatie en bedrijfsvoering rijksdienst* 2011, Stb. 2011, 18).

some much more detailed provisions than these two and within the context of this study it can be viewed as a combination of a code of conduct with a general law regarding public officials. Law 83-634 is applicable to all public officials and many provisions equally to contract workers, see also section 2.5.5.

In the Netherlands, local government and other public institutions each adopt their own code. The association of Dutch municipalities, the VNG (*Vereniging Nederlandse Gemeenten*) offers a model code for elected officials but not for appointed ones. In Romania, the existence of a generally applicable law for 15 years has not deterred many ministries, municipalities or even city departments from adopting their own codes, usually called *cod de conduită etică* (code of ethics). They may change their practice in the future, now that the control of the implementation of the rules code of conduct has disappeared. Many Romanian professions have done the same, like in France, including special categories of public officials such as police officers or internal auditors. Some French ministries and other public institutions also have their own codes of conduct.[158]

Besides the persons to which the codes apply, the material scope must be determined; conduct at the office, outside of the office but in the exercise of duties, or in relation to duties, or even in strictly private situations. The Romanian Administrative Code does not clarify this aspect.[159] For some articles, for example the interdiction to "make false declarations in public regarding the institution where they work […]" (Art. 434) it can be inferred that it applies to all situations, even when the official is on her own time, because otherwise the interdiction would make no sense. Other individual articles mentioned that the interdiction relates to "the exercise of the public office", limiting the situations in which the official is bound to it. The Romanian code should thus be analysed at the article level. The Dutch code explicitly mentions that the expectations towards civil servants regarding ethical behaviour are not limited to the work place or working hours (Art. 2.2). This provision is however only apparently a general one – one cannot expect public officials to refuse gifts that are unrelated to their work. As well as in the Romanian code, the extent of the situations to which the code applies must be reviewed case by case. The French code (Art. 25 of Loi 83-634) limits the principles applying to public officials to the exercise of their duties. This is also understandable because, for example, respect for the principle of religious neutrality cannot be required from officials in their own time as such a requirement would impede their freedom of religion. Subsequent articles contain specific provisions with their own material scope, for example the obligation of asset reporting.

Sanctions

Of course, there is a difference with the criminal law in that most sanctions are disciplinary – not all of them. In all three countries, the maximum sanction is termination of employment. Wrongdoers can also be sued for damages under the civil law. At least in theory, codes of conduct with a mandatory status such as in the three studied countries are strong instruments of enforcement. However, all disciplinary sanctions are imposed by the employers, institutions that have an interest in 'keeping things quiet' besides their interest in the ethical behaviour of their public officials. It would be worth investigating whether mitigating measures can counter this risk, for example by randomly assigning cases to disciplinary committees from other organisations, or by having one central disciplinary body from the first instance, but that is outside of this project.

[158] According to the 2019 GRECO report on France, only the Ministry of Foreign Affairs had a 'comprehensive' code.

[159] It does contain a notion of 'territorial scope', describing how public officials should behave abroad and when dealing with foreign organisations. For example, public officials are not allowed to express personal opinions on national issues when meeting representatives of foreign states (Art. 448).

The Romanian Administrative code dedicates Article 492 to the disciplinary liabilities of officials when breaking the code (see also section 2.3.3). Public institutions' disciplinary committees have investigative powers under a special law, Government Decision 1344/2007[160]. Only when this committee thinks that criminal acts were committed, the case is referred to the public prosecutor. The Dutch code refers to the Law regarding public officials, Art. 6, which refers in its turn refers to the labour law. The special disciplinary law for public officials has been abrogated under the new law. Still, it is highly improbable that when an official accepts a bribe this will only lead to contractual sanctions, even though it is forbidden by the code of conduct as well as by the criminal code. A criminal sanction can be applied in combination with a disciplinary one. It might be advisable to add this explicitly to the code of conduct, to preclude a possible mitior lex defence. The French 'code' does contain such an explicit reference in Article 29: "Any misconduct by an official in the exercise of his duties exposes him/her to disciplinary sanctions, without prejudice of criminal punishment if the case arises". What exactly these sanctions are depends on the gravity of the misconduct and can be found in chapter 2. See the same chapter for more details about the disciplinary procedures.

Motives

Even if, according to the literature cited above, the impact of codes of conduct is uncertain and their adoption is often driven by the desire to contain damage from incidents (Demmke & Moilanen, 2012, p. 57)[161], there are other incentives for legislators and administrators to adopt them, such as the symbolic reassurance that they provide and the cheapness of implementation.[162] Adopting a code is hardly controversial; everyone is for ethical behaviour (repealing one might be more difficult). We shall take a closer look at the motives given by those who proposed adopting the principal code in the three studied countries.

The new Romanian Administrative Code has an explanatory memorandum[163] detailing the Government's motives for adopting the new code. In the context of the voluminous act that combines several major laws on public administration, the attention for rules of conduct or integrity is minimal. The focus is on administrative capacity and quality, only indirectly related to corruption prevention.

In the Dutch context, where the code of conduct for all officials of the central government was adopted following a modification in the law regarding public officials that made it mandatory for public institutions to have such a code, it is relevant to look at the reasons why the government initially proposed this modification. In their memorandum from 2004 accompanying the legislative proposal for modification[164], the responsible ministers explain that they wanted to incorporate ethical rules but found that the nature of those rules made them unsuitable to be inserted in the law (stricto sensu). Besides, they wanted to leave public institutions room for adapting the rules to their local situation, saying that "there must be ample room for a dynamic and layered integrity

[160] See chapter 2, section 2.4.5. This decision was not abrogated by the new Administrative Code, although some parts of it (on composition, for example) are made obsolete by it.

[161] In this study, only The Netherlands reported that public discussions on ethics were mostly value-driven.

[162] See Saint-Martin, 2006, p. 17 for path dependency theory applied to ethics policies.

[163] It is called a *notă de fundamentare*, because it was adopted as an emergency regulation. See: https://gov.ro/fisiere/subpagini_fisiere/NF_OUG_57-2019.pdf.

[164] Deeplink: https://zoek.officielebekendmakingen.nl/kst-29436-3.html

policy"[165]. Hence the obligation to have a code, but nothing about its content. The broader context for the proposal was the general objective of the government to "restore moral values in Dutch society". For this to happen, the public sector must be an example of good conduct. Another aspect was the "growing room for individual responsibilities of public officials" which creates the need for more awareness of the "requirements for their profession". In the third place, they thought that codes of conduct would help making the public sector more robust and effective in its actions. The above is the 'why'. The objective of a code of conduct is stated as "supporting a change of culture within public institutions" and the "development of ethical awareness in the addressees", adding that integrity means a lot more than a code of conduct. Therefore, the proposal also contains the obligation for institutions to have an integrity policy.

An overview of French developments from before the substantial modifications of 2016 (Hine, 2006) notes that there had been failed proposals to introduce a general code of conduct, but that many professions and individual institutions did have one. The same article stresses the French tradition of using hard law (as opposed to the United Kingdom), which may be why the set of ethics rules finally were added to the law instead of creating a separate instrument with a less formal status. While at the time of the article "no one [of the spokesmen for most concerned institutions] believed that codes of conduct would add anything", this may have changed, even though the preference for hard law remains.

The *exposé de motifs*[166] for Law 2016-483, the law that introduced the set of principles that can be viewed as the French central code of conduct, into the general statute regarding public officials, asserts in broad sweeps that society has changed profoundly since the beginning of the 1980's when that statute was published (the *Loi le Pors,* see also chapter 2) and that those principles must be restated to give new meaning to the public service. Also, a need was felt to add the principles to the law and to give formal status to notions that, beforehand, were defined exclusively by the administrative judge (mostly in the case law of the highest administrative judge, the *Conseil d'État).* Another document accompanying the introduction of the bill was the impact study.[167] It states that the exemplary conduct of public officials helps to strengthen France. Similar to the Dutch motivation, this reflects the idea that society must be based on moral principles and that public officials must give a good example by living these principles. The impact study goes on to stress the importance of formally fixating the age-old principles of the French public service, impartiality, probity, and dignity being among the most important, each with their interpretations in official documents and jurisprudence.

The recent evaluation of the implementation of Law 2016-483 by a French parliamentary committee, with members from all the parties in the Assemblée Nationale, shows that opinions

[165] In the context of the proposal, 'layered' means that on the basis of the general provisions in the law, a general code of conduct can be adopted, which can in itself be adopted to local situations. 'Dynamic' is less clear. Given the goal of restoring values that apparently pre-existed and must thus be stable, 'flexible' probably does not mean that the values expressed in ethics codes can be one thing today and another tomorrow.

[166] It can be consulted in the 'legislative file' of the law: https://www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=395ED2C4933E0A4473009450EA80AEC2.tplgfr27s_2?idDocument=JORFDOLE000027721584&type=expose&typeLoi=&legislature=

[167] Such an impact study must accompany almost all bills tabled in France. Link: https://www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=395ED2C4933E0A4473009450EA80AEC2.tplgfr27s_2?idDocument=JORFDOLE000027721584&type=general&typeLoi=&legislature=

in France have changed as it proposes an extensive integrity charter (*charte de déontologie)* for the public service in general, that should complement the principles in the law in a more applied way.[168]

The Council of Europe Model code

Having compared form, scope, sanctions and motives, we will now turn to the content of codes of conduct. Is there an international standard about what a code of conduct should be? Or at least a European one? For a completeness check, we will quickly review an existing international model code and then compare it to the national ones.

The most relevant model for France, The Netherlands and Romania is the one recommended by the Council of Europe, 'close to home' for all three studied countries and specifically aimed at public officials[169]. The CoE Model code (see also section 2.2.2) is an appendix to Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000)[170]. Its preamble condemns corruption as "a serious threat to the rule of law, human rights, equity, and social justice", calls the public administration "essential" in democratic societies and public officials the "key elements of a public administration". The recommendation itself is of course not binding for CoE member states. Its basis is Principle no. 10 of the Twenty guiding principles for the fight against corruption (Resolution no. 24 of the Council of Ministers from 1997), that gives codes of conduct as an example of "promoting further specification of the behaviour expected from public officials". Member States must, however, give sound arguments for not following the recommendations, to which their representatives agreed. GRECO was charged with supervising the implementation of the principles, and thus of codes of conduct. Indeed, in its second evaluation round, GRECO did check whether the evaluated countries were using codes of conduct. However, in the country reports only a cursory check can be found, no analysis of the contents or of the enforcement of national or sectoral codes.[171]

A complete analysis of this Model code would exceed our scope and not all these provisions are relevant for corruption prevention. They are summarised in the table below, leaving out the obligations that are already implied in other obligations.

[168] See 'proposition no. 7' in Rapport d'information no. 611, http://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b0611_rapport-information.

[169] The United Nations first adopted a model code in 1997, similar but shorter than the CoE model. See: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010930.pdf

[170] View online: https://rm.coe.int/16805e2e52

[171] Location of the reports: https://www.coe.int/en/web/greco/evaluations/round-2. Report on Romania (2005): page 11. Report on France (2004): page 12. Report on The Netherlands (2005): page 13.

Table 3: Obligations in the CoE Model Code

Topic	Obligations	Article
	Obligations for (the management of) public institutions	
	1. Inform all addressees about the rules	2
	2. Ensure that no prejudice is caused to a public official who reports misconduct	12
	3. Check integrity of candidates (personal obligation for relevant managers)	17
	4. Take reasonable steps to prevent corruption (personal, managers)	17 24
	Obligations for all public officials	
General principles	1. Respect the law, lawful instructions, ethical standards and this code	4
	2. Do not frustrate lawful policies, decisions, or actions	4
	3. Serve loyally	5
	4. Be honest, impartial, and efficient	5
	5. Work to the best of your ability, in the public interest	5
	6. Be courteous	5
	7. Have due regard for the rights, duties and proper interests of all others	6
	8. Never take undue advantage of a position for private interests	8
	9. Be accountable to superiors to the extent of the law	10
	10. Respect the privacy of public officials	17
	11. Respect confidentiality	22
	12. When in doubt, seek advice or approval	15, 28
Reporting	13. Report unlawful, improper or unethical instructions, or breaches of the code of conduct	12
Conflict of interest	14. Be alert to any actual or potential conflict of interest	13
	15. Take steps to avoid such conflict	13
	16. Disclose to his or her supervisor any such conflict	13
	17. Comply with any final decision to withdraw from the situation or to divest himself or herself	13
	18. Do not seek improper advantage when leaving service	26
	19. Do not benefit any person or body in respect of any matter on which he or she acted for, or advised, the public service (appropriate period)	26
Incompatible interests	20. Declare interests and affiliations as lawfully required	14, 15
	21. Do not engage in anything that is incompatible with or detracts from the proper performance of his or her duties as a public official	15
Public activity	22. Act politically neutral	16
	23. Prevent the appearance of partisanship	16
	24. Comply with lawful restrictions on political activity	16

Topic	Obligations	Article
Gifts, improper offers	25. Accept only conventional hospitality/minor gifts	18
	26. Refuse undue advantages	19
	27. Take steps for protection and evidence (obligation to record, detailed in the code)	19
Susceptibility to influence	28. Avoid (the appearance of) obligations to return a favour to any person or body	20
	29. Avoid conduct that creates susceptibility to the improper influence of others	20
Misuse of position	30. Do not offer or give any advantage connected with position	
	31. Do not seek to influence for private purposes, by using position or offering advantages	21
	32. Do not give preferential treatment to former public officials	27
Resources	33. Do not use public property for private purposes (except when lawfully permitted)	23

There are three categories of obligation holders in this code: Besides the obligations for individual officials, some of the obligations are imposed on managers or on the management of public organisations. Only two provisions apply to "the administration" as a legal person, namely the obligation to inform personnel about the code (Art. 2 of the Model code) and the obligation to protect whistle-blowers (Art. 12). Failure to do so may lead to civil and administrative liabilities for the legal person and for its leadership. The obligation to respect the confidentiality of those who file declarations of interests is not attributed to anyone. Following the general application of the Model code, all officials are responsible for respecting this duty. Then there are obligations for managers in their capacity as public officials. The Model code does not apply to organisations, but only to public officials according to its first article. These obligations can be used to hold individual managers accountable as natural persons. The Model code defines them very concretely as the official "who supervises or manages other public officials". There is a blanket obligation for management to "take reasonable steps" for preventing corruption, plus responsibility for breaches if they have failed to take the necessary preventive steps (both Art. 25). The Model code includes examples of these reasonable steps: enforcement, education/training, being receptive to alerts and setting a good example. The obligation to ensure that the integrity of candidates is verified before appointing them (Art. 24) falls to the public official who "has responsibilities for recruitment, promotion, or posting". While having responsibilities is not the same thing as being responsible – the wording of the Model code could be improved at this point – it is sufficiently clear that officials who have duties in this area but no prerogatives of management, cannot be held responsible for the proper observance of screening policy. This obligation must be one for the relevant manager.

The third category consists of obligations applicable to all public officials. In the Model code, public officials are all persons employed by a public authority, appointed and contract workers alike. The Model code includes employees of relevant private organisations only optionally. The provisions that apply to all officials are subdivided above in several categories. Some of the obligations have nothing to do with corruption but can be included in the notion of integrity, such as courteousness and efficiency (Art. 5). Others are sanctioned in the criminal code of all three countries as corruption offences, such as how to handle bribery attempts (Article 19). Some articles are high-level principles, others give practical instructions for certain situations, such as how to

respond to improper offers (Art. 19). This ambiguity is not necessarily a bad thing. The code of conduct is meant to be a practical instrument that gives helpful advice about how to respect the law. For the same reason, it can be acceptable that the topic of conflicts of interest returns under various labels in the Model code: All corruption stems from conflicts of interest so it would not be an apt logical classifier, but the articles of the Model code refer to and elaborate existing labels in society for certain behaviour.

Topics covered by the three national codes and the Model code

One would expect the codes of conduct to be largely the same in all three studied countries, all being CoE members, with a few local accents like the French *laïcité* (the principle of strict separation of religion and state). The overview below shows how they relate in practice.

For an efficient comparison, the Model Code was further condensed in the table below, showing whether the three discussed codes cover the same topics. Topics such as 'respect the law' have been left out for being too obvious – they would clutter the discussion unnecessarily.

Model code	French code	Romanian code	Dutch code	Issue covered by # of codes
Promote integrity by management	-	-	Art. 2.1	1
Loyalty	Art. 28	Art. 434		2
Honesty	Art. 25	Art. 447		2
Impartiality	Art. 25	Art. 447	Art. 3.1	3
Efficiency	-	Art. 368		1
Courtesy	-	Art. 447		1
Accountability	-	Art. 368		1
Privacy	-	-	Art. 3.2	1
Confidentiality	Art. 26	Art. 439	Art. 5.1	3
When in doubt, seek advice or approval	-	-	Art. 1.1	1
Obligation to report misconduct	-	-	Art. 8.5	1
Actively avoid conflicts of interest	Art. 25 bis	-	Art. 4.1.	2
Avoid pantouflage	Art. 25 octies	Art. 434	Art. 4.6	3
Political neutrality	Art. 25	Art. 436	-	2
Undue advantages	-	Art. 440	Art. 4.1	2
Obligation to record bribery (attempts)	-	-	-	0
Avoid susceptibility to influence	-	Art. 445	Art. 4.1, 4.2	2
Misuse of position	-	Art. 368	-	1

As a caveat, the table above gives an overview of the topics contained in each code, but not their specific parameters. For example, even if 'loyalty' is a topic in both the French and the Romanian

code, the definitions of this concept may differ, and the concrete provisions may even be each other's opposites: loyalty to the public versus loyalty to the employer.

Also, each code may include topics that are absent from the CoE Model Code. Indeed, the French code mentions religious neutrality, shedding of financial interests, and a prohibition of engaging in commercial activities. The Romanian code contained provisions on freedom of speech, openness and transparency, as well as interdictions to give advice to citizens in conflict with the State, of political activities while on duty, to buy something from the State after learning its value, and more. The Dutch code includes trustworthiness, accuracy, media contacts, how to handle integrity breaches, and others. None of the codes mention harassment, which is a much-debated topic in the interviewed institutions' integrity practice.

At first glance, the fact that quite a few topics appear in only one of the codes can leave the observer wondering whether codes of conduct are a token instrument: Can one set of principles be easily swapped for another? Why would there be such differences between three EU and CoE Member states with a largely shared legal tradition? Do these differences matter? On the one hand: To include, for example, political neutrality in your code but not respect for privacy, does not mean that the latter can be disregarded, nor does it necessarily mean that it is less important. Obligations not included in the code can be included in other legislation. On the other hand: If a conduct is not explicitly mentioned in legislation at all, this does indicate that it is considered less fundamental. All the codes reflect choices about what to include, what principles or topics to make explicitly mandatory, and which ones to leave out. These choices provoke the question of what the effects are of not having principles such as transparency in your code. Transparency will then not have the elevated status of the included principles, it will not so easily be included in training programs, and it will be more difficult to discipline opaque officials, because of a lack of criteria. Codes of conduct do serve as basis for disciplinary measures and their confirmation before the administrative judge. This does of course not prove a causal relation between the presence or absence of a topic in the code of conduct, and the concrete behaviour of public officials, but it can be imagined that not being trained in a topic makes one less likely to display the desired behaviour on that topic.

There also seems to be an insufficiently systematic legal approach: From a legal viewpoint, the type of instrument should match the purpose of the provisions, without redundancy between instruments. The instrument should be proportional to the issue. There should be sanctions and enforcement. The purpose and choices made should be made explicit. The system would be the application of these principles. The guiding principle(s) for a code of conduct can explain what is included and excluded. For example, if the principle is: 'When faced with a choice between acting in the public interest or acting in a private interest, a public official should choose the former', using only this principle excludes topics such as 'efficiency', but that topic comes into scope after adding the principle 'Make optimal use of public resources'. Adding the principle 'Show respect for the rights of individuals' leads to the inclusion of topics such as neutrality, privacy, discrimination and harassment. All of the topics above can be derived from these three principles. The ultimate overarching principle is 'Follow the law', which is of course so overarching that it makes the others redundant as originating principles but is included in all codes. So instead of speaking of principles it would perhaps be better to speak of main topics and subtopics and concede that a legalistic approach to constructing codes of conduct is not a good fit.

It may be concluded that the three national codes broadly cover the same spectrum as the CoE Model Code. There is a notable omission, however. The provisions that encourage active preventive behaviour by individual officials can only be found in the Dutch code, and the provision to record evidence of bribery attempts is absent from all three codes. The Dutch code is also the only one

that promotes responsibility of management and not just of individual officials. The Romanian code stood out for having included the most 'soft principles' from the CoE code, such as courtesy, efficiency, and accountability.

Three topics from the CoE code are shared by all three codes. They will serve as a handle for closer comparison. One topic shared by all three codes is revolving doors, or *pantouflage*, but this is covered in section 4.2. We first take a closer look at the topic of impartiality, defining it as not favouring someone over another – meaning that the official must not give preferential treatment, unless in cases of positive discrimination, not only with regard to characteristics of the individual (man/woman, black/white, rich/poor) but also with regard to proximity (family, neighbours, friends versus strangers). The Dutch code uses the term *onpartijdigheid* for this, which is elaborated in the following rules (Art. 3.1 of the code): Do not base your actions on personal interest, and Do not base your actions on improper grounds – such as prejudice. The Romanian Administrative Code takes a similar approach (Art. 431): public officials must have an "objective attitude, neutral towards any kind of political, religious, economic or other interest", then linking the concept to non-discrimination in Art. 447 and as part of professionalism (Art. 433). Art. 449 applies the concept to internal hierarchical relations. Public sector managers must not "engage in financial relations" with their reports, to maintain impartiality. The French code does not explain its obligation of impartiality, but in the impact study of the law introducing this concept (see above), impartiality is placed in the sphere of equality, neutrality and independence. Case law of the Conseil d'État shows that a breach of impartiality happens when a public official is influenced by, among others, prejudice or personal interests.[172] Impartiality is thus interpreted in a very similar way in all three codes.

The second shared topic is confidentiality. Confidentiality protects the rights of individuals and the security of the State. It does not always help prevent corruption, on the contrary. Therefore, in the Model Code this topic is preceded by an obligation to respect the rights of access to official information (Article 11). Still, the Model Code uses confidentiality as the norm and transparency as an exception. The Romanian code includes in Article 439 (secret and confidential information) and Article 434, under the heading 'Loyalty towards the public authorities and institutions', an obligation to refrain from using non-public[173] information "in other circumstances than provided by the law". The former law 7/2004 mentioned that this obligation is not meant to be a derogation from the obligation to provide requested information based on transparency legislation[174] or from the rights of whistle-blowers[175], but this last provision was dropped from the new law. However, the whistle-blower law remains in effect, even if the link is made less explicit. Read in conjunction with the law on the protection of whistle-blowers (Law 571/2004) the official involved is relieved of the obligation to keep relevant information confidential, if it relates to the forms of misconduct mentioned in Art. 5 of that law; ranging from corruption to breaches of internal procedure. See also section 5.3. The French code (Art. 26) introduces the obligation of professional secrecy and refers for its definition to the Criminal code. Article 226-13 of the Criminal code prohibits the "disclosure of

[172] See the discussion in the impact study for the 2013 bill: https://www.legifrance.gouv.fr/content/download/4842/75569/version/1/file/ei_deontologie_fonctionnaires_cm_17.07.2013.pdf, p. 8.

[173] Non-public means not intended to be made public.

[174] The article does not specify which legislation forms the basis for this obligation. The main law on transparency (see also chapter 2) is Law no. 52/2003 (publication on the initiative of the authorities) or Law no. 544/2001 (transmission of information on request).

[175] As defined by Romanian Law no. 571/2004 regarding the protection of personnel at public authorities, public institutions and other entities that report breaches of the law. See also chapter 2, and chapter 5 on the protection of whistle-blowers.

information of a secret nature" by someone to whom it was entrusted. The location of this description in the law, under 'crimes against persons', would exclude the disclosure of secrets that harm the State. However, those secrets are also protected by the code of conduct because in addition, French public officials must "show professional discretion" regarding any information related to their work, unless there are explicit legal exceptions or explicit decisions of the relevant authority. Dutch public officials must keep confidential information to themselves, only use it for intended purposes and share it only when it is necessary, also after leaving the public service (Dutch code of conduct, Art. 5.1), an aspect also mentioned in the Romanian but not in the French code, but these obligations are immediately followed by privacy protection as well as transparency obligations: Do not withhold information in the interest of your organisation, only withhold information when it is in the public interest, duly motivated. The Dutch code also stresses sharing information next to avoiding leaks. The combination of these opposite obligations could create confusion. Transparency practice also does not fully reflect this code, as will be discussed in section 6.2.4.

For the sake of topical comparison, we have put the three national codes on the same level, but their differences should not be disregarded. The image that emerges from this review is that the French code remains the closest to the concept of formal law: it sets a few principles and provides obligations for specific categories of officials in general (i.e. in all situations). The Dutch code is the most practical in the sense that it discusses many concrete situations, descending from principles and overarching definitions. The Romanian code contains an extensive set of principles, that return in more detailed provisions under thematically grouped articles, nevertheless neither concrete nor general. These differences are probably due to differences in legal traditions and it is at this point not possible to say which approach is better suited to prevent corruption, because the effects of these codes have not been isolated and measured – if that is at all possible. However, these differences denote the struggle between the argument of giving such a code maximum authority by casting it as a law by Parliament, on the one hand, and on the other hand the argument that, as a reference tool for daily behaviour, a code must not be abstract but it must be a handbook with guidelines applied to concrete situations. The French code follows the first argument, the Dutch code the second, while the Romanian Administrative code is positioned somewhere in between. The consequence is that the French code follows the legislative technique of abstraction and absence of redundancy but leaves the actual rules about how to behave to other instruments. The Dutch code contains many redundancies and refers explicitly to rules in higher positioned instruments but gives practical examples, making it a mixture of rules and explanations (but with a mandatory status). The Romanian code also contains some redundancies but gave no implementing information.

Examples of local codes – comparison with national ones

For this section, the codes of four large cities in each studied country will be used for comparison. Links to the codes referred to in the text below can be found in Annex 1: Codes of conduct public officials. The question is to what extent they differ from the national codes. The expectation is that local codes only add to and/or explain national codes in a practical way.

The largest cities in Romania are Bucharest, Cluj, Timișoara and Iași. The most recent code is from 2018, the oldest from 2012, all before the legislative reform from 2019 (new administrative code, abrogation of the national law regarding the ethics code). Timișoara was excluded because a code with a comparable scope could not be obtained. The code for the city of Brașov (fifth largest) was used instead. All the local codes state as goals: 1) Keep the prestige of the city officials high, 2) Inform the public about the ethics standards, and 3) Foster trust and respect between citizens and officials/contract workers. These are copied from the defunct Law 7/2004. All four codes have the

same personal scope 1) public officials, 2) employees on a labour contract. The Bucharest code mentions temporary public officials explicitly, while they would arguably be covered by category 1). The codes do not apply to elected officials, external contractors, volunteers or interns. A review of the four codes reveals that they are highly similar and copy the relevant legal texts literally. This raises the question how much attention these cities have devoted to developing specific norms and to implementing them. The evidence indicates that it is a formal affair only. With the abrogation of Law 7/2004 regarding the code of conduct for all officials, the obvious redundancy has been removed 'from the top', but at the same time the local codes have been left without a legal basis. At the time of writing, no new code has been adopted in these four cities since the abrogation of Law 7/2004 in the summer of 2019.

Table 4: Local codes Romania

Topic	Bucharest	Cluj	Iași	Brașov
Quality of public service	X	X	X	X
Respect for the law	X	X	X	X
Loyalty towards public authorities/institutions	X	X	X	X
Conciliatory attitude towards interests of employer	X	X	X	X
Relations with press and public	X	X	X	X
Political activities		X	X	X
Commercial/political activities related personal image as public official	X	X	X	X
Freedom of expression	X			
Respect, impartiality, discrimination	X	X	X	X
Conduct in foreign relations	X	X	X	X
Gifts, services or advantages	X	X	X	X
Influence trafficking/undue privileges	X	X	X	X
Equal treatment/objectivity, within organisation	X	X	X	X
Abuse of office/corruption	X	X	X	X
Using public resources	X	X	X	X
Participation in procurement/concessions/renting	X	X	X	X
Ethics counselling	X	X[176]	X	
Reporting/handling violations of the code	X	X	X	
Disciplinary liability	X	X	X	
Specific rules for internal auditors	X	X	X	
Protection of whistle-blowers			X	
Conflicts of interest/incompatibilities			X	
Confidentiality				X

The largest French cities are Paris, Lyon, Marseille and Toulouse. Marseille did not have a code for public officials, so it was replaced in the table by Bordeaux. Paris occupies a special place due to its size; the city employs more than 50,000 persons. Paris and Toulouse have adopted a code that is

[176] This topic exists only for public officials in the Cluj code, not for contract workers.

obligatory not only for public officials and contract workers, but also for interns and consultants who work with the city on a temporary basis. According to the Toulouse code, it aims to "translate, clarify and supplement" the national law. The Paris code wants to "prevent integrity and corruption risks". Lyon and Bordeaux only had codes for procurement officials. For Lyon, the goal is to guide agents in their relations with third persons. But local codes of conduct are an exception in France: The AFA report from 2018 on local government states that about 6% of responding local government institutions had adopted a code of conduct.[177] The table below shows that the codes of the four cities are quite different: only 4 of 21 topics are shared by all (conflicts of interest, gifts, impartiality, and confidentiality). This is unexpected; even if two of the codes are aimed at the procurement process only, one would expect that all codes at least clarify the principles from the law, however only the Paris code does this. And this last code omits to discuss the specific corruption offences from the criminal code. The other three codes also have considerable omissions. If the integrity/anticorruption instruction of French officials is based on the local code of conduct, it might be found wanting.

Table 5: Local codes France

Topic	Paris	Lyon	Bordeaux	Toulouse
Integrity principle (*probité*)	X	X		
Professional attitude (*dignité*)	X	X		
Loyalty	X			X
Impartiality, objectivity	X	X	X	X
Secularism (*laïcité*)	X			X
Conflicts of interest	X	X	X	X
Gifts (presents, events, travel)[178]	X	X	X	X
Confidentiality	X	X	X	X
Secondary activities	X			X
Sponsoring, partnerships	X			
Procedure integrity alerts	X		X	X
Whistle-blowers	X		X	
Sanctions	X			
Special rules for procurement	X	X	X	
Transparency		X	X	
Bribery		X	X	
Influence trafficking		X	X	
Undue privileges (*concussion, favoritisme*)		X	X	
Contacts with the public/companies			X	X
Risk factors			X	

The four most populous cities in The Netherlands are Amsterdam, Rotterdam, The Hague and Utrecht. As mentioned above, the Netherlands do not have a standard or model code for local authorities, municipal authorities are free to establish the contents of their own code. We will quickly review

[177] See: https://www.agence-francaise-anticorruption.gouv.fr/files/files/Rapport_danalyse_-_enquete_service_public_local.pdf, page 29.

[178] Paris has a maximum for accepting gifts of 69 EUR, Lyon 65 EUR, Bordeaux 30 EUR and Toulouse 150 EUR/year.

the topics addressed in them for the purpose of comparison. The code of the city of Utrecht was not public and had to be requested through the procedure according to the Law on transparency of public administration (the *WOB* in Dutch, see also section 2.4.4). A separate procedure for whistle-blowers could be found on the city web site, as an annex to the general conditions for personnel. It can be noted that this choice reflects the idea that reporting misconduct should be integrated in the regular HR framework. The Amsterdam code also explicitly refers to its general conditions. The other codes were published online, either on the city website (Amsterdam) or on the website for officially adopted documents of local authorities (The Hague and Rotterdam). Discounting the topics included by only one city, such as disclosure of police measures or speaking Dutch as a matter of good conduct, many topics are shared among all four codes. It seems that there is a consensus among Dutch local authorities as to which topics a code of conduct should contain. The four topics in the four local codes, such as gifts, secondary activities, confidentiality, reporting misconduct, and conflicts of interest, are also highly similar to the reviewed code for the central government.

Table 6: Local codes The Netherlands

Topic	Amsterdam	The Hague	Rotterdam	Utrecht
Reporting misconduct[179]	X	X	X	X
Discrimination	X	X	X	X
Harassment, violence	X			X
Gifts, invitations, facilities	X	X	X	X
Disclosing financial interests		X	X	X
Private use of public property	X	X	X	X
Confidential information	X	X	X	X
Information security and privacy	X	X	X	X
Secondary activities	X	X	X	X
Ask for help if unsure how to act	X		X	X
Show respect for others	X	X	X	
Avoid appearance of conflicts of interest	X	X	X	
Do not choose private above public interest	X	X		
Bribery	X			
Conduct in private situations (harmful relations, harmful talk)		X	X	
Collaborate, give and ask for feedback		X	X	
Speak Dutch		X		
Avoid talking to the media		X	X	
Report data security breaches		X		
Avoid talking to City council members	X	X		
Charge only strictly necessary expenses	X	X	X	
Disclose police measures against you			X	

Is there an ideal approach?

Interviewed public sector professionals in the three studied countries refer to the national and local codes as practical instruments, a practical reference framework for individual officials to guide their

[179] The City of Utrecht has a confidential advisor for misconduct and separate ones for harassment

behaviour. This denotes a concrete need 'on the ground'. The other role, discussed above, is that of outward reference, an instrument for the public to know what behaviour they should expect.

Practical reference should indeed be their role, because otherwise these codes of conduct will find themselves largely redundant compared to existing provisions in criminal codes and administrative legislation. The most important corruption prevention rules that they contain are already provided by other laws such as the criminal code.

However, codes of conduct are not only explanatory. In the legislation overview of chapter 2, it was shown that bribery is incriminated in all three countries and influence peddling is a criminal offence in Romania and France. If in The Netherlands, a local authority would wish to formalize influence peddling as a disciplinary offence, in the framework of a code of conduct and the labour agreement, then the code would not only be a practical reference but also a formalization of administrative law. This is always the case when the legislator leaves the implementation and interpretation of certain concepts (such as "good official" in The Netherlands, or the amount up to which gifts may be accepted, in France) to individual authorities – and it is also inevitable in work situations that can never be foreseen in every detail and thus must grant management a degree of discretionary power to direct the behaviour of personnel in concrete situations. In consequence, it cannot be avoided that codes of conduct contain references to existing criminal law and (local) rules that are formalized interpretations of legal provisions. Otherwise the reference would be incomplete and public officials would be insufficiently informed. Codes of conduct should contain, however, an indication of the consequences of breaches: Some breaches can lead to imprisonment and others to dismissal.

This may be why in Romania and France, the principles of good conduct and several concrete provisions – for example, how to act if incompatible – are (were) cast as laws: They contain binding provisions that are not found in other laws. Especially for principles, this may strengthen the authority of these references. On the other hand, without the concrete examples and helpful guidelines it may be the wrong form for this instrument – the code of conduct then needs its own implementing guidelines.

Furthermore, to serve as a practical reference, the language in which the code is put cannot be abstract. This is different from legislative techniques, according to which a law must be worded in the most encompassing terms, to avoid excluding relevant situations from its scope, after which implementing rules can specify rules for specific situations, if need be. The language of codes of conduct must be as concrete as possible to describe actual conduct.

There are three categories of rules in this discussion: Principles of conduct, sanctioned legal provisions, and implementing (explanatory) provisions. It follows from the above postulations that principles of good conduct should be enshrined in the formal law, like in France (*Loi le Pors*) and Romania (both the former general law on public officials, no. 188/1999 and the code of conduct, law 7/2004, and now in the Administrative Code, Art. 368), but the code of conduct itself should not be a law. It should be a set of guidelines in the form of a central or local government decision. Shaping principles and sanctionable provisions in law follows the argument of maximum authority and generality, while having the code of conduct itself on the level of executive instrument gives the advantages of flexibility and practicality.

Another measure by which we can assess the topics/contents of codes of conduct is one of the frameworks for corruption prevention from the literature as described in Annex 2: Typology of corruption prevention rules, i.e. whether codes of conduct contribute to: 1) reducing rewards of

corrupt behaviour, 2) increasing the risk for wrongdoers, 3) increasing the effort required for corrupt behaviour, 4), reducing provocations (opportunities) for corruption, or 5) removing excuses for corruption. Of course, the way codes of conduct contribute to anything depends ultimately on how they are enforced and complied with, but it starts with how they are worded. It follows that for a code of conduct to be a practical instrument to prevent corruption (and other types of integrity incidents), it must address as many of these five purposes as possible.

Translating these purposes into topics for codes of conduct, we can make the following matches, as an example:

Table 7: Possible code of conduct topics

Corruption prevention purpose	Possible code of conduct topic
Reduce rewards	- Asset recovery: If you are caught accepting bribes or any undue advantage, they will be confiscated, additional to the criminal sanction - Civil liability: If your guilt is proven, you will be held financially liable for any losses incurred by the organisation (ex. If a buyer buys too expensively or if someone uses an official car for personal purposes).
Increase risk	- All officials must report any suspicious behaviour; this topic is already present in some codes of conduct and the CoE Model code.
Increase effort	- Four eyes: For example, all money spending decisions must be signed off by another department. - Disclosure of financial interests, present in many codes of conduct, also makes it more difficult to hide the proceeds of corruption.
Reduce provocations	- All official cars have GPS-tracking, to see if they are used only for official purposes.
Remove excuses	- Management are personally responsible for unexplained cost overruns, together with the involved officials. - Many Dutch codes of conduct refer to private conduct and private family or social ties that may influence loyalty and create conflicts of interest. Awareness of this point, coupled with an obligation to report for example criminal relatives at work, might help mitigate those conflicts. - An obligation to ask your manager when in doubt, remove the possible excuse of "I didn't know it was illegal". Present in some Dutch codes.

Some of the purposes above are indeed covered by existing codes of conduct, see Table 7, but when compared to all of these 'purposes' from the literature, all three studied national codes are incomplete. None of them contain provisions in more than two of the mentioned categories. It would be advisable that the existing codes of conduct be reviewed with such 'purpose' frameworks in mind.

3.3. Information and training

Correct (non-corrupt) behaviour is not innate to all. For example, we naturally tend to favour family over unknown persons. Not all public officials know how to recognize risky situations and how to

handle them. Therefore, information and training should be provided for all public officials and contract workers who are exposed to corruption risks (i.e. virtually everyone, in a higher or lesser degree), and sufficiently funded.

The literature (Van Montfort et al., 2013) shows that ethics training programmes are not always effective. In the mentioned article, 'effective' stands for how much employees know about integrity issues some time after the training. The correlation between knowledge and behaviour is difficult to measure. Other study (Huisman & Gorsira, 2015) shows that knowledge of what legally constitutes corrupt behaviour is not an impediment for such behaviour.[180] Therefore, information and training should be a minimal condition and not a sufficient measure for corruption prevention. The content and frequency of the training could also be relevant.

Anticorruption training may be embedded in 'integrity training' or 'work ethics training'. Unlike prevention measures that target specific corruption risks, such as the publication of procurement data to detect prices that may point at bribery, employee training generally includes not only all forms of corruption as we have defined it here, but also fraud, embezzlement, and theft. Training may also include behaviour that is undesirable, such as lack of openness in organisations, handling of criticism, bullying, harassment, and other behaviour that can all be covered by the integrity label. It may even include related topics such as how to treat citizens who interact with the authorities, or how to protect privacy and confidential information. Likewise, measuring the knowledge of integrity and, more specifically, corruption, can be linked to other fields of law that public officials must know and respect, in a periodical general compliance test. This is not current practice in any of the reviewed countries.

The UNCAC provides in Article 7 that the parties should "endeavour to adopt […] systems […] that promote education and training programmes", and in the Technical Guide (page 16) the advice is to make training comprehensive and periodical, and to involve officials in yearly corruption reviews. This means that there is no obligation to have training programmes, only to consider them. The Guiding Principles of the Council of Europe mention (like the UNCAC in its Article 6) training for specialists, not for large groups of officials[181]. The other discussed international instruments do not mention information and training as a specific subject, but in the ample OECD documentation there are some examples of best practices[182].

3.3.1. Absence of specific legislation

A 2011 Transparency International report[183] stated that in France, there is a 'recurring gap between a generally satisfactory legal and institutional framework and the actual practices or an insufficient implementation of those rules'. Nevertheless, on the subject of training for officials on corruption prevention or integrity topics, there are no specific rules at national level. The above-mentioned report by the French parliament from 2018 indicates that, in local government, "there is a real need

[180] The reverse is also true: One can behave correctly without having been told how. In fact, this is what administrations rely on in the absence of training.

[181] Resolution (97) 24 of the Committee of Ministers On the twenty guiding principles for the fight against corruption.

[182] For example: Integrity in Public Procurement: Good Practice from A to Z, OECD 2007, page 83. URL: https://www.oecd.org/gov/ethics/integrityinpublicprocurementgoodpracticefromatoz.htm. See also (OECD, 2015), chapter 10.

[183] National Integrity System Assessment France, 2011, page 5. URL: http://issuu.com/transparencyinternational/docs/2011_nisfrance_en

for initial and continuous training"[184] after the legislative changes from 2016. It also proposes to "enhance the training modules for continuous training".

The Dutch legislator has left it to individual public authorities and institutions to decide how to include training and information activities in their integrity policy. These policies at organisational level are obligatory as such, based on Article 4 of the Law on Public Officials (*Ambtenarenwet*). The same article mentions transferring knowledge about integrity at the occasion of periodical personnel reviews and 'work meetings', and by training, as a minimal effort. Training should also be included in the obligatory annual reporting. The contents of the training and information, and their frequency, are discretionary. Interviews with Dutch integrity officers in local and central government reveal that there are significant differences. Some organisations provide yearly trainings for all employees. Others do not organize any training at all. Still others leave this issue to department managers who must first analyse the risk and then have trainings organized if necessary.

Romania has no law either that prescribes information and/or training to public officials about corruption. The National Anticorruption Strategy for the period 2016-2020 does contain a specific objective for training.[185] The Ministry of Justice plans to develop a yearly online and obligatory integrity training program. Integrity training was also an objective in the previous Strategy (2012-2015) with the difference that it was left to the management of individual public institutions to organize ethics courses and have their employees participate. The Strategy for 2008-2010 contains the same objective, mentioning actions such as information campaigns for public officials, adapting training programs to specific risk levels and consolidating and extending the 'network of ethics counsellors' (under Area 1, Objective 2).

The concrete objectives for integrity training are laid down in policy documents that are given formal authority by Government Decisions (*Hotărâri de Guvern*), obligatory for all public institutions. An objective is not the same as an obligation, however. If not fulfilled, responsible parties may point at lack of funding (for which the Government itself is responsible) or at the 'effort' character instead of an obligation to come to certain results. Thus, the National Anticorruption Strategy may not be the instrument of choice if the government wishes to make all authorities undertake certain actions. A short stick, as it were.

3.3.2. Obligations derived from more general legislation

Without specific legislation, it may be possible to derive from other legislation if employers (public institutions) and individual officials/contract workers have obligations to train and to be trained, respectively.

In Romania, the Administrative Code offers directly binding provisions, for individual officials and management alike. Article 458 of this law obliges all public officials to 'continuously improve their skills and training'. In conjunction with Art. 430 of the same law, regarding the obligation to respect the rules of professional conduct, this article obliges all officials to inform themselves about non-corrupt conduct. The content of the notion "good conduct" is also specified by law[186],

[184] Point B.2.c of the report (see http://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b0611_rapport-information.pdf).

[185] General objective no. 4: Enhancement of the knowledge and understanding of the integrity standards by public officials and the public. URL: http://sna.just.ro/Seturile+de+indicatori+de+performan%C8%9B%C4%83.

[186] The obligations for public officials included in the Administrative Code

so there really is no way around it. All public officials and contract workers who do not know how to behave with integrity, expose themselves to disciplinary measures. Also, Art. 458 (2) and 459 of the Administrative Code state that all public authorities and institutions must establish an annual education plan for public officials (not for contract workers) that officials should receive training at least once every two years, on subjects to be determined by the employer, and that trainings must be included in the annual budget.

In the Netherlands, similar obligations can be derived from the Law regarding public officials. This law contains the explicit obligation for employers to offer integrity training, in Art. 4, without mentioning objectives, frequency, or other details, nor does the employer have to make the training mandatory. Public officials only have the obligation to be a 'good official' (*goede ambtenaar)*. The law or the explanatory memorandum give no definition of this concept, but it existed already under the previous law and in case law. Following the code of conduct is certainly an aspect of being a good official. The central government's code of conduct[187] does not provide that individual officials should actively obtain information or training about integrity issues. The institution, as 'good employer' however must make integrity part of their training offering based on Article 2.1. This can be considered the same obligation as the one in Art. 4 of the Law regarding public officials, see above. Note that in both instruments, the employer must offer training and information but not necessarily to all officials.

French law takes a more implicit approach. The general law on obligations for public officials (mostly applicable to contract workers also) does not mention the obligation to obtain training or to provide training. For integrity/corruption issues, the official has the "right" to consult with an ethics councillor. The official thus has her formal obligations and sanctions, which even without specific obligations does imply that she be aware of them.

In France and The Netherlands, there is no specific obligation for public institutions to report on their training efforts. It does create an extra administrative burden (unless automated) but there is no way of knowing if a policy or legal provision is applied, or how, without reporting. In the field of integrity/anticorruption, reporting is of the utmost importance because the behaviour that the rules are trying to prevent is a covert one by nature.

[187] See section 3.2.2.

Table 8: Legal obligations regarding training

	FR	RO	NL
Who must be trained	Unspecified	All officials (see above)	'officials'
Frequency of training	Unspecified	Unspecified	Unspecified
Prescribed topics	Unspecified	Unspecified	'integrity'
Monitoring of results	No	National Agency for public officials has formal obligation	No

3.3.3. Implementation of training

In France, the majority of officials in senior positions have attended one of the *grandes écoles,* where ethics is in the curriculum. However, a report from 2017 considers this training insufficient[188]. Training (on all topics) for local government officials is established and organized by the national centre for local government resources[189], which offers an optional integrity training. The obligatory training for central government officials is established by each ministry. After GRECO recommendations from 2006[190] that all public officials receive integrity training, an official report[191] shows that between 2008-2012, integrity training was not a distinct part of the curriculum. A report from 2018[192] shows that an average of only 2% of local government entities had a corruption prevention training plan in place. The AFA organises online information sessions which, according to their website, had reached 16,000 participants by March 2020, on a public sector work force of around 5 million.[193] This initiative is however not structural, formalised, or mandatory.

Romanian and more implicitly also Dutch law infers that all public officials must receive integrity training. The actual practice varies greatly between public institutions, in both countries.

In Romania, the continuing presence of specific training-related objectives in the subsequent anticorruption strategies indicates that this practice has not yet been integrated in the standard personnel training framework. Evaluations also reveal this. For example, a report[194] from 2017 found that at the Ministry of Public Health, knowledge about rules concerning gifts was 'almost inexistent'. A self-evaluation by the Ministry of the Environment from 2015 states that in that

[188] See: https://www.researchgate.net/publication/313316700_Les_conflits_d'interets_nouvelle_frontiere_de_la_democratie

[189] Centre national de la fonction publique territoriale (CNFPT), website: http://www.cnfpt.fr/. Relevant law: Décret n° 2008-512 du 29 mai 2008 relatif à la formation statutaire obligatoire des fonctionnaires territoriaux. Art. 2 provides that the CNFPT establishes the obligatory (and other) education programs.

[190] See the addendum to the original report: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c5db7.

[191] https://www.fonction-publique.gouv.fr/files/files/statistiques/point_stat/PointStat_formation_2008_2012.pdf

[192] The AFA evaluation of local government anticorruption practice from November 2018, cited in multiple places in this study: https://www.agence-francaise-anticorruption.gouv.fr/files/files/Rapport_danalyse_-_enquete_service_public_local.pdf. See page

[193] See: https://www.agence-francaise-anticorruption.gouv.fr/fr/nouvelle-diffusion-mooc-corruptionfavoritismedetournement-comment-prevenir-dans-gestion-locale.

[194] Evaluare tematică a Ministerului Sănătății privind implementarea strategiei naționale anticorupție 2016-2020, October 2017. See page 13. URL: http://sna.just.ro/docs/pagini/51/Raport%20de%20evaluare%20tematica%20Ministerul%20Sanatatii.pdf

year, 23 persons participated in an integrity training – while more than 700 officials work there. The others could have been trained the previous or the next year, but this seems unlikely.[195] On the other hand, the Ministry of Finance tested in 2016 the integrity knowledge of its personnel (1093 respondents) and on average more than 90% of the answers was correct. The methodology used is unknown.[196] And according to its own report, the Ministry of Labour trained in 2015 more than 1000 employees, however only 2 at the Ministry itself and the rest in subordinate organisations such as the Labour Inspection and the National Pensions Administration.[197] The 2018 report of the ANFP, the Romanian coordinating agency for public officials, mentions that in that year several hundred officials have been "exposed" to integrity information.[198] The 2019 report on the implementation of the national anticorruption strategy mentions more than 8,000 persons that year nationally who received training regarding a code of ethics (out of approximately 1.2 million public sector workers that year).[199]

The above data point in the same direction as the audit of the 2012-2015 strategy, conducted by the OECD, which concluded that the "*extent of training for employees of public authorities differs widely across different authorities and only in a few parts of the public sector the impact of such training can be seen. Regarding such indicators as the degree of knowledge, self-evaluation seems ill-suited for central monitoring because the vested interest for particular institutions to inflate the findings is too high*."[200]

In The Netherlands, 80% of public officials think that they are familiar with integrity rules and are applying them in their work, according to a report from 2016[201]. But this is not necessarily due to active training and information practices: The same report finds that the implementation of integrity policy varies greatly between institutions. The interviews for this study confirm a significant variation between organisations that have comparable sizes and tasks. Below are some examples of implementation in The Netherlands:

- One municipality leaves it to the department directors to organize trainings, or not. These directors must make their own assessment. Integrity training and education is not a topic that must be reported to the top management.
- A ministry organizes an 'integrity week' every year, with information activities, where top managers try to show their commitment to integrity by speeches. Throughout the year, some articles are published on the internet showing integrity implications of current events. Employee perception is tested in a yearly questionnaire.

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[195] Raport autoevaluare MMAP - anul 2015. URL: http://www.mmediu.ro/categorie/rapoarte-si-studii/13

[196] Evaluarea gradului de cunoaștere a normelor de conduită și a legislației în domeniul integrității. URL. http://discutii.mfinante.ro/static/10/Mfp/integritate/rezumatEVALUARI18052017.pdf

[197] See Raport de autoevaluare a inventarului măsurilor preventive anticorupție și indicatorii de evaluare 2015. URL: http://www.mmuncii.ro/j33/images/Documente/Transparenta/SNA/SNA_InventarIndicatoriEval2015.pdf. Of course, there may be a perfectly reasonable explanation for this.

[198] The 2018 report on the evaluation of the rules of conduct: http://www.anfp.gov.ro/R/Doc/2019/RAPORT%20monitorizare%20%20Semestrul%20II%202018%20.pdf. The reporting stopped after the legal basis (Law 7/2004) for it was abrogated in 2019.

[199] See the 2019 report at: http://sna.just.ro/Rapoarte+de+monitorizare.

[200] Independent evaluation of implementation the 2012-2015 National Anti-Corruption Strategy in Romania, Romanian Ministry of Justice/OECD, 2016. URL: http://sna.just.ro/docs/pagini/17/Evaluation%20of%20the%20Impact%20of%20the%20National%20Anticorruption%20Strategy%202012-2015%20EN.pdf

[201] Monitor integriteit en veiligheid openbaar bestuur 2016, ministerie van Binnenlandse Zaken (Netherlands), p. 79.

- Another municipality offers mandatory training (yearly, starting in 2018) on integrity issues, combined with information security. A bi-annual questionnaire tests the perception of openness in departments and contains knowledge questions about the local code of conduct.
- Yet another municipality includes integrity information in an 'induction day' for new employees. Then each year there are so-called 'dilemma sessions', where employees talk in groups about situations where it may not be clear what the correct behaviour should be. This organisation does not test how familiar employees are with integrity rules.
- Another ministry offers an online integrity training to all employees. There are no consequences for failing or skipping this training.

3.3.3. Analysis

In all three countries there are codes of conduct in place. There is a minimum set of rules. There are also sanctions in place, a basic but not sufficient condition for enforcement. Since the obligations to respect the rules are individual ones, individual public officials have the general obligation to inform themselves about the rules. Their employers, the institutions who set (part of) the rules, have the obligation to propagate them and to monitor their observance. One would thus expect that no specific obligations regarding training should be necessary. Indeed, obligations to train or even inform officials about the rules are less apparent than the integrity norms themselves and must be derived from more general legislation. This correlates with significant differences in practice, as we have seen. In The Netherlands, there is also a lack of data regarding because the practice of integrity training is not monitored.

Regarding integrity/anticorruption, just knowing the law is not sufficient. In the wording of the code of conduct for Dutch central government employees, Art. 1.1: "…[T]he code of conduct cannot provide for every possible situation. Besides, the circumstances continually change due to new developments." Every official to whom integrity laws and codes of conduct apply, must therefore be actively trained to supplement the rules with practice. An example of this is dilemma training, where officials discuss real situations in which it is difficult to determine the appropriate conduct.

Lack of training cannot be justified by an apparent absence of integrity incidents. In the first place, the nature of corruption is such that many incidents may go unnoticed. And in the second place, the activity in question is about prevention. Prevention must be based on a risk analysis. If based on incidents, the administration will always be too late. If a risk analysis shows that the risk of corruption is so low that training is unnecessary, this could be a valid justification. But we must not forget the distinction between non-corruption and integrity. Integrity is such a broad topic that it is hard to imagine an official who is not exposed to integrity risks.

Integrity training, more specifically informal discussions between colleagues and direct managers on difficult choices, could also influence an organisation's culture regarding integrity. This is outside the scope of the study but may be relevant when designing policy.

It can be posited that, although both official and employer have the obligation to ensure training, this obligation should weigh heavier on the employer because they have superior financial and organisational means to do it, and if the employer organizes trainings, there will be side benefits of prioritization that takes the 'big picture' into account, homogeneity, and economies of scale. Public institutions have a responsibility. If they fail to act on this cornerstone of anticorruption policy, the government should be prepared to take corrective measures.

A final thought on training: It was discussed above that some public officials receive training while others do not. Besides the question whether someone receives anticorruption training, it can be asked what kind of anticorruption training they (should) receive, based on what criteria? Like in other education settings, some public officials already know and practice correct behaviour, others know the theory, and yet others do not know the correct conduct. Consequently, some officials may need an hour training online every six months. Others may need an intensive training with monthly follow-ups. It can be asked which topics should be taught, depending on the values and practices that public officials bring with them from their private life. Would it be morally acceptable and technically feasible to differentiate according to personal values and practices of new recruits? The first candidate's mother never leaves the house and is not allowed to criticise his father. Should he be trained in respect for women? The second candidate immigrated from a country where there is a moral obligation to help relatives obtain a position. Should her conflict of interests-training be intensified? And the third one has a record of gambling addiction. Should he be trained to make him less vulnerable to blackmail? Should they first be tested, to find out the persons' own views and exclude a discriminatory bias? Probably yes. Without going into further detail, it can be concluded that this aspect cannot be found in the integrity/anticorruption training policies in the three countries. Currently everyone receives the same training, if they receive it. This aspect would be interesting, if difficult, to debate and study.

3.4. Appointments and promotions

Research in Italy (Mocetti & Orlando, 2019) suggests that "higher levels of corruption are associated with a poorer ability of the public sector to select and allocate workers". It is in the public interest to not employ persons that will act corruptly. Since we cannot (yet) predict future behaviour, the filtering out of persons who will likely behave corruptly must be done by proxy data such as past behaviour, or mental 'configuration'. For example, someone who has had a gambling addiction and whose psychological profile reveals a propensity for gambling, may in the future also be tempted to cook the books and gamble with the stolen money. Such a practice would be morally questionable, however, because it would introduce a bias from which past wrongdoers cannot escape. We also cannot filter out anyone with a little stain on their history because it would be disproportional and thus unfair treatment. Besides, there probably would be no candidates left. It is possible that some measures, such as higher or lower salaries, influence honest, or less honest, persons to apply for a job (Barfort et al., 2019). A too generous remuneration for example could attract financially motivated candidates more than those who are intrinsically motivated for the public service (see also section 3.4.5). This self-selection would be beneficial but probably imprecise, and could be relied upon as the sole prevention practice. Other measures would still be necessary.

Preventive measures regarding appointments can have different starting points. One type of measures looks at the persons who are candidates for positions in the public sector, and assesses the risk that they will behave corruptly in the future. The most common example is of excluding candidates from certain (or all) positions if they have a criminal record, of automatically suspending the duties of active officials who are convicted or even officially accused of certain crimes. Other types of background issues are possible; take the fictional case of the candidate for a bookkeeping position at a municipality whose previous employer was a motorcycle club, recently declared illegal. Another type of preventive measures assesses the risk of certain positions and/or activities. Some government activities, such as the granting of permits or subsidies, carry a higher corruption risk. Generally speaking, the higher the risk of the activity, the lower the risk of the person should be.

This type of assessment itself has a risk of being discriminatory if used on categories of candidates (for example, the category of 'candidates with criminal relatives'). The government must prove that any exclusions are proportional, and that the exclusion is based on a balanced risk assessment. In each country, antidiscrimination legislation may require extra procedural guarantees.

The existing rules on background checks are detailed below, followed by rules for the selection of candidates. These two sets of rules could be viewed as one, because they both deal with candidates for a position, or a change of position, in the public sector. They are discussed in different paragraphs to follow the structure of legislative practice. These two paragraphs are followed by three separate issues that are viewed in the literature as having some relation with the incidence of corruption: rotation of staff, oaths of office, and salaries – these three are included in this chapter because they all relate to taking up a position in a public institution or being promoted inside the public sector.

3.4.1. Verifying candidates

To minimize the risk of corruption inherent in candidates[202], the public sector should appoint only people who do not pose such a risk or in whom the risk is acceptable. To determine the risk, psychological tests and background checks can be conducted.

Intrinsic motivation

From the literature (Gorsira, 2017a; Zhang et al., 2019) we learn that intrinsic motivation, a candidate's personal norms, is a significant indication of behaviour. This issue is not addressed in the cited international or national legal instruments. Psychological testing as part of the recruitment process could be employed to counter this risk, and indeed this type of testing is used in the selection process for public sector positions, however not explicitly linked to corruption risks. For example, an urban planning specialist may decide where a multimillion project is going to be developed, without ever having been tested for intrinsic motivation because only certain categories, such as candidates for police jobs, were tested. Detection of 'bad convictions' by psychological testing is however not structural and not specifically related to corruption and fraud risks. While information campaigns and training do try to address the issue of personal conviction, excluding persons with insufficient intrinsic integrity from the start would be a much stronger tool. Of course, such a tool would have its own risks, for example of bias against certain social or ethnic profiles. The possibility of structural testing for the intrinsic motivation of candidates should therefore be considered carefully.

Background checks: France

In France, the *Loi Le Pors*[203] prescribes in Article 5 that no one can have the status of public official if their right to vote or be elected has been revoked. This can happen as a complementary sanction with a criminal conviction. These civic rights can be revoked for a maximum of 10 years (*Code pénal*, Art. 131-26). Another impediment for becoming or remaining a public official is when any "mentions […] in the criminal record are incompatible with the exercise of the duties". Public officials can have a criminal record, but for each of these duties it must be verified whether there are incompatible

[202] The activity of selecting and appointment also has a risk of corruption inherent in the person(s) who do the appointing. This risk consists of the existence of a conflict of interests.

[203] The same conditions apply for public officials and contract workers alike, although there are different legal bases for those who work for the central government or local public institutions, e.g. the Décret n° 88-145 du 15 février 1988

(as defined by the employing institution) criminal registrations in the second part (*bulletin 2*) of the criminal record. Public institutions have the right to check the *bulletin 2* of a candidate to see if there are incompatible convictions recorded. This check is not part of a mandatory procedure, although many public institutions may practice it. The employer may qualify a conviction as incompatible, a decision against which the candidate can appeal to the administrative courts. If the convicted person already was a public official, he or she may be dismissed only after following the appropriate disciplinary procedure.[204] One might ask, even if the candidate wins the appeal and passes the subsequent 'concours', or gets reinstated, if such events could possibly lead to a healthy subsequent career. But that issue goes beyond corruption prevention.

A *bulletin 2* may also be requested to ensure that only trustworthy persons have access to classified information, regarding persons who participate in a public tender, and some other cases (e.g. requests from foreign authorities). The criminal records are governed by Art. 768 to 781 of the Code of Criminal Procedure. From the *bulletin 2* are excluded juvenile convictions, most fines for traffic and similar violations, some commercial offences, suspended sentences, and some other categories that are considered a lesser danger to the public. As far as background checks go, French legislation does not provide for any other verifications of candidates' past conduct. Even on the website of a counterintelligence agency, there is no mention of supplementary checks for candidates.[205]

Background checks: Romania

The Romanian Constitution[206] protects the right to privacy in Art. 26 and conditions the restriction of exercising fundamental rights in Art. 53. Any restriction must have a basis in the law[207], be necessary, proportional, and non-discriminatory. Article 465 of the Administrative Code is this law and it explicitly prohibits anyone with a conviction for corruption and corruption-related offences from being a public official (until full rehabilitation according to the criminal law). Such a person cannot be appointed, and if the appointment precedes the conviction, the official must be dismissed. It follows from this law that all candidates must show a criminal record without any of the mentioned offences[208]. It is debatable whether this 'blanket ban' is constitutional: Absolutely all public offices would have to be corruption-sensitive for the law to be proportional. It could be argued that 1) the number of offences that bar access to the public service is limited and that 2) the nature of the public service is in itself incompatible with certain offences. But it is also unclear whether the law is non-discriminatory: if labour contract-employees in the public sector can do the same work as officials but are not obliged to show a clean record, the law could make an unfair distinction. In Romania, unfair discrimination between candidates by employers is even a criminal offense[209] but not if the discrimination is based on having a criminal record. The Law

[204] Relevant case law: C.E. 12 avril 1995, ministre de l'éducation nationale, and C.E. 3 décembre 1993, bureau d'aide sociale de la ville de Paris

[205] The DGSE (military foreign intelligence) formal recruitment conditions: https://www.defense.gouv.fr/dgse/tout-le-site/le-recrutement-par-concours.

[206] Latest version published in M.Of. 767 on 31.10.2003.

[207] In this context, 'the law' is a normative act of Parliament or one confirmed by Parliament.

[208] For certain types of officials, the interdictions are stricter. According to Art. 10 of Law 360/2002 regarding the Statute of police officers, you can only enter the force if you have no criminal record, you are not currently under criminal investigation or criminal trial. You also must have a 'conduct in accordance with the principles governing the profession'.

[209] The offense of abuse of office, Penal Code, Art. 297.

regarding public officials states in Art. 413, under (2), that 'any discrimination between public officials…is forbidden'. This rule covers discrimination between public officials but not between public officials and candidates, so in a strict interpretation it would only apply in promotion cases, not when a candidate is not already a public official[210].

It follows thus from the law that candidate-public officials must request a statement[211] (called a *cazier judiciar)* from the local police unit to prove that they have no impeding criminal convictions. The criminal register may also contain data from other EU Member States. Only definitive sentences are entered in the register, ongoing trials or convictions open to appeal are not mentioned in it except in cases of 'extension of the criminal trial' (i.e. extending the trial to new facts, persons, or crimes) about which the register receives an interlocutory court decision. Personnel working at civilian airports[212] must undergo a background check, involving, besides the *cazier,* interviews with persons designated by the candidate.

A different background check is required for those who work with state secrets, regardless of their position. There is a public institution tasked with keeping a national register of secret information, called ORNISS.[213] This office is responsible for the implementation of security measures regarding state secrets, among other providing authorisations for access to classified information. To conduct its background checks, ORNISS can request "necessary information" from any public or private entity. The law governing classified information[214] states that authorizations must be renewed after four years maximum. No general rules were found concerning the verification procedure, but it is clear that this type of background check is not aimed at preventing corruption risks but exclusively at protecting classified information.

Background checks: The Netherlands

In The Netherlands, the Law regarding public officials provides in Art. 3a that public sector employers have the right to verify the aptness and ability of candidates for public sector positions, including by processing sensitive personal data (such as criminal convictions). The implementing decision for the law[215] further specifies that for verifying the aptness and ability of candidates, employers may process[216] health data (Art. 3), judiciary data, and a declaration of good conduct (Art. 4). Other sensitive data categories may not be processed without a legal basis. Confidential positions (*vertrouwensfuncties)* are an exception: for these positions, not the employer but the AIVD (intelligence service) performs the verification according to the Law on Safety Checks (*Wet veiligheidsonderzoeken*).

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[210] Decision no. 5000/2015 of June 29, 2015 of the Cluj Court of Appeals mentions that this article 'refers to […] selection of personnel' which would imply a broad interpretation of this article.

[211] Governed by Law 290/2004 regarding the judicial register, M.Of. 586 of 30.6.2004

[212] Ordinul 755/2010 privind aprobarea măsurilor de securitate alternative pentru operațiunile de aviație civilă din toate categoriile prevăzute la Art. 1 din Regulamentul (UE) nr. 1.254/2009 al Comisiei din 18 decembrie 2009 de stabilire a criteriilor care să permită statelor membre să deroge de la standardele de bază comune privind securitatea aviației civile şi să adopte măsuri de securitate alternative, M.Of. 699 of 20.10.2010

[213] Ordonanta urgenta 153/2002 privind organizarea si functionarea Oficiului Registrului National al Informatiilor Secrete de Stat, M.Of. 826 of 15.11.2002

[214] Legea 182/2002 privind protectia informatiilor clasificate, M.Of. 4.12.2002

[215] Uitvoeringsbesluit Ambtenarenwet 2017, Stb. 2019, 346.

[216] Processing in the sense of the GDPR.

There is also legislation for appointments at the level of the central government: the Decision on Recruitment and Selection, that was abrogated on January 1, 2020 but is still used until a new implementing decision is adopted under the new Law regarding public officials. Ministries can have their own supplementary policies. Municipalities have or will have to adopt a local policy, because the previous central policy instrument[217] was also abrogated on January 1, 2020.

Art 3a of the Law regarding public officials cited above does not limit the discretionary space, except for the necessity requirement when accessing sensitive personal data categories. The law implies that a positive result of a screening, or a certificate of good conduct *may* be required. The necessity is thus determined per position. A government institution could decide that all positions are risky positions and that candidates for all positions should have a certificate of good conduct. It could also decide that no candidate needs to produce one.

The procedure is as follows: The employer determines that a certificate is necessary for a certain position. Much depends on the initiative of employers: The legislation in force does not allow background checks without a request. All candidates must then provide the certificate of good conduct to be eligible. To do so, they request the certificate, called a VOG, *verklaring omtrent gedrag)* from their local authorities. The request is sent to the central processing authority. This authority retrieves the relevant data from the records. It may refuse to process the request if it is obviously unnecessary[218] The certificate (or refusal) is an appealable government decision in the sense of the administrative law (a *beschikking)*. If the applicant has no convictions or (foreign) police records of any kind, they always receive a VOG. If there are criminal convictions on the record (in the last 4 or 10 years, or for some convictions without a time limit), a VOG is not automatically refused but the central processing authority (called Justis/COVOG) uses screening profiles[219] to determine the applicant's risk. These profiles are not limitative, i.e. Justis can refuse to provide the declaration even if the candidate is cleared on the standard profile. There is a general profile and some specific profiles for certain positions (such as detectives in the judiciary police). The general profile is based on eight 'risk areas', such as 'information', 'money', 'management', or 'persons'. They are not specifically aimed at corruption risks. For example, the category 'persons' assesses the risk that an applicant will abuse their trust relationship while working with vulnerable persons such as children.

A new legal basis for the procedure has entered into force on January 1st, 2018, called the *Beleidsregels VOG-NP-RP 2018*[220]. It further details the criteria for refusing the certificate. There are two criteria. The first, more objective, criterion is whether 1) judiciary data of criminal conduct are found that 2) if repeated, 3) would pose a risk to society and 4) hinder the proper execution of the position/task/occupation. If the answer is yes, then the applicant can still receive a VOG if COVOG considers that the facts of the case are of such a nature that the interest of the applicant must prevail instead of the public interest. The second, more subjective, criterion in Article 2.1, under b, of this instrument follows the necessity principle, stating that a request to investigate

[217] This was a collective agreement called CAR-UWO.

[218] Article 34 of the Law regarding judicial and criminal data (Wet justitiële en strafvorderlijke gegevens, Wsjg) of 2004 (Stb. 2002, 552).

[219] The screening profiles that this organisation uses are here (in Dutch): https://www.justis.nl/binaries/Screeningsprofielen%20VOG%20NP%20(04-2017)_tcm34-85263.pdf

[220] Stcrt. 2017, 60620. URL: http://wetten.overheid.nl/BWBR0040253/. 'NP' stands for 'natuurlijke personen' (natural persons) and 'RP' for 'rechtspersonen' (legal persons). This implementing rule is based in its turn on the Law regarding judicial and criminal data.

a person's conduct can only be awarded if it is necessary to limit a risk to society in view of the purpose of the request, but then states in point 2 of the same article that requesting VOGs for employment purposes is presumed to be necessary. So we return to the discretionary powers of the employer. The advantage is that employers can be flexible and apply measures where there is a concrete risk. Employers in the public sector can also be regarded as having the task to protect both the interests of their organisation as those of the general public. On the other hand, to give employers the initiative for checks in the interest of national security might not be the right choice if national security is neither that employer's task, nor their expertise. Besides, it remains unclear who concretely, under the umbrella responsibility of the public body, should weigh the risks and remind managers with a job opening to add the requirement of a background check to the vacancy posting. A designated HR official? A specialised integrity official? Each public organisation is free to establish a procedure for this, or not. In any case, the risk of arbitrary background checks and the possibility that candidates are excluded unfairly is mitigated, at least theoretically, by the intervention of the central processing authority that 1) may refuse to carry out checks if they are obviously unnecessary and 2) can issue a VOG even if the candidate has a criminal record.

Some numbers that show the proportions of the practice of requesting a certificate of good conduct: The number of requested VOGs is on a steady rise, from a little under 500,000 in 2010 to a little under 1 million in 2016. The number of refused VOGs is declining, from 0,8% in 2010 to 0,4% in 2016[221]. The number of VOGs granted to persons with a criminal record was in 2016 almost 150,000, but this does not mean that this number of persons was hired, because VOGs can be requested for other purposes than employment and data structure issues prevent the authorities from selecting for category or purpose[222].

For high-risk positions, the intelligence service (AIVD, *Algemene Inlichtingen- en veiligheidsdienst*, general intelligence and security service) can conduct a more thorough background check, that does not just rely on existing police and judicial records. The legal basis is the previously mentioned Law on Safety checks. The positions for which a so-called VGB (*Verklaring van geen bezwaar,* statement of consent) must be obtained, are established by the respective Ministers in their role as heads of the department and its subsidiaries. According to the AIVD website, most of these *vertrouwensfuncties* (trust positions in the sense of the lex specialis, not in the general sense) can be found at critical installations such as the national airport, critical energy supply functions and national safety related functions such as intelligence, army, police and customs officers. The law refers in Article 3 explicitly to national security. Local government and regular ministry positions are almost never trust positions. Only this extended background check, performed by the AIVD, and then only at the top 2 out of 3 levels, includes checks of someone's risky habits or vulnerabilities (gambling and other addictions, belonging to a group that exerts pressure, etc.). The VGB or a refusal to provide one is an appealable decision (*beschikking).*

The law provides for the same screening mechanism when a person changes jobs within a public-sector organisation. Again, the employer must consider it necessary to have such a check conducted and have the official or employee request a new certificate (VOG or VGB). Repeat checks are also possible, without a change in position. A permanent screening is not possible, except for taxi drivers (!) and child care workers. To combat a risk, employers can use repeat checks, but the intervals are long enough that the risk situation can change dramatically. An example: After clearance through a VOG, a person is appointed as an official and receives the task of issuing building permits. In the

[221] Justis annual report 2016. URL: http://jaarverslagjustis.nl/2016/factsheet_vog.html

[222] According to an e-mail from the JUSTIS service from February 2, 2018.

first year after his appointment, he starts stealing money from his relatives to cover his gambling addiction. He is caught and two years after the appointment, convicted by the court. All this time, his employer not only does not know but also does not have the right to enquire about the conviction, until the next VOG-request a few years after appointment. It is as if the legislator considers the clearing as a permanent state, while in reality a background check is a review of past conduct, without any guarantees for the future.

But it might be more of a technical issue. In a letter[223] to Parliament from 2010 about the subject of permanent screening for taxi drivers, the Minister of Justice explains that permanent screening is a supplementary burden to employers and employees and it requires that COVOG has complete and actual data regarding the employment situation. For example, if all officials of the City of Amsterdam should be permanently screened, then COVOG must know each day who is employed there. Also, the law must provide for the possibility to screen without a request by the involved person and condition further employment to the existence of a valid certificate. In other words: The government would like to do permanent screening on more categories of public officials, but the effort involved is considered too great.[224]

Summary background checks

The table below summarises the national policies on background checks.

Table 9: Background checks

	NL	**RO**	**FR**
Which positions	Risk positions, determined by employer	All	All
Who requests	Candidate	Candidate	Employer
When (candidate/promotion/ disciplinary review/other/ repeat check/permanent check)	Before appointment/ promotion, in some cases repeat check.	Before appointment/ promotion	Before appointment/ promotion
Are there different levels of checks?	Yes	Yes	No
Which data is being used (convictions, police records, foreign records/other)	VOG: (foreign) police records, judiciary records VGB: official databases and data on social environment	(foreign) judiciary records	Judiciary records

[223] URL: https://www.rijksoverheid.nl/documenten/kamerstukken/2010/11/12/5672999-voortgang-herziening-screening

[224] The Dutch government promised more research in 2019, after requests to update the integrity framework from local authorities, related to organised crime. See: https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z01256&did=2019D02817.

Grounds for refusal	Risk to society on grounds of past criminal conduct, impeding proper execution of activities, or vulnerability to blackmail (VGB only)	Presence of certain convictions	Presence of certain convictions
Person in question is kept informed?	Before checking and about the results	Before checking and about the results	unknown
Who does the checking	A central institution that reports to the Minister of Justice, or the intelligence service	Employer	Employer

3.4.2. Procedural measures

Out of the candidates who fulfil the preliminary requirements, including background checks, it must be determined who is best suited for the job. The persons who decide who to appoint or who can influence such a decision, pose a corruption risk.

Corruption scenarios

There are typical corruption scenarios where persons who have decisional or influencing power over appointments make sure that some relative gets the job. Colloquially this is called nepotism.[225] The victims are candidates who would be more qualified but still do not obtain a certain position, and society that is run by bureaucrats whose selection is not based on quality. This is a collusion-type risk, between the candidate and the relative or acquaintance who has decisional or influencing powers regarding the appointment. Managers with sufficient powers can even create fake positions, to be filled by someone that satisfies private interests and who may never even show up for work.[226] It is also possible that exceptions to the rules, such as greater discretionary powers in emergency or temporary situations, are abused to circumvent the objective procedure and to appoint business partners, friends or relatives, or persons to whom a favour is owed. In yet another scenario, candidates must pay a bribe to get the position.

This relative, acquaintance or other person who has a private interest in a certain candidate, or the bribe-taker who sells jobs to the highest bidder, can be for example:

- The person who grades the eliminatory exams or their manager;
- A member of the advisory committee for appointments;
- The future manager of the candidate;
- A member of the body that officially makes the appointment and, by principle of symmetry, can revoke it;
- Some other influencer, such as a person with inside information about the exam questions.

[225] In Romania, the nepotism link consists in many places of political party affiliation (Volintiru, 2016, p. 146).

[226] See this press report of such a case from Romania: https://www.nytimes.com/2019/05/27/world/europe/liviu-dragnea-romania-corruption.html.

Recommendations from international instruments

To counter this, the UNCAC (Article 7) recommends transparency and objectivity in the recruitment procedure. Transparency involves the advertising of all job openings, using clearly established job descriptions and clearly administrated salaries. Objectivity involves countering bias in the procedure by not letting appointments depend on one person's preferences. Both aspects are discussed below in this section. The OECD recommendations in their Integrity Framework[227] concentrate on background checks, not going further downstream in the hiring process. It does include an interesting suggestion of unspecified 'integrity testing', which could be made part of the eliminatory exam. The 2002 GRECO report on Romania recommends using competitive examinations or tests 'in principle' for all civil servants. Apparently this was not the case at the time, although the law then in force did prescribe it (Law 188/1999, formerly Article 41).

Conflict of interest and sanctions

In the case of corrupt appointments, the public interest is protected by the administrative and the criminal law. In the nepotism scenario, there is a conflict of interests that puts the objectivity at risk. It is possible that those involved may not be aware of it, or claim that they did not know. However, the person with the power to influence the hiring process has an obligation to verify if such a conflict is present, and if it is they must recuse themselves. Not recusing oneself from such a position of influence in a conflict of interests, or failure to at least report the issue, exposes the official to disciplinary sanctions. Specific rules to prevent conflicts of interest in recruitment procedures may be established at the organisation level. Decision-making in recruitment procedures while knowing that there is a conflict of interests present is not a criminal offense in any of the studied countries. In Romania, the charge could be 'abuse of office' (*Codul penal*, Art. 297) but this offense requires that the official acted with intent and that there is a clearly established damage to the public institution in question. If the position was obtained through bribery or extortion, the specific provisions in the criminal law apply.

Transparency

In all three countries, publication of the open position is mandatory[228], but not publication of who was selected for the position. Can appointing managers bend the transparency rules by using discretionary powers? For Romania there is case law proving that they do in fact break them, for example when the director of a public institution ordered his HR staff to appoint certain persons and then create a false file of emergency job openings and passed exams.[229] In France and The Netherlands, such case law could not be found but in theory the risk exists in all countries.

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[227] Towards a Sound Integrity Framework: Instruments, Processes, Structures and Conditions for Implementation, OECD report, 2009. URL: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=GOV/PGC/GF(2009)1. In the course of 2020, the OECD will produce a revised publication, the Integrity Handbook.

[228] See for Romania HG 611/2008 http://legislatie.just.ro/Public/DetaliiDocument/95595, chapter II, section 4. For France, a decision of the Conseil d'État states that the publicity must be sufficient and that this may determine the legality of the concours: https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007708570. For The Netherlands, it is standing policy (situation April 2020) even though the relevant government decision has been abrogated on January 1st, 2020.

[229] Decision no. 602/2017 from 21-apr-2017, Court of Appeal Bucharest (the facts were from 2011). Another example of the same strategy is Decision no. 102/2015

Objectivity

Other than obligations for the power holder and corresponding sanctions, there are organisational safeguards for objectivity. France and Romania use the mandatory *concours, concurs* respectively, as standard practice. This is an eliminatory exam that candidates for all public offices must take. It is not only an anticorruption measure, but also designed to stimulate meritocracy within the public service. It should be noted that there are exceptions to the exam principle and that for contract workers, there is no such exam. Excessive use of exceptions may therefore be an indication of corruption. The exams are supervised by a jury.[230] The exam shifts the corruption risk (bribery, nepotism) from the hiring manager to the supervisors of the exam: those who know the questions and can influence the evaluation of the outcomes. From Romania, there are recurrent reports of how a seemingly impartial and transparent *concurs* was doctored to ensure that a certain candidate would win.[231]

The Netherlands has no tradition of exams to determine which candidate will occupy an open position. Legislation until 2020 made it mandatory "if possible"[232] to include several other persons in the process beside the recruiting manager, usually in the form of a recruitment committee (*selectiecommissie*) and for some senior positions an additional advisory committee. The intended effect of this committee is the introduction of objectivity in the procedure.

In a system that includes an eliminatory exam, the corruption risk is shared between the person who makes the appointments and the persons who grade the exams. The appointing manager must retain some discretionary power and the corruption risk that comes with it, or else she will just have to accept the person who scored best, even if they do not fit in the team.

The exam weeds out those who have no relevant knowledge and only rely on relations. But exams are not tamper-proof: The correct answers can be distributed beforehand to certain persons, the results can be falsified or simply invented when the 'right' candidate was not even present, or the announcement of the exam may be such that only those in the know are aware that it takes place. An effective exam organisation must counter such risks, by measures such as randomly distributing different versions of an exam, and by centralising the grading, making the persons grading the exams fewer and less accessible to those who wish to influence them. Exam grading can also be done blindly, or even automated.

Without an eliminatory exam, suitable candidates must be selected on the basis of CV assessment and interviews. Sometimes there is a first filter in the form of an HR assistant who eliminates objectively unsuitable CVs. The appointing manager has more discretionary power than with an eliminatory exam. The use of a recruitment committee for some appointments shows that this power is seen as a potential issue.

The discussion on using eliminatory exams for public sector positions is much broader than the objective of preventing corruption. Cost, administrative burden, cultural aspects, focus on knowledge versus skills, are all aspects that influence the discussion. However, purely from a

[230] For France, see Law 84-16, Chapter III. See also Law 83-634 Art. 16 about how the jury is to be kept objective. For Romania, See Administrative Code, Art. 469.

[231] For example in the press: https://revista22.ro/actualitate-interna/posturi-scoase-in-pripa-la-anaf-si-concursuri-aranjate-pentru-oamenii-psd, or these press releases from the anticorruption prosecutor https://www.pna.ro/comunicat.xhtml?id=9405 and https://www.pna.ro/comunicat.xhtml?id=8550.

[232] Besluit werving en selectie, Art. 15. This government decision was abrogated on January 1st, 2020, but its provisions are still used where relevant. See also chapter 2.

corruption prevention perspective, well organised eliminatory exams can lessen the risk that persons are appointed in a personal interest.

3.4.3. Staff rotation

Within the same theme of appointments and promotions, some international instruments, such as the UNCAC, and scientific publications (Abbink, 2004) recommend staff rotation as a means to reduce the risk of bribery. However, a paper on corruption in Africa (Fjeldstad, 2009) warns about the risks of job rotation: Those in the most 'lucrative' posts will try to benefit as much as possible while stationed there, and corrupt managers have extra leverage over their employees because they can rotate them to a good or a bad location. The practice may even *create* corruption, because the 'good' posts may be worth bribing a superior. The way this practice is regulated is thus important.

The idea is that the mandatory rotation of officials who have frequent (face-to-face) contact with potential bribers, such as those who issue permits, award subsidies or acquire goods and services, prevents the development of a relationship between (potential) briber and official. This makes it harder for the briber to predict the response of the official (i.e. whether the bribe will be accepted). The risk for the briber of being discovered and sanctioned is then supposedly higher. There is support for this idea from behavioural economics: "when individuals are uncertain with respect to their opponent's intrinsic corruptibility, they are less likely to engage in corruption" (Ryvkin & Serra, 2012).

In The Netherlands, staff rotation is a rare practice outside of the diplomatic corps. The tax authority reportedly uses it, and it is in any case a decision taken at the organisation level. No general rules were found on the practice, even though some policy evaluations do recommend it[233].

The situation in Romania is much the same; job rotation is not common.[234] A report from the Ministry of the Interior calls it a "lesser-known practice"[235] The Romanian government decided in 2015[236] that public institutions should rotate staff on 'sensitive positions' (as determined by each public institution) in principle every 5 years, but this decision was repealed in 2016.

In France, the practice does exist in the public sector (judges, prosecutors), albeit not for corruption prevention – not explicitly, at least. GRECO notes the practice in its 2004 evaluation report on France, of senior officials at several ministries who were subjected to 'a system of compulsory mobility'. But in general, staff mobility is not compulsory. The new law regarding public sector careers does intend to stimulate the practice, but for other purposes than corruption prevention

[233] For example: A report from 2008 on fraud detection by the Dutch general auditor: https://www.integriteitoverheid.nl/fileadmin/BIOS/data/Publicaties/Downloads/boeken_ark_rapport_signaleren_van_fraude2008.pdf, a model integrity policy by the Dutch Ministry of the Interior https://huisvoorklokkenluiders.nl/wp-content/uploads/2018/03/BZK-2006-Modelaanpak-Basisnormen-Integriteit-Openbaar-Bestuur-en-Politie.pdf, and a parliamentary report from 2002 on construction fraud: https://zoek.officielebekendmakingen.nl/kst-28244-6.html. The term used here is *functieroulatie*..

[234] Civil society interviews reveal that it was a common practice during communism to dispose of unwanted officials, so that the practice currently has a bad name.

[235] Ghid de bună practică privind prevenirea faptelor de corupție pentru reprezentanții administrației publice locale (Best practices in local government corruption prevention), Ministerul Administrației și Internelor, 2012. The practice is called 'rotația personalului'

[236] Ordinul 400/2015 pentru aprobarea Codului controlului intern/managerial al entităților publice (M.Of. 444 din 22.6.2015), annex 1. This is the general code for internal control of public institutions by the general secretariat of the Romanian Government, annex 1. The code from 2018 is discussed in section 6.4.

(or any kind of prevention).[237] The AFA report on local government practices mentions that only 1,8% of the respondent local authorities (cities, departments, regions) had implemented mandatory staff rotation.[238]

3.4.4. Oath-taking

Romanian and Dutch officials swear an oath, but the French do not. No one claims that taking an oath is in itself a powerful enough instrument to morally compel officials to refrain from corrupt behaviour. But does it have any effect? The CJEU gives at least some weight to it, judging that it is important enough to become an obstacle to the free movement of services when such oaths are required for service providers in one Member State and not in another.[239] The technical guide to the UNCAC (p. 23) sees an oath of office as giving 'individual relevance' to a code of conduct. In the criminal law, a public oath warrants the truthfulness of a witness' testimony but in an instrumental way, as a formal part of the procedure just as well as a moral underpinning of the testimony. Moral standards do seem to play an important role in abstaining from (or engaging in) corruption[240], but the question remains whether taking an oath of office helps persons behave correctly.

On the English-language website of the Dutch government, oath-taking is one of three topics listed under the heading 'Integrity in public administration'.[241] This might illustrate how Dutch policymakers view this instrument. In Romania, the Administrative Code provides the basis for this practice in Article 529, stating also that refusing to take the oath leads to revocation of the appointment. In The Netherlands, the regulation is highly similar. The Law regarding public officials introduced in 2005 the obligation to take an oath (or 'promise' for non-religious persons) in Article 5 There is an implementing decision with all the different formulae[242]. A formal ceremony is held, and the written evidence of the oath is kept in the official's personnel file. The explanatory memorandum[243] views the oath as 'an integrity instrument', meant to stimulate officials to become conscious of the principles of officialdom (i.e. behaving with integrity) when they are appointed.

The tradition in France is different. In the 19th and 20th century "civil servants did not swear an oath to the public interest, but to the party in power" to ensure compliance with policy (Mungiu-Pippidi, 2015, p. 73). We know from history that in the Second World War, officials took an oath of personal loyalty to Marshal Pétain of the Vichy regime. In modern day France, public officials don't take oaths, not even elected ones – with some exceptions such as police, gendarmes, magistrates and court clerks. Romanian officials swore allegiance to the Communist State, but this history has not stopped the legislator from introducing an oath in its post-communist statute.[244]

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[237] See this government information website: https://www.vie-publique.fr/eclairage/272292-la-mobilite-professionnelle-dans-la-loi-transformation-fonction-publique.

[238] See https://www.agence-francaise-anticorruption.gouv.fr/files/files/Rapport_danalyse_-_enquete_service_public_local.pdf, page 29.

[239] C-465/05 Commission vs Italy, par. 48.

[240] Huisman and Gorsira show this in the report 'Offenders on causes and consequences of corruption' for the Romanian Ministry of Justice (See the report on Researchgate at URL: https://tinyurl.com/y7yj8d43) and in (Gorsira, 2017b).

[241] URL: https://www.government.nl/topics/public-administration/integrity-in-public-administration

[242] The Uitvoeringsbesluit Ambtenarenwet 2017, see also 3.4.1 and

[243] Kamerstuk 29436 nr. 3, March 1st, 2004.

[244] Currently in the Administrative Code, Art. 529.

3.4.5. Salaries

The first GRECO evaluation report about Romania, from 2002[245], recommends raising the salaries of judicial police officers, some 130 EUR per month at that time. Public sector salaries in Romania have indeed increased spectacularly. Press reports indicate an average net salary of 3 575 RON (approximately 800 EUR) in the sector Public Administration and Defence in 2017.[246] This is considerably higher than the global average net salary in 2017, of 2 391 RON. The same is true about France and The Netherlands, where gross public-sector salaries for professionals (e.g. not management or support staff) of about 50 000 EUR and 67 000 per year respectively are significantly higher than the medium wage.[247] It is worth mentioning that in Romania, the development of salaries in the public sector is less predictable than in other countries. Some years see pay rises of more than 20%, while during the last financial crisis, all public officials saw their wages cut by 25%. But it is safe to say that the average public official in all three countries does earn a wage that will not incentivize bribery out of sheer poverty.

Above this lower 'subsistence' limit, where bribes are taken to support basic household expenses[248], it is questionable whether higher salaries lead to less corruption. The idea is that when your salary is higher, you have relatively less to gain and more to lose (when caught) from corruption. The UNCAC Technical Guide does not mention salaries as a preventive instrument. Transparency International, discussing judges' salaries in The Netherlands, concludes with satisfaction that they are 'by far the highest in the Dutch public sector'[249], without discussing salaries for other categories of officials. Rose-Ackerman (2016, p. 527), discussing public tenders, sees a connection between what is expected of officials and the amount of their wage: "From the perspective of civil servants, increased monitoring by supervisors or peers and penalties for corruption that are proportionate to the act detected should be coupled with increased compensation and reduced workloads if the acceptance of payoffs has become a substitute for the careful evaluation of alternatives. If civil service wages are allowed to deteriorate relative to the private sector and if pay differentials within the civil service are too small to give officials an incentive to seek promotions, then efforts to control official corruption are unlikely to succeed." In other words, adequate pay is a minimal condition. An experimental analysis of public service delivery (Barr et al., 2009) found weak evidence of a correlation between higher pay and less "expropriation". A laboratory experiment on the influence of wages on the corruptibility of civil servants (Veldhuizen van, 2013) does show a clear link, but with many caveats. A recent statistical analysis shows a correlation between higher than average public sector wages and lower corruption (Cornell & Sundell, 2019). However, a recent dissertation in psychology (Köbis, 2017) argues that if the risk of losing the well-paid job is small enough, there

[245] GRECO, First evaluation round – Evaluation report on Romania, March 2002. URL: https://www.coe.int/en/web/greco/evaluations/romania

[246] Source: Ziarul Financiar of June 6, 2017. URL: http://www.zf.ro/eveniment/salarii-romania-salariul-mediu-sanatate-crescut-35-ultimul-an-ajungand-2-663-lei-net-administratie-publica-aparare-salariul-mediu-crescut-22-pana-3-574-lei-net-16408521

[247] See these figures from 2015 from the OECD: http://www.oecd-ilibrary.org/governance/government-at-a-glance-2017/average-annual-compensation-of-senior-and-junior-professionals-in-central-government-2015_gov_glance-2017-graph61-en. The gross average annual income for 2015 is approx. 35,000 EUR for The Netherlands and about the same amount for France, according to the national statistics bureau (www.cbs.nl) and French press outlets. All these figures should be used with caution because averages may conceal many relevant facts and also lack context such as the average number of hours per week.

[248] This practice may be considered perfectly normal by the general population. See (Brooks et al., 2013, p. 72)

[249] Transparency International, National Integrity System Assessment in The Netherlands, 2012, p. 90.

may be no correlation at all. This can be the case in countries where corruption is endemic and practiced by large groups in the bureaucracy. In such cases, the incentive structure must be changed along with the salary increase or there will be no effect on corruption.

When discussing salaries, we must not let some other distinctions out of sight such as the difference between grand and petty corruption, or the differences between the highest-ranking management positions in the bureaucracy and the larger group of non-management positions. One needs only to follow the corruption scandals in the press to observe that a dominant position and high pay do not deter some persons from acting corruptly. This also implies that a higher salary is not enough to refrain from corruption and that it can only be used as an effective instrument in combination with instruments that influence other incentives.

Above are some of the scientific conclusions regarding salaries and corruption, but government policy in the three countries does not make an explicit connection between the two. Salary negotiations in the public sector are about budgetary constraints versus the desire of unions to improve their members' wages, not about secondary effects of salary raises. Policy instruments address the topic only incidentally. The Romanian national anticorruption strategy 2008-2010 mentions the need for 'more competitive' salaries in certain public institutions, based on 'performance' without detailing the reasons or objectives for it, but the issue is altogether absent from the subsequent strategies.

3.5. Summary

This chapter discusses codes of conduct, information and training, and appointments and promotions. On all three subjects the studied countries have legislation and policies in place.

Codes of conduct are recommended by international instruments and, even though there is an ongoing debate about their usefulness, much used in the three countries – with the exception of local authorities in France. It can be concluded that they are not only widely used, but they also have similar topics across the three countries. Sample Romanian local codes are even literal copies from the model text. But codes of conduct are only useful if they are brought regularly under the attention of their target audience, the public officials. And it follows from section 3.3, on information and training, that this practice is insufficiently developed in Romania and France, and that in The Netherlands there are great differences between organisations because information and training is left to department managers without national oversight.

The next topic was about corruption prevention in appointments and promotions of public officials. Verification of criminal records is not mandatory everywhere, but seems to be general practice in all three countries. Repeat checking is not, or only exceptionally, included in policy. This raises the question whether these proxy measures to establish corruption risk (together with other risks) are useful and proportional. If a person has committed fraud four years ago, she may be very honest now, and the opposite may also be true. There are proposals to extend screening, making it a regularly recurring exercise.[250] It would be even more informative to know 'real-time' what public officials do and if their behaviour is risky, by monitoring their current activities in their status as public official, and to draw conclusions from those observations. Such monitoring would have to be subject to certain conditions, such as to steer clear of an official's private life (as much as possible), not be intrusive, not lead to an additional administrative burden, and be transparent.

[250] For example, a bill to introduce 'continuous screening' for police officers is currently debated by the Dutch Parliament. See the file here: https://wetgevingskalender.overheid.nl/Regeling/WGK004987.

The following topic concerned appointments and promotions. It can be concluded that the activity of recruiting new public officials, which is influential on organisational practice because it determines the future propensity for corruption among the staff, carries a high risk with many instances where a corrupt decision-maker or influencer may intervene. The recommended measures to keep recruitment clean – transparency and objectivity – are implemented through transparency of vacancies and through eliminatory exams, a practice in France and Romania but absent in The Netherlands (in some cases there is a committee to objectivise the choice). The exams can be useful against corruption, if implemented with countermeasures against abuse. All three countries use screening practices in a similar way to filter out high-risk candidates. In none of the three countries, structural practices have been identified to test the personal convictions of candidates for corruption risks.

Finally, staff rotation, oath-taking and salaries were briefly reviewed as potential preventive topics. Staff rotation is an incidental practice in the three countries and could be used more in certain circumstances. Oath-taking is a general practice in Romania and The Netherlands and suggested in the UNCAC, however without any clear corruption prevention benefits. Salaries seem to correlate with corruption, to a certain level, but it appears that public officials in the three studied countries earn enough to prevent a higher risk of petty corruption.

4. Conflicts of interest and incompatibilities

4.1. Introduction

This chapter contains the two intimately related topics of conflicts of interest and incompatibilities, both central to corruption and its prevention. Other related topics, under the umbrella of transparency for the prevention of conflicts of interest, can be found in Chapter 6. This chapter first annotates the concepts in this paragraph, before diving into the law, international instruments, and an implementation case from each country. The chapter concludes with a short summary.

Concept

Within the context of corruption prevention, it is insufficient to prevent and sanction bribe-taking. Even without any incentives coming from bribing attempts, public officials must resist the – humanly natural – urge to choose their own private interest and defend the public interest instead.[251] Conflicts of interest rules prescribe the choices public officials must make in certain situations and, in some cases, make the choices for them by defining a concrete activity or situation as incompatible with the public office. In short, they form a list of things public officials are not allowed to do, to be or to have. Strictly speaking, the conflict of interest itself is not reprehensible or illegal, but it can create risks and impressions that undermine trust. Behaviour becomes illegal when the conflict is solved in favour of the private interest, and can take various forms, disciplinary and criminal.

As in common usage, with the term 'conflicts of interest' in this text is usually meant 'the illegal resolution of conflicts of interest'.[252] Of course, many conflicts of interest that occur every day in the bureaucracy of the three countries, are solved by the official in question by choosing the public interest. An illegal conflict of interest can occur in the normal exercise of one's duties but can also involve conduct that is illegal in itself, thus combining the conflict of interest with abuse of office or some related offence. For example, if a public official appoints their cousin while having the discretionary power to do so, the resolution of the conflict is done illegally but the act in itself was within the legal powers of the official. If however the official, not having discretionary power, changes the name of the appointee in the database in the name of their cousin, then the act to resolve the conflict of interests illegally was in itself illegal and leads to two offenses, fraud and favouritism – which the criminal judge may merge later, depending on the law and circumstances of the case.

Also, there are of course more than one public interests. A conflict between two interests that are both public in nature, such as may occur between environmental and economic policy is not illegal; an illegal resolution of a conflict of interests occurs always between a public interest and a

[251] An extension of this notion is the well-known principal-agent dichotomy from sociology. The agent defends his own, strong interest while the principal mandates the agent to do just the opposite, but from the weaker position of the 'mandate-giver'. On the other hand, 'doing the right thing' can also find support in universal human traits such as the sense that people should not get more than they deserve (e.g. not be served with a building permit before those who have waited longer) and that those who do not contribute to something are not entitled to a share of the results.

[252] There is a study on different policy instruments for conflicts of interest (Ochoa & Graycar, 2016) with some more definitions.

private interest. They are 'conflicts of loyalty' (Mattarella, 2010). It should be noted that French law sanctions public/public conflicts of interest as a disciplinary offense (see below under Definitions of conflicts of interest). In this case, the conflict is between loyalty to the institution one works for versus loyalty to another public institution or mission. This expresses the notion that there is not a single public interest, but many. Hence also the issue with the *cumul de mandats* (accumulation of different positions, elected and/or appointed, in the public sector) in France, creating a conflict between a national and a local public interest. This notion is also reflected in codes of conduct that claim loyalty to the employing institution, so that deciding to the advantage of a different public institution could be a disciplinary offense. The Dutch code of conduct for central government officials[253] does not make such a claim but speaks of "loyalty to the public cause". The Romanian code obliges officials to "defend the prestige" of their employer, leaving some room for individual decisions that would be more to the advantage of another public institution, without lowering the prestige of their own employer.

Conflicts of interest are relevant for corruption prevention because legislation and doctrine go further than just repression by incriminating certain behaviour. To prevent conflicts of interest, public officials have reporting obligations and the State has monitoring obligations and decision-making powers to prohibit or allow certain activities, positions, or interests. The State must also prevent apparent conflicts of interest, since they (allegedly) undermine the public trust in government and corrode the rule of law.

All public sector corruption stems from a conflict of interest – solved at the expense of the public interest – but most of these conflicts are left to the official involved, to handle according to his/her training, moral values, or fear of punishment. For example, if a bribe is offered, this creates a conflict of interest between the private interest of immediate enrichment, and the public interest of acting impartially and objectively. The public official involved solves the conflict by choosing to accept the bribe or not. Put in this situation, the official should know what to do. Many conflicts are much subtler than a bribing attempt, such as abuse of insider knowledge. Others do not involve monetary benefits: giving priority to your good neighbour by putting his application at the top of the stack, making some additions to your niece's CV before sending it on to the recruiter, or voting in favour of granting a vacant lot to the sports club that you are a member of. A conflict of interest may thus be not at all obvious to the public officials involved. Therefore training and education, as discussed in the previous chapter, are important.

Incompatibility rules

These rules forbid specific activities (such as selling to the government), situations (such as occupying a certain position) or passive interests (such as owning stock) for private persons who are also public officials – in some cases, aspiring or former public officials. They are illegal conflicts of interest ipso jure, not because the official involved decides to further her own instead of the public interest but because the risk of that happening is considered too great.

Sometimes, the difference is unclear. The *Loi Le Pors* calls incompatibilities both "*situations de conflit d'intérêts"* and "*incompatibilités"*. But the Romanian integrity agency gives the following rule of thumb: A situation of incompatibility does not require making decisions, while an illegal conflict of interest arises when you make the wrong decision[254].

[253] See https://zoek.officielebekendmakingen.nl/stcrt-2019-71141.html, Article 2.2.

[254] See Guide on incompatibilities and conflicts of interest, ANI, 2018: https://www.integritate.eu/Files/Files/Ghid_Incompatib_ConflicteInterese_2011/ghid%20incomp%20si%20conflicte%20august%202018.pdf.

One can question whether this is a conceptually sound difference. If incompatibilities are a subcategory of conflicts of interest, then where is the boundary? There are several reasons why there are two categories. First, 'incompatibilities' are formally and specifically designated by the legislator and apply regardless of the actual existence of a conflict of interests. For example, if a public official may not be also employed by a state-owned company, this does not mean that there is a real and present conflict of interests. Other conflicts of interest are not specified but are laid down in non-exhaustive norms. They must be inferred from the circumstances, and acted upon, by the involved persons. Second, there is a difference in salience: Incompatibility rules are more visible and can serve to sustain the appearance of 'correctness' better than rules that only apply when the situation presents itself. Third, there is a difference in effect. A formal incompatibility forbids a certain activity or situation. It is impossible to follow the law and to find oneself in the prohibited situation. Other conflict of interest rules rely on recusation. Either the official in a conflicting situation recuses themselves or they are removed from it by management. But unlike the incompatibility rule, this does not prevent informal ways of influencing. For example, the director of a public institution normally sits on a committee that approves all events expenses. When the director's husband, who owns an events agency, competes for a project, the director recuses herself. But the other committee members may still feel the pressure, especially in institutions where the director is a powerful personality who can make things (such as a promotion) happen or not.

We will now discuss some other characteristics of incompatibility rules. They are detailed in some areas (financial interests), and generic in others. It is also one of the few categories of rules where there is a significant difference in philosophy between the studied countries. The difference between incompatible positions, incompatible activities, and incompatible interests is reflected in legislation in The Netherlands, where the rules for incompatibilities focus on elected officials, some top executives and magistrates (not discussed here) and on the financial interests of senior management. The freedom of public officials to occupy various positions is also limited by a number of what is called in Dutch *onverenigbare functies* (the literal translation of incompatible positions, but in the Dutch context this means positions within the public sector) and incompatible activities (*nevenwerkzaamheden*) separate from their public sector work.

A certain scale of severity can be applied within the range of conflicts of interest/incompatibility rules, each with a different impact on the freedoms of public officials:

1. The strictest are rules that forbid certain simultaneous activities outright;
2. Then there are rules that subject these activities to a special permission;
3. Less stricter rules allow the activities if they are reported (internally or in a public register). The requirement of a special permission as above of course includes the obligation to report;
4. The least impeding are rules that leave the appreciation of the risk of conflicts of interest to the individual official without any ex ante check but impose sanctions if breached.

The first type of rules would – theoretically – be necessary to use if there is a structural conflict of interest (i.e. a conflict that inevitably results from the nature of the position itself, for example the conflict between supervising banks and managing banks) with high risks for society (Moret-Bailly et al., 2017, p. 44). The other types can also be applied using risk as a guide, see also below under section 4.4.

The determent may not vary so much between these types of rules because that depends on the risk of being found out, the sanctions being the same (on the disciplinary scale and, depending on how deliberate the offending behaviour is, the criminal one). If the risk of getting caught and the maximum sanction are the same for type 1 and type 4, type 4 is preferable because it is less

restrictive to the freedoms of officials. This is one of the main differentiators between the types. Another difference is in the burden of proof and the ease of enforcement. For example, if public officials are not allowed to be the administrator of a company, this can be easily checked in the trade register. But if this interdiction is conditioned, checking the register is not conclusive. For this reason, it could be in the overriding public interest to apply a type 1 rule.

Even if fully adhered to, incompatibility rules have a limited scope. In the current structure of the public sectors in the three countries, incompatibility rules can preclude only some of the possible risky situations. If an official must decide on who gets a building permit, he/she may be prevented by such rules from entering a situation in which he/she can give one with priority to a family member. But it is not possible to make specific rules for all categories of possible private interests (siblings, neighbours, classmates, etc). For this reason, generic rules can be employed, such as "if the request for a permit is made by or on behalf of a person in whom the official has a private interest, the official must recuse him- or herself from the procedure". This last option has its own risk of leaving more to the appreciation of the official in question. A 'four eyes' procedure is no remedy either, because colleagues or superiors cannot know all the persons in whom their colleague has a private interest. An explicit declaration regarding the absence of any private interest might constitute some barrier (similar to air travellers having to state that they carry no explosives), but no guarantee. And evidently, incompatibility rules do not prevent conflicts of interest with other sources, for example the offer of a bribe.

Besides the distinction between 'self-managed' (number 4 in the list above) and 'regulated' conflicts of interest (the other three), the literature – and the law – differentiates between 'actual' and 'apparent' conflicts; the latter category should also be avoided to prevent the undermining of trust in public institutions (the Romanian definition is an exception, see below). This sometimes clashes with other public interests. For example, an advisory board that issues recommendations on subsidies for the use of new technology in hospitals must be composed of persons with such a high degree of medical expertise that they probably also have a private interest in getting cheap access to state-of-the-art equipment in their role as doctors. It is in the public interest to have subsidies handed out by impartial persons, but it is also in the public interest to have them handed out by experts in that field.

Incompatibilities do not solely exist to prevent (the appearance of) conflicts of public with private interests. They must also prevent conflicts of different public interests. Some incompatible sets of positions that are both in the public sector are not imposed to protect the integrity of the public service but to respect the configuration of the trias politica. In The Netherlands for example, a cabinet Minister cannot be at the same time member of Parliament. The same type of rules exists in the other two countries. This 'constitutional' type of incompatibility falls outside the scope of this study. With other incompatible sets, the distinction is not so clear. For example, Romanian public officials are not allowed to work for state enterprises (Law 161/2003, Art. 94[255]). The purpose of this could be to keep a distance between the public service and economic undertakings, for reasons of sound management. But whatever the motive, one of the effects is that this interdiction cuts off an avenue for conflicts of public versus private interests, not only public versus public interests such as in the example of the minister.

Which rules should apply in which circumstances? Ideally, incompatibility rules are based on a risk analysis, depending on the size of the possible private advantage, the effort to obtain it, and other factors that influence the proper judgment that would have to be used were there no

[255] See also section 2.4.4.

incompatibility – social pressure, moral standards. These factors determine whether the official can be trusted[256] to do the right thing if a conflict of interests arises, if he/she must be prevented from it by being declared incompatible, or if an intermediary check of reporting the intended action or requesting permission must be put in place. It is also possible that incompatibility rules, restricting some of the choices that officials can make, infringe upon the fundamental rights of individuals such as the right to be elected, the right to protest, or the right to privacy. The latter is restricted when public officials have to publish their interests in a register. The restrictions must be checked against (constitutional) conditions for the restriction of fundamental rights; The 'cost' of limiting the freedoms of officials must also be weighed in. Furthermore, the benefits of an incompatibility rule must be weighed against the risks and against the effort of enforcing it. The benefit being the absence of a negative outcome (corrupt behaviour not happening), it is very difficult to quantify. However, foregoing such an exercise would open the door for arbitrary restrictions of officials' freedoms at a cost that may include resentment against preventive rules that could be perceived as useless burdens.

The fact that incompatibility is a relatively well-defined legislative area creates the opportunity to include at the end of this chapter three brief case descriptions of the 'costs vs. benefits' - the proportionality and enforceability of the relevant rules.

4.2. The law

Definitions of conflicts of interest

Conflicts of interest are a separate category of illegal behaviour in the legislation of all three countries. In Dutch it is called *belangenverstrengeling,* literally 'entanglement of interests', an overarching category that includes incompatibilities and illegal secondary activities but also, among others, bribery and illegal financial interests. In The Netherlands, conflicts of interest are not defined in the law. The general law on public administration (*Algemene wet bestuursrecht*, see section 2.4.5) prohibits biased decision-making and the influencing of public body decisions by public officials (among other persons) appointed there, who have a personal interest (Art. 2:4). The public body is responsible for preventing this from happening. Still, this article indicates which behaviour is unacceptable, which can be and is used as a basis for explicit prohibitions in internal regulations such as codes of conduct.[257]

In France, the term is *conflit d'intérêts*, meaning "every situation of interference between a public interest and a public or private interest that can or appears to influence the independent, impartial and objective exercise of [the public official's] duties", defined by the *Loi Le Pors*, Art. 25 bis; an identical definition can be found in Law 2013-907 that applies to the government, local elected officials, magistrates, and heads of institutions. France is the only of the three countries where a conflict of a public interest with another public interest is specifically included in the concept, but not the only country that provides countermeasures, such as the interdiction of combining two full time public sector jobs. The Romanian definitions, as we shall see below, do not include public/

[256] This is a topic for further research: Trust and anticorruption legislation.

[257] And also in case law: The Raad van State (supreme court for administrative law) annuls decisions by public officials with private interests or the appearance of private interests (ex. ECLI:NL:RVS:2002:AE6228). The court motivates this extension by the general goal of the article, to provide guarantees that decisions are made with impartiality. It should be noted that the responsibility in this case law lies with the public body, not the individual public official.

public conflicts but Romanian law does prohibit the combination of different public sector jobs, in an even stricter way than in France because even part time jobs or activities cannot be combined with any other public sector jobs, unless the official in question is temporarily relieved from their duties.

In Romanian the concept is called *conflict de interese*. It has three definitions in the administrative law[258]. Art. 70 of Law 161/2003 defines it as "a situation where a person in the exercise of a public office has a personal interest of a pecuniary nature, that could influence the objective fulfilment of their duties under the Constitution and other laws" (see also section 2.3.4). This definition applies not only to public officials but also to local elected officials and members of the government. The definition is narrowed by an exhaustive[259] list of conflict situations in Art. 79 of the same law. This list does not apply to the other addressees of the law.

a) Deciding upon a request of any kind, other kinds of decisions or participating in decisions, regarding natural or legal persons with whom they have relations of a pecuniary nature;
b) Sitting on committees with public officials who are their spouse or first-degree relatives (children or parents);
c) Making decisions in the exercise of their duty if those decisions may be influenced by their own pecuniary interests or those of their spouse or first-degree relatives.

In the case law based on law 161/2003, the conditions for the existence of a conflict of interests based on Art. 79 under c) are formulated as follows[260]:

- The person in question must hold a public office;
- In the exercise of this office, they make decisions (on their own[261]);
- Those decisions are influenced by pecuniary interests of themselves, their spouse or first-degree relatives.

If one of these situations, a), b), or c), occur, the official in question must abstain and report the conflict to management. Management must then replace the official who finds himself in conflict of interests. Note that non-pecuniary interests, or apparent interests, cannot be conflicting according to this definition. The word 'objective' is not defined in the law. In the context of loyalty towards the public service, this word must be understood as 'impartial'.

Theoretically, the exhaustive list that Law 161/2003 uses narrows the options even further. It follows from this narrow definition that, in the absence of one or more of these conditions, the public official in question cannot be sanctioned at the disciplinary level for letting private interests prevail over public interests. Management can invoke the general rules of the Administrative Code regarding the proper conduct of a public official, but in court this could lead to issues. For example: A public official has awarded a subvention preferentially to his nephew (a 3rd degree relative), who barely fulfilled the conditions for eligibility. The official cannot be sanctioned under the conflicts of interest rule, but the employer can invoke the general rule from the Administrative Code, that public officials must be impartial (368). A defensive argument could be raised, however, that what constitutes impartiality is defined by the lex specialis so that the public official in question cannot be sanctioned for such an offence. It is observed that the criminal law follows a strict principle of legality but in disciplinary matters the employer usually has more discretionary powers to

[258] There is also a criminal law definition, in Art. 301 of the criminal law. See section 2.4.2.

[259] Case law regarding this exhaustiveness: Decision no. 2389/2017 of 25 May 2017, Curtea de Apel Bucuresti.

[260] Decizie nr. 160/2017 din 23-nov-2017, Curtea de Apel Oradea

[261] Decizie nr. 201/2017 din 08-nov-2017, Curtea de Apel Ploiesti

determine whether a conduct was or was not in violation of the rules. In this case, it seems that the disciplinary authority is more restricted than usual by the 'closed' definition. There is also an advantage to this approach, namely that illegal behaviour is easier to detect and to prove in court.

Law 7/2004 on the Code of Conduct for public officials, abrogated in 2019, had a broader definition of conflicts of interest: "any situation or circumstance where the indirect or direct personal interest of the public official conflicts with the public interest, so that their independence or impartiality in decision-making or the timely and objective fulfilment of their duties in the exercise of their public office, is affected or could be affected". However, the provisions on conflicts of interest and incompatibilities in the Administrative Code, that replaces it, refer to Law 161/2003.

Law 98/2016 regarding public procurement contains a separate definition of conflicts of interest, which is also broad: "any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure" (Art. 59). This definition is identical to the text of Art. 24 of EU-Directive 2014/24 on public procurement[262], which Law 98/2016 transposes, the only difference being that the Directive provides it as a minimal requirement: "the concept…shall at least cover…".

This definition means that for public procurement,

- The appearance of a compromised impartiality/independence counts as a conflict of interests;
- Any interest can be conflicting, not just monetary interests like in law 161/2003;
- The formal relation to the persons with whom the decision maker/influencer has ties is irrelevant (it can be a relative, friend, neighbour, colleague, etc.).

The Code of Fiscal Procedure[263] contains yet another definition of conflicts of interest, also a broad one. Article 44 states that there is a conflict of interest if the representative of the Tax Authority in the respective procedure:

- Is also a taxpayer, or the representative, spouse or relative to the third degree of the taxpayer;
- Can obtain an advantage or incur a disadvantage, directly or indirectly;
- Finds himself in conflict with any of the parties;
- Other cases as defined in the law.

Considering that a conflict of interest is defined differently depending on the situation (integrity law, procurement law, fiscal law, criminal law), it is safe to say that the law is ambiguous. The practice may be less ambiguous, if the cases brought by ANI are all based on Law 161/2003. Still, it is difficult to explain that in the one situation a public official can have conflicting interests of a non-pecuniary nature and in the other situation he cannot.

By way of conclusion: The three studied countries use different definitions of conflicts of interest; Romania even uses multiple definitions that may apply to the same situation. But they are not fundamentally different. The main element of all three definitions is the interference of private interests in public decisions. None of the countries require intent for the application of disciplinary sanctions. All of them include non-financial interests and the appearance of conflicts of interest (if for Romania the broadest definition is used). It should be noted, however, that the Dutch legal

[262] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 094 28.3.2014, p. 65.

[263] Codul de procedură fiscală, Legea 207/2015, M. Of. 547/2015.

provision protects society from wrong government decisions, but the two other countries have definitions in the deontological realm that also protect government institutions from personally motivated officials by defining a personal responsibility in the law.

Different principles on incompatible activities

While the laws in the three countries are highly similar on some conflicts, such as accepting gifts, on the matter of secondary activities – that could lead to illegal conflicts of interest – the Dutch principle is quite different from the Romanian and French ones: Concurrent activities are allowed, with some exceptions. To illustrate this, the Dutch Code of Conduct for state officials describes the existence of commercial, employment or financial activities as a current situation and even encourages officials to engage in unpaid secondary activities (because it would connect them better to society).[264] The code of conduct for the City of Amsterdam has the same message.[265] Dutch law does consider the issue important, hence its inclusion of incompatibilities in Article 8 of the *Ambtenarenwet*. This article instructs the official to report high-risk secondary activities, while Article 5 obliges public sector employers to provide for registration of high-risk secondary activities, publishing them in some cases and reporting financial interests (among other topics).

Contrary to the Dutch approach, The French law (*Loi Le Pors,* Art. 25 septies) states as a matter of principle that public officials "cannot engage in any private professional commercial activities whatsoever" and the law on public transparency (law 2013-907, Art. 1) contains a general ban on conflicts of interest for members of the government, local elected dignitaries, and leaders of public institutions. Romanian public officials can be active in the private sector, only "without any direct or indirect relation to their duties" (Law 161/2003, Art. 96)[266]. French and Romanian law thus adopt starting points that are the opposite to the Dutch one.

What activities are incompatible?

This paragraph is based on the main integrity legislation. No other special laws were reviewed for this purpose; some specific incompatibilities have thus been left out, for example the incompatibility of the *maître d'ouvrage* with almost any other role in the execution of public works in the new *Code de la commande publique* (public procurement law)[267] in France. The comparison below is between the most common rules for the largest group of officials in each country. Also left out are restrictions to the freedom of expression and right to protest, as it seems highly unlikely that private *personal* interests are furthered with those activities.

Secondary activities in general

The Netherlands

The Dutch *Ambtenarenwet* provides in Art. 8, under 1 a, that secondary activities (*nevenwerkzaamheden* – private activities of any kind while one is public official) are forbidden "if the good fulfilment of the position or the public service related to the position cannot be reasonably guaranteed". The

[264] Gedragscode integriteit Rijk, Art. 4.5. See also section 3.2.

[265] Code of conduct city of Amsterdam Art. 21.2, see https://www.amsterdam.nl/pga/21-gedragscode-ambtenaren-gemeente/21-2-regels-tegengaan/.

[266] The more recent Administrative Code has no incompatibility regimen of its own, it refers to Law 161/2003 in Art. 429 and in other articles.

[267] See Art. L2422-11. JO of 5/12/2018. Entry into force: April 1, 2019.

implementation of this principle at the institution level is no longer guaranteed by collective instruments, as it was under the old law. Now that the labour law is applicable to public officials, the contract parties have chosen not to include rules on secondary activities in the collective labour agreements (*CAO*). Each local employer must adopt their own procedure. For central government personnel, there are some further instructions in the Code of Conduct, which contains a checklist to establish the risk of secondary activities, instructions for reporting, and some guidance for proportionality assessments. The reasonable guarantee condition can be applied in a strict way; one case law example shows that activities in financial services, although unrelated to the actual position of the official involved, were not allowed because they took place in the same economic sector and would affect the image of the Tax authority where the official worked.[268] This condition does not put the burden of proof on the official in question, i.e. they do not have to prove that the activity does reasonably guarantee the fulfilment of the position and/or the public service, but it does leave the administration the possibility to refuse permission if it can convincingly argue that there is *potential* interference with the public service or the individual's duties. Art. 8 under 1.c, *Ambtenarenwet* adds an interdiction regarding financial interests, under the same conditions as above (reasonable guarantee of good fulfilment). The reporting of financial interests is intended inter alia to prevent misuse of inside information. What constitutes interference is not defined in the law of any of the studied countries. Obvious interference is when a decision-maker decides directly on a matter that she is interested in privately. But there are many forms of interference, some of them completely outside of the formal hierarchy in the public service. Consider, for example, the situation where a relative of the director of one department of a small institution requests a subvention that must be decided upon by an official in a different department. Formally, the interests are completely separated and there is no conflict. In reality, it is not unthinkable that pressure is exerted on the decision maker, or that the decision maker anticipates on pressure, fears for their chances of promotion, and acts accordingly. Or that they do the opposite and immediately exclude the relative from the subvention in order to avoid any suspicions. And even if there were no such pressure, even the appearance of interference is illegal.[269]

Article 8 of the Law regarding public officials also an explicit interdiction to participate, directly or indirectly, in the delivery of products or services "to the benefit of any public service" unless they have obtained a waiver from their employer. This would imply that one employer can waive the restriction that applies to any public service but that would in practice be ultra vires. Public sector workers who wish to become vendors for public services may have to apply for a waiver from each potential client.

Many local authorities have adopted their own rules on secondary activities (even under the old regime) and the VNG offers a model decision[270]. This model document considers activities incompatible if they are or may be contrary to the interests of the municipality or with the involved person's position within the municipality.

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[268] CRvB 7 november 1996, LJN ZB6459, TAR 1996, 210, with notes by C. Riezebos, ECLI:NL:CRVB:1996:ZB6459. The legal criterion at the time was that the activity must not be harmful to the fulfilment of the official's duties. The court extends this to potential harm.

[269] See this article on the definition of conflicts of interest (Moret-Bailly, 2011) for an elaboration on the concepts of impartiality, loyalty, and independence in connection with that of interference.

[270] See https://vng.nl/onderwerpenindex/arbeidsvoorwaarden-en-personeelsbeleid/integriteit/nevenwerkzaamheden. The instrument is dated 2014. Accessed on May 14, 2020.

It should be noted that the Dutch rules do not apply to (temporary) staff who are not appointed, unless explicitly stated or referred to in the agreement the involved person is working under, or if the person has signed a declaration of adherence.

Romania

In Romania, the Administrative Code refers to the lex specialis, stating in Article 429 that public officials must comply with the rules regarding conflicts of interest and incompatibilities. Using the definition from Law 161/2003, the scope of conflicts of interest is limited in its Art. 70 to actual conflicts of a pecuniary nature. The law lists in Art. 79 the conflicts of interest (decision-making or sitting on committees where personal interests are involved, see above under definitions) and in Art. 94 and following the incompatible activities for public officials. Contract workers in the public sector do have the obligation to fill out asset declarations but are not subject to these incompatibility rules. Here, the principle is that the status of public official is incompatible with any other public office, quality, or activity, even unpaid. Exceptions are limited, e.g. officials who represent the State on the board of an enterprise of which it has economic ownership – but they can still find themselves in a conflict of interests. Another incompatibility is that between family members (Art. 95): spouses, parents, or children may not be direct reports of each other (in comparison, members of the judiciary must recuse themselves from procedures involving relatives including the 4th degree). Educational, scientific, or artistic activities are compatible, as are positions in the private sector without "any direct or indirect connection with the tasks of the public office" according to the formal job description (Art. 96). What this means is for example that a public official who has auditing tasks cannot be a trainer for an association working in the area of public audits.[271] However, the court looks at concrete activities and not only at purely formal legal statuses to establish whether holding a public office is incompatible with that of being administrator of a company.[272] Law 161/2003, Article 98, further prohibits public officials from occupying leading positions in political parties. High-ranking public officials cannot be member of a political party or occupy a leading position in a union.[273] The Administrative Code prohibits legal assistance by public officials in cases against the State or the public entity where they work (Art. 434). The same law prohibits some political activities in the exercise of the public office: 1) fundraising for political parties, independent candidates, or related organisations 2) offer logistic support to candidates for elected office, 3) display politically affiliated signs and markings, and 4) express their political opinions during or participate in political meetings during work.

France

In France, the oft mentioned *Loi Le Pors* is the basis for the incompatibility regime regarding public officials. They must avoid any situation in which an interest, public or private, influences or appears to influence the independent, impartial, and objective exercise of their duties (Art. 25 bis[274]). While the appreciation of whether they find themselves in such a situation is left to individual employees in many cases, one category of higher-risk public officials, designated by Décret n° 2016-1967[275]

[271] Case law: Decision no. 1675/2016 of 31 May 2016, Inalta Curte de Casatie si Justitie

[272] Case law: Decision no. 1024/2016 of 31 March 2016, Inalta Curte de Casatie si Justitie. See also: Decision no. 4151/2017 of 06 November 2017, Curtea de Apel Bucuresti

[273] Art. 98 of Law 161/2003. Art. 242 of the Administrative Code prohibits this for secretaries-general of local authorities.

[274] Art. 2 of Law 2013-907 on transparency of public life gives the exact same definition.

[275] See section 2.6.5.

must undergo a pre-emptive check by submitting a declaration of interests, the acceptance of which is a condition for their appointment (Art. 25 ter). These officials are in management positions, such as directors and *chefs de service*[276], but also officials who have certain powers, e.g. to accord and withdraw certain permits and authorisations. The declaration is then analysed by the employer, if necessary, with the assistance of the HATVP (High Authority for transparency in public life) and if an incompatible situation is found, the employer must take the necessary measures. Then, if the interests of the involved person change 'substantially' in the course of her employment, the declaration must be updated and submitted again, within two months.

Another category of officials[277], not quite the same but with many similar positions as the list in Art. 25 ter, must divest of all their financial interests within two months after appointment and for the duration of their position. This category is characterized by their 'economic and finance responsibilities' (Art. 25 quater). They must "take all necessary measures to have their financial instruments managed […] so that any control from their part is excluded". The term for control is *droit de regard*. This means that for this category, the use of financial instruments is incompatible with their position. To prevent formal divestment while the assets remain under indirect control, the exact conditions are described in a separate government decision[278] and the measures taken must be reported to the HATVP. Article 25 quinquies establishes the obligation for certain public officials to also submit a declaration of assets (*declaration de situation patrimoniale*), but the purpose of this is to compare declarations before and after occupying the position to see if there was suspicious enrichment. This procedure can lead to the discovery of incompatibilities but is not principally a measure aimed at incompatibilities.

Article 25 septies of the law (not applicable to contract workers of public institutions that are independent from ministerial or local government control) states the principle that commercial (*lucrative*) activities are off limits and proceeds to describe some applications of and exceptions to this principle. In the first place, full-time employment is incompatible with professional activities in the private sector, except for voluntary work for non-profit entities and for a list of 'accessory activities' determined by law[279] for which the official must obtain permission from management. These activities are mainly situated in public interest, education, sports and under the condition that they are 'compatible' with their position as public official and do not interfere with the 'normal operation, independence or neutrality of the public service' (Art. 10 of *Décret 2020-69*). In the second place, part-time officials may under certain circumstances still engage in paid private

[276] A formal category of officials listed in decrees per Ministry. Included in this category is the position of *sous-directeur*.

[277] The positions in this category are listed in Annex I of Décret n° 2017-547 du 13 avril 2017 relatif à la gestion des instruments financiers détenus par les fonctionnaires ou les agents occupant certains emplois civils. It appears to be a fine-tuned list with for example, from the Ministry of Agriculture, the Director-general for food production but not the other directors-general, and from the Ministry of Economy and Finance a larger number of top officials.

[278] Décret n° 2014-747 du 1er juillet 2014 relatif à la gestion des instruments financiers détenus par les membres du Gouvernement et par les présidents et membres des autorités administratives indépendantes et des autorités publiques indépendantes intervenant dans le domaine économique, JORF no.°0151 of 2 July, 2014.

[279] Décret n° 2020-69 du 30 janvier 2020 relatif aux contrôles déontologiques dans la fonction publique, JORF 26 of January 31, 2020. Allowed activities are consulting (if unrelated to any public sector entity), teaching, sports, cultural activities, farming/fishing, non-paid work in shops or offices, social assistance for relatives or partner, odd jobs, public interest activities (in non-commercial settings), international cooperation, care for children or elderly persons, or housekeeping, or selling good that they made themselves.

activities, with permission from their employer. The employer retains discretion for these first two categories of exceptions, in interpreting the concept of 'compatible activities', if necessary after consulting the HATVP on starting a business in part-time. In the third place, creative activities in the sense of intellectual property law are allowed. In the fourth place, there are some temporary exceptions. However, some interdictions are absolute. A public official may not concurrently:

- Act as expert or lawyer in litigation, in any jurisdiction, where natural or legal entities of the public sector are involved (except to assist a public entity that does not compete on the market);
- Acquire or hold any interests in corporations under the control of their employer or in relation to it, that would compromise their independence;
- Occupy two or more full-time positions.

Public procurement

The interdiction of participating, for him/herself or as an intermediary, in public procurement procedures is absolute in The Netherlands and can only be waived by specific permission (Art. 8 of the Law regarding public officials). The does not specify whether this permission must be entered in a register or published somewhere, which makes practice hard to verify. In Romania, the handling of public procurement conflicts of interest is left to the contracting authorities and ANI, using the broad definition described above (see for a case study on Romanian public procurement law section 9.3), while Article 444 of the Administrative Code prohibits also the acquisition of goods *from* the State or the local authorities by public officials if they collaborated on the sale, had inside knowledge, or had the power to influence the proceedings. In France, the prevention of conflicts of interest in public procurement is based on the general obligation of impartiality[280]. Specific conflicts of interest rules do not appear in the new *Code de la commande publique*. Many institutions have adopted codes of conduct regarding public procurement, but these do not necessarily contain specific provisions on conflicts of interest.

Accepting gifts

A gift of goods or services does not have to be a bribe, but often creates the appearance of reciprocity, especially when it is valuable. In all three countries, gifts are severely restricted for public officials. Gifts are regulated in Art. 8 of the Dutch Ambtenarenwet, where the request or receipt, in the exercise of their duties, of compensations, rewards, gifts, or promises is conditioned by permission of the institution's management (this permission can be general, for example 'gifts of less than 50 EUR are allowed'). The *Gedragscode integriteit Rijk* adds invitations to events and sponsoring to the list. The Romanian Administrative Code prohibits "gifts or other advantages", except free goods received in the exercise of the official's duties according to protocol (Article 440). Local rules may further specify this. French law does not specifically prohibit receiving gifts; this can be specified at the organisation level. The city of Toulouse for example has a code of conduct that prohibits accepting gifts of more than 150 EUR in value. Also, accepting bribes is not a specific disciplinary offence in France, only a criminal one.

Incompatibility with the status of former public official

In France, there has been much discussion about the phenomenon of 'pantouflage' – persons who leave the public service and could use their old knowledge and contacts for the benefit of their new

[280] See for example the decision of the Conseil d'État in the Applicam case from 2015: ECLI:FR:CESSR:2015:390968.20151014.

private sector employer[281]. This is potentially a form of using privileged public sector information for private gains and could have a detrimental impact on the public opinion. Sometimes these former officials return to the public sector after a few years, contributing to the image of the 'revolving door'. In all three countries, this notion is distinct from lobbying – although lobbying organisations might employ former public officials – and from abuse of confidential information. Related to the concept of pantouflage is that of interest-taking (*prise illégale d'intérêts)*. If a French former public official is employed by, consults, or invests in a company that she, as a public official, supervised, contracted with, advised the authorities about, or evaluated, this is a criminal offence (Criminal code, Art. 432-13) if it happens within three years after leaving the public service.[282] Third party companies with at least 30% common capital assets or that have signed an exclusive contract with any of the mentioned companies fall also under the interdiction. The parliamentary report that was discussed above under 3.2.2 evaluates this criminal offence under par. 1. A. 4. as rarely encountered in practice (6 decisions from the supreme court between 1996 and 2018) but necessary nevertheless as a building block, a deterrent, of the integrity framework. The same report speaks of the unfamiliarity of public officials with this criminal offence, so that the deterring effect of it may in fact be small. The Netherlands does not incriminate this behaviour, but the Romanian Law 78/2000, Art. 11, refers to similar conduct while the official still works in the public sector or up to 5 years after their specific mandate (to supervise, to verify, reorganise or liquidate an economic operator) has ended – regardless whether they still are in the public service.

In the disciplinary sphere, Government decision no. 2020-69 in conjunction with Art. 25 octies of the *Loi Le Pors* further establishes that French public officials (and contract workers) who leave the service permanently or temporarily must inform their employer of any private sector plans at least three months before starting the private activity (any sort of paid work), and again each time they change jobs within a period of three years from leaving the public service. The report from the official is forwarded, with an opinion, by their direct employer, with the advice of the *référent déontologue* if necessary, and in second instance evaluated by the HATVP. The criterion for compatibility is the absence of a risk of affecting the

a) normal functioning,
b) independence,
c) neutrality of the public service, and
d) principles of dignity, impartiality, integrity and probity.

The HATVP also declares the activity incompatible if it thinks that it would constitute the criminal offence described above. Besides compatibility and incompatibility, the HATVP can also give a verdict of compatibility under certain conditions. The decision is binding for both parties and non-compliance can lead to various sanctions for the former official (a pension cut, termination of a labour contract).

[281] A series of high-profile cases have fueled this debate in many European countries, for example concerning the former German Chancellor Schröder, former EU Commission president Barroso, or in The Netherlands former Prime-minister Kok (none of these persons faced legal issues because of their pantouflage). A recent scandal in France revolved around Mr. Kohler, a high ranking official close to President Macron. The phenomenon is remarkably absent from the Romanian press, possibly because it is overshadowed by scandals involving other types of corruption.

[282] Article 432-12 contains similar provisions regarding persons invested with public authority or elected officials but with a higher sanction and some exceptions for small municipalities.

The Netherlands has implemented a few restrictions through policy instruments (codes of conduct, local administration policy, procurement policy), that apply to two scenarios:

1) former public officials offer their services to their former employer, or

2) persons at a sensitive position within the public service leave for the private sector.

Sensitive positions are for example those who inspect or oversee private actors, or those who have access to inside or secret information. In the first scenario, the former employer has the obligation to carefully weigh the risks of hiring someone who used to work there. The *Gedragscode integriteit Rijk* mentions inter alia an image risk if former officials get rehired as consultants at higher costs. In the second scenario, a so-called 'cooldown period' can be established by mutual agreement. In this period, the public official has restricted tasks or access to information before leaving the service. It is a voluntary arrangement with no sanctions, unless the former public official breaches confidentiality (or insider trading) obligations. Even though there are no sanctions for former public officials, contracting former colleagues can lead to disciplinary measures for those who remain in the public service, for a conflict of interests in the form of favouritism. In the local administration, pantouflage does not seem to be a major issue. In a recent report of the local court of auditors on public procurement in the city of Amsterdam, the subject is mentioned as an issue that did not receive sufficient attention, but not as a problem that requires action.[283] However, the 2019 GRECO report on The Netherlands considers this lack of regulation 'striking' in a section on post-employment of top officials, and recommends introducing rules for top executive functions.

The Romanian National anticorruption strategy for 2016-2020 (SNA, *Strategia națională anticorupție,* the fourth strategy)[284] contains action points on pantouflage. It also indicates that knowledge about it was lacking at the moment of evaluation of the previous strategy (2012-2015). The strategy sums up a number of objectives for a 'system to manage the migration of public officials to the private sector':

1) To ensure that no abuse is made of certain information obtained in the public sector;
2) To ensure that the exercise of public authority by an official is not influenced by personal gain, such as hopes or expectations of a future career;
3) To ensure that the access to information and contacts of current and former public officials are not used for unjustified gains.

There is no mention of lobbying or rehiring former officials as consultants. Recent salary raises in the public sector have made the chances of migration to the private sector for 'rank-and-file' officials smaller.[285] In the law, the rule is similar to the French one. Art. 94 of Law 161/2003 prohibits former public officials to work for or offer consulting services to commercial entities (state-owned or private) that they supervised or inspected, three years after leaving the public service. As mentioned above, a part of pantouflage conduct is included in the criminal law (Article 11 of Law 78/2000). Lacking specific provisions and considering that the involved persons can no longer be sanctioned under disciplinary law, it is unclear whether there are other sanctions than

[283] The final report for Amsterdam from 2017: https://www.rekenkamer.amsterdam.nl/content/uploads/2017/03/Bestuurlijk-rapport_Inhuur-met-beleid_met-kaft_DEF.pdf.

[284] See also chapter 2. Adopted by Government decision no. 583/2016 and published in M.Of. no. 644 of 23.08.2016.

[285] According to the Romanian institute of statistics, in October 2018 the average net salary was 4254 RON in the public sector, compared to the national average of 2720 RON. See http://www.insse.ro/cms/files/statistici/comunicate/castiguri/a18/cs10r18.xls.

civil law ones, in which case damages must be proven. There is specific legislation only for public procurement. Emergency Ordinance no. 66/2011 provides in Art. 13 that beneficiaries of EU funds may not hire anyone who was involved in verifying requests for funding within 12 months before signing the financing agreement. The remedy is that the competent authorities must ask the court to annul the agreement signed in breach of this article. The official SNA evaluation report for 2019 does not report any concrete progress on this issue.[286]

Summary

The conflicts of interest/incompatibilities in the three studied countries are summarized in the table below, i.e. the legal interdictions for public officials – again, with the exception of incompatibilities with political offices. For Romania, following national practice, the definition from Law 161/2003 is used.

Table 10: Incompatible activities

No.	Incompatible with public office	Involved positions	Country
1.	Any secondary activity that (potentially) interferes with the good fulfilment of duties	All those in scope	Netherlands
2.	Owning securities or having other financial interests or engaging in financial transactions if this (potentially) interferes with the good fulfilment of duties	All those in scope	Netherlands
3.	Participate in public acquisition procedures	All those in scope	Netherlands
4.	Accepting gifts, bribes unless with permission	All those in scope	Netherlands
5.	Refrain from expressing opinions or exercise their right to associate and protest if this (potentially) interferes with the good fulfilment of duties	All those in scope	Netherlands
6.	Accepting gifts/advantages that compromise impartiality	All those in scope	Romania
7.	Any other public office	All those in scope	Romania
8.	Any directly subordinated or superior positions held by spouse, parents or children	All those in scope	Romania
9.	Positions in the private sector (in)directly connected with the tasks of their public office	All those in scope	Romania
10.	Leading positions in political parties or related foundations or associations	All those in scope	Romania
11.	Membership of a political party or leading position in a union	Certain high-ranking officials	Romania
12.	Legal assistance by public officials in cases against the State or the public entity where they work	All those in scope	Romania

[286] The reports can be found here: https://sna.just.ro/Rapoarte+de+monitorizare.

13.	Political party activities	All those in scope, during the exercise of their duties	Romania
14.	Deciding upon a request of any kind, other kinds of decisions or participating in decisions, regarding natural or legal persons with whom they have relations of a pecuniary nature	All those in scope	Romania
15.	Sitting on committees with public officials who are their spouse or first-degree relatives (children or parents)	All those in scope	Romania
16.	Making decisions in the exercise of their duty if those decisions may be influenced by their own pecuniary interests or those of their spouse or first-degree relatives	All those in scope	Romania
17.	Working or consulting for a company previously overseen or inspected	Former public officials (3 years limit)	Romania
18.	Any interest, public or private, that influences or appears to influence the independent, impartial, and objective exercise of duties	All those in scope	France
19.	Controlled financial interests	Certain economic-financial positions	France
20.	Commercial activities	Full-time officials	France
21.	Any other full-time position	Full-time officials	France
22.	Expert or lawyer in litigation involving public entities	All those in scope	France
23.	Any interests in corporations under the control of the employer or in relation to it, that would compromise the official's independence	All those in scope	France
24.	Affect the public service by a private sector activity, after leaving the public service	Former public officials (3 years)	France
25.	Express religious opinions	All those in scope	France

'All those in scope' means all public officials within the scope of this study. This table shows considerable differences between the three countries, which is no surprise given the widely differing principles as discussed in the dedicated section above. The legislation in all three countries also shows some redundancy – specific interdictions are also covered by a general rule.

The general rules in each country cover conflicts of interest in the broad sense, not incompatibilities in the strict sense of incompatible positions, because they are not specific and the official involved must do their own assessment. They are the following:

- *France*: Any interest, public or private, that influences or appears to influence the independent, impartial, and objective exercise of duties;
- *Romania*: Any other public office, or any positions in the private sector (in)directly connected with the tasks of their public office;
- *Netherlands*: Any secondary activity that (potentially) interferes with the good fulfilment of duties.

The French and Dutch rules are similar, both open. They look at the effect of concrete situations and leave their appreciation to the individual involved. In practical guidelines, officials are encouraged to discuss any ambiguous situations with their management. The French rule includes the appearance of undue influence, while the Dutch rule has the criterion that activities are forbidden if well-functioning the office or the public service in general could not be guaranteed. This indicates an element of doubt, similar to the French rule: If such a guarantee cannot be given, in other words, if there *might* or *appears to* be undue influence, then the activity is forbidden. The effect is the same as the French rule, also depending of course on how the administrative judge handles this matter. The Dutch rule speaks of 'good fulfilment', the French one is more specific. There is a difference between the French 'interest' and the Dutch 'activity'. This is because the French rule also covers other conflicts of interest besides incompatibilities. The overarching rule in Dutch law is the obligation to behave like a good official laid down in the *Ambtenarenwet*, Art. 4. This rule is even broader than conflicts of interest, it applies to all aspects of integrity.

The Romanian general rule takes a different approach from the other two, excluding positions instead of activities, in a broad sweep. Unlike the French rules, the exclusion of all concomitant public offices does not offer exceptions for part time positions. Private sector positions or activities[287] are allowed (it does not follow from the law or case law whether this includes (unpaid) positions in the non-profit sector) if they have no connection to the tasks of the person's public office. This leaves much less room for interpretation. A few examples from the courts: offering business consultancy to farmers is incompatible with the office of legal counsel for a municipality[288]; a director in the regional subventions payment agency cannot be an accountant, because both positions require "the same professional knowledge and competences"[289]; being a manager in the local social assistance department is compatible with membership of and organisation of workshops for a non-profit association for social inclusion[290]. Activities or positions that are not connected in any way with the tasks of the public office but can interfere with their fulfilment, are allowed under this law but can be sanctioned under the Administrative Code, as a failure to act with impartiality. To fall under the scope of the criminal law, such behaviour would need to include active decision-making.

Each country also specifically prohibits certain simultaneous situations, the 'designated incompatibilities'. For comparison, the previous table is 'turned on its side' below. The 'open' rules

[287] The law only speaks of positions, but from the case law it emerges that this must be interpreted as including other professional activities: Decision no. 4259/2018 of 22 October 2018, Curtea de Apel Bucuresti.

[288] Decision no. 79/2018 of 11 June 2018, Curtea de Apel Suceava.

[289] Decision no. 731/2018 of 21 February 2018, Curtea de Apel Bucuresti

[290] Decision no. 691/2017 of 15 December 2017, Curtea de Apel Craiova

where the official must make an assessment are omitted here and the interdictions are grouped in topics:

Table 11: Incompatibility topics per country

Incompatibility topic	France	Romania	Netherlands
Financial interests	X		X
Participate in public acquisition procedures			X
Accepting gifts, bribes		X	X
Simultaneous positions	X	X	
Family interference		X	
Political parties		X	
Unions		X	
Litigation against the State	X	X	
Commercial activities	X	X	
Religious neutrality	X		

Please note that simultaneous activities not covered by a specific rule can still be covered by a general rule. Below is a list of takeaways.

- Financial interests are incompatible in some situations in France, for certain public officials. In The Netherlands they are incompatible for all officials if they could interfere with the exercise of duties. In Romania there is an obligation to report financial interests but they cannot lead to an incompatibility, only to other types of conflicts of interest. All Romanian public officials must declare their interests and assets, and all declarations must be published on the internet. However, these declarations are not requests for permission; they are filed for transparency and control reasons. This topic will be treated under section 6.3.
- In France and Romania, public officials cannot participate in litigation against the State. The prohibition is broader in France: Romanian officials are allowed to litigate or offer legal advice against any local authority other than the one they work for.
- The participation of public officials in public acquisition procedures is subject of an explicit interdiction only in The Netherlands. In practice, Romania's integrity agency operates a dedicated system to prevent conflicts of interest in public procurement, see section 9.3.
- A specific interdiction to accept gifts is missing in France, while in Romanian and Dutch legislation this topic is prominent. See also above in this same paragraph.
- Holding two or more simultaneous positions within the public sector is illegal in Romania. For France, this interdiction is only valid for full-time positions. Simultaneous commercial activities are less restricted in both countries, in spite of the explicit principles enounced in the law. In The Netherlands, one person's concomitant public sector positions fall under the general rule.
- Working with family members is only in Romania formally restricted.
- Romania is the only country that formally restricts activity in unions and political parties. These are obviously fundamental rights, but these restrictions have not been contested before the Constitutional Court so far. Some of them only apply to top officials.
- Abstention from any religious display is only in France a formal interdiction, because of the *laicité* principle that prescribes strict religious neutrality.

The table shows a wide divergence in the activities that the three countries have explicitly prohibited for public officials. Romania does not have a general prohibition to cover for unforeseen situations. This may explain the larger number of explicit interdictions but does not replace the lack of general cover. The fallback option for the Romanian disciplinary authorities is the general provision in the Administrative Code, mentioned above.

Internal Reporting

Public/private incompatibilities as described here are often hard to detect by the employer, because they take place in the private life of the public official. Even public/public incompatibilities may be difficult to track if there is no shared HR administration for the public sector. Only The Netherlands has a form of shared HR services[291] across the State (not local) authorities, but this is the only country of the three that does not impose any objectively detectable limits (that make automated tracking possible) on the cumulation of two or more appointed offices.

To mitigate the difficulty of tracking private behaviour, various self-reporting obligations have been set up in the three studied countries, with great differences in scope. Public officials must let their employer know about some of the things they are doing privately, so that these reporting obligations are limitations to the right of privacy and must comply with the conditions in international (ECHR, Art. 8)[292] and national law. This section covers internal reporting; who reports what in this area. For the public disclosure of assets and interests for transparency and external control purposes, see chapter 6.

A related question is, which situations these reporting obligations are really preventing. It can be submitted that only good-faith reporting of possibly conflicting interests is covered. If the public official omits reporting issues in bad faith or through negligence, the covert nature of many incompatible situations makes them difficult to detect and even if detected, the sanction is dismissal at most unless intent can be proven. Reporting thus becomes a burden for public officials of good faith engaged in simple interests. But the obligation to report might be helpful for public officials of good faith with complex interests, who are thus made aware of the issue and do not get unwillingly entangled in conflicting interests. However, public officials of bad faith will always be able to avoid reporting of possibly conflicting interests. This conclusion is supported by the results of the interviews, where it was brought forward that while this type of reporting obligations does not offer any guarantees for the prevention of conflicts of interest, it at least eliminates some of the most blatant breaches of integrity.

Then, when a conflict of interest or an apparent conflict of interest has been detected by the employer, or reported by the public official, measures must be taken. But opinions can differ about these measures, that may amount to a limitation of the fundamental freedoms of individuals. What is the discretionary position of the employer to forbid or allow activities?

France

France has the most detailed legislation on this topic, laid down in Art. 25 ter to octies of the *Loi le Pors*: The appointment of an individual to a certain position (see the discussion on Art. 25 ter above, it is a relatively small group of high-ranking officials) is conditioned by the submission of an exhaustive declaration of interests to the employer. Interests of spouses, children or other

[291] Called P-Direct, this is a shared services organisation under the authority of the Minister of the Interior.

[292] See the Court's Guide on the application of article 8, nos 114-118. Internet: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

relatives do not have to be reported. If the interests change 'substantially', a new declaration must be submitted within two months. This declaration must not contain any mention of political, trade union, or belief/religion related opinions or activities, unless this cannot be avoided because they are implied in publicly exercised positions – for example if a candidate has been a union leader. This explicit provision serves to counter any (suspicions of) discrimination but limits the scope of what can be checked with this report. A model declaration and the procedure are detailed by *Décret n° 2016-1967* (see above). The reporting categories are as follows (Art. 7):

1. Professional remunerated activities at the time of appointment or in the five years preceding the declaration;
2. Consulting activities at the time of appointment or in the five years preceding the declaration;
3. Participation in management bodies of a public or private institution or a company, at the time of appointment or in the five years preceding the declaration;
4. Direct financial participation in the capital of a company (i.e. holding shares), at the time of appointment;
5. Professional activities of the spouse, civil partner or person living with them (the *concubin)* at the time of appointment;
6. Positions and elected mandates held at the time of appointment.

Note that these activities are not illegal per se, but they can lead to a potentially illegal conflict of interests. Upon receipt of the declaration, the existence of a conflict of interests is assessed by the 'hierarchical authority'[293] of the official or, if they recuse themselves, the HATVP who can issue recommendations on the measures to take. The HATVP must reply within two months with a recommendation or a message that 'there are no observations to be made'. It is the hierarchical authority that eventually determines the measures to be taken (by itself or by the official) and the time limit for the execution of these measures. The declarations and any recommendations are added to the personnel file. If the public official disagrees with the measures, she can appeal to the administrative judge.

Public officials with certain financial-economical responsibilities must divest themselves of their financial instruments (see the discussion on Art. 25 quater above) and report the measures to the High Authority. The time limit for the measures is two months following appointment, for the explanation of the measures taken there is no mention of a time limit. The report is not added to the personnel file and may not be accessed by third parties (contrary to the report from the previous paragraph, which is confidential but may be accessed by authorized persons).

The positions not mentioned on the lists of positions for which a declaration of interests must be submitted – the large majority of public officials – are not required to declare anything but remain obliged to abstain from entering the conflicts of interest that are the subject of the declarations. Also, if a public official wishes to develop private remunerated activities, they must submit a declaration regarding this activity to the hierarchical (line) authority. There are two cases of exemptions where the authority has no discretionary room at all[294], and there are 'authorisations' possible for part-time officials and for officials who are planning 'accessory' activities, where the authority checks the compatibility with the public office.

[293] Autorité hierarchique (~line authority): A general term that designates, in this context, the office with the power to take disciplinary measures and put in place constraints regarding the public official involved.

[294] In a temporary situation of one year, when a business owner becomes a public official, or when the public official works part time up to 70% of full employment.

Romania

In Romania, there is a general obligation for all public officials to submit a declaration of interests, to the designated official or the human resources department of their employer which sends a copy to the national integrity agency (ANI, see section 2.3.6). ANI ensures the oversight and enforcement of the relevant rules but cannot impose sanctions. Sanctions are applied by the employer or the judiciary[295]. The declaration of interests is aimed at the prevention of conflicts of interest and incompatibilities. All public officials must also submit a declaration of assets, to see if there was a suspicious increase in assets over time. Since these declarations are all published on the internet, they are also an instrument for transparency and external control, so that the complete procedure will be discussed in section 6.3.

The topics that must be reported on are detailed by Law 161/2003:

1. Being an associate or shareholder in a commercial entity, association, or foundation;
2. Participating in management bodies of commercial entities, associations, or foundations;
3. Membership of a professional organisation or a trade union;
4. Participating in the leadership of political parties, even unpaid.

Note that these obligations apply to all public officials, even though only a small category of public officials is legally restricted in their political or trade union activities. Unlike in France, the reporting obligation does not include simply working in a private sector organisation or doing consulting work. Only management positions must be reported. The assets and some of the interests of the spouse and of the children who are dependent on the public official must also be reported.

The Netherlands

In the Dutch situation applies once again the general rule of the *Ambtenarenwet*, and implementing rules at the institution level. Art. 5 of the *Ambtenarenwet* provides that public sector employers must adopt rules for the reporting of risky secondary activities, and in some cases their publication, and for the reporting of financial interests. No other possible conflicts of interest must be reported. Nor are there any obligations regarding asset reporting. The official in question must judge whether there is a risk. The reported secondary activities are added to a non-public register. The secondary activities of some top officials are published[296]. The *Gedragscode Integriteit Rijk* encourages officials to report any activities that could be an issue, because only secondary activities that "could not interfere with the interests of the public service in any way" (Art. 4.5) do not have to be reported – a somewhat broader instruction than in the law.

From the Dutch point of view, secondary activities do not include interests. The public officials who must report their financial interests and transactions that may interfere with the public interest form a small group and are designated by each Minister or local executive, based on their

[295] ANI issues a report when it detects a conflict of interest. A large part of the body of case law is dedicated to public officials objecting to this report before the administrative judge.

[296] These officials are the members of the so-called Top Management Group, consisting of the secretary-general, directors-general and several similar functions within the central government. The legal basis is the Regeling aanwijzing TMG-functies, link: https://wetten.overheid.nl/BWBR0038780/2020-01-01/#Artikel1. The list of activities is published on the website of the Algemene Bestuursdienst (general management service of the central government), for example the list for 2018: https://www.algemenebestuursdienst.nl/documenten/publicatie/2018/09/01/nevenwerkzaamheden-tmg. The publication of the secondary activities of local top officials is subject to local municipality rules, see an example for the municipality of Utrecht here: https://zoek.officielebekendmakingen.nl/gmb-2017-20979.html.

risk of financial conflicts of interest. The reported interests are kept in a register. Each Ministry or municipality can establish further rules.

An example is the Ministry of Finance, which established such rules regarding 'insiders' in 2016[297]. It specifies that the risky interests must be reported each year to a designated internal compliance officer, that ownership and/or transactions of securities are subject to restricted lists: if the securities in question are added to a restricted list, they may not be owned or, in some cases, may be owned but not traded. The designated compliance officer can award exemptions for securities that were already owned at the moment of appointment or are inherited, or if the insider has relinquished any control similar to the French rules above[298]. Insiders must also report any securities that should be on the restricted list and 'take steps to prevent' securities trading by their spouse or children, similar persons, or persons whose behaviour they can influence, that would be illegal if that insider were trading themselves. The designated compliance officer keeps a register of all declarations and awarded exemptions. She can issue binding interpretations of the organisational rules and instruct reporting officials to make certain information available. In case of non-compliance, she cannot apply sanctions but must inform the secretary-general of the Ministry (the highest-ranking official). It is unclear what happens if the secretary-general herself fails to comply.

Sanctions

There are several special sanctions related to noncompliance with the rules for conflicts of interest. They are not elaborated here because we concentrate on prevention, but it is useful to list some of them, that are not included in Chapter 2. Below are personal administrative sanctions; Administrative law also provides the possibility of annulment of decisions by the administrative judge if they have been made on the basis of a conflict of interests.

Under Romanian law, if an official has been identified as being incompatible, but they continue making decisions or issuing administrative acts, the penalty is a disciplinary one according to Art. 25 of Law 176/2010 (if not a criminal one, connected with e.g. fraud or abuse of office), and the penalty may not be one of the lightest categories. It follows from this article that if the official in question is unaware of the issue or is aware of it but stops making decisions or issuing acts, he/she will not be sanctioned. The issued acts while in conflicts of interest can be annulled, and the official in question could be liable for damages under the civil law.

Romanian law does not sanction apparent conflicts of interest. This puts a heavier burden of proof on the employer, to show that the public interest was indeed harmed. To protect the investigations of ANI, lack of collaboration by withholding information or responding after the time limit is punished with a fine (Art. 27 of Law 176/2010) – but ANI must seek a conviction by the Court which then applies the fine.

In France, there is an interesting provision in Art. 25 septies of the *Loi le Pors*: If a public official earns any money in an unauthorized way, the illegal sums are withheld from the salary by disciplinary measure. In Romania there is a less direct option: ANI can report their findings to the tax authority which may then investigate (and claim back taxes). In The Netherlands, there is no such administrative option.

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[297] Insiderregeling Financiën 2017, see https://zoek.officielebekendmakingen.nl/stcrt-2016-55117.html. Note that the rules discussed here do not apply to officials of the Belastingdienst (Tax Service).

[298] The Dutch term is 'vrije-handbeheer': The securities are managed by a third party who can trade without permission (similar to a blind trust).

Regarding the sanction for illegal conflicts of interest in itself, in France some forms of engaging in a conflict of interest, i.e. taking any direct or indirect interest in a business or operation which they supervise, administrate, liquidate or pay money to, by some categories of public officials in management roles, fall under the definition of *prise illégale d'interêts* (Art. 432-12 of the criminal code, see chapter 2), and are punishable with up to five years imprisonment. Almost the same offense, with the same maximum sanction is provided in the Romanian law 78/2000, Art. 11. It is interesting to note that the French judge can take a broad view to the concept of supervision, so that supervision still exists if a mayor recuses himself from the vote on real estate developments while he did preside over the proceedings[299]. Approximately the same sanction can fall on the Romanian public official who, in the exercise of their public duties, obtained a financial advantage for herself, her spouse, or relative of the first or second degree – unless this happens through a legislative act, the exercise of a legal right or the fulfilment of a legal obligation, barring abuse of those rights or obligations (Romanian Criminal Code, Art. 301).

In The Netherlands, conflicts of interest are not incriminated. France also incriminates some conflicts of interest after leaving the public service, see above under Incompatibility with the status of former public official.

4.3. Implementation of international recommendations

To present a balanced view, it must be stressed at the start that all three countries have followed most legislation-related recommendations in international instruments, or already had them in place. This section is about the differences.

UNCAC

The UNCAC prescribes the introduction of 'systems that promote transparency and prevent conflicts of interest' in Art. 7, par. 4. Conflicts of interest are also part of the Codes of Conduct that form the subject of the UNCAC's Art. 8, stating that States Parties should make rules "requiring public officials to make declarations […] regarding […] activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result…". Incompatibilities are not mentioned here as such. The Technical Guide to the Convention provides an interesting set of requirements for assets and interests reporting. This should:

1. Cover all substantial types of incomes and assets (also of relatives)
2. Allow for year-on-year comparison
3. Preclude the concealment of assets (e.g. overseas)
4. Allow for cross-checking with public registers (e.g. tax data) for entities related to public officials
5. Require officials to substantiate/prove the sources of their income
6. Preclude the declaration of non-existent assets (to hide later surges in wealth)
7. Include an oversight authority that can apply meaningful controls (capacity, powers)
8. Include appropriately deterrent penalties

This does not imply that the three studied countries have the obligation to put all these measures into practice. It does show that the prevention of conflicts of interest allows some substantial intrusions in the private life of individuals, not only public officials but also their relatives – at least in the conception of the Convention. It also shows that the UNCAC promotes a complete

[299] Cour de cassation, chambre criminelle, February 23, 2011, no. 10-82.880, discussed in Voko, 2016.

system for those public officials who are subject to reporting. Ideally, it should be checked also what these officials do not report, by cross-checking with other sources. Reporting officials must prove or at least substantiate their interests. It would require far-reaching measures to implement recommendations 3 and 6, because only with substantive research can hidden or false assets be ruled out with any measure of confidence. It would require a meticulous review of all the sources of income of the public official and their relatives, and even then, unreported gifts or illegal sources of income would remain undetected and could only come to light in a criminal investigation if there are suspicions of fraud or forgery.

None of the three studied countries have followed all the advice from the UNCAC technical guide. Romania comes the closest to implementing these requirements for all public officials, but its rules on what constitutes a conflict of interest are limited. Since in The Netherlands and in France there is an open rule instead of the Romanian exhaustive one, their scope is wider and covers all the subjects mentioned in the UNCAC's Article 8, provided of course that they are a possible cause of interference with the public service.

Contrary to France and The Netherlands, in Romania all interests and assets must be reported, but they are reported through predefined forms that do not include, for example, the non-remunerated presidency of a local sports club that could constitute a significant conflict of interest if one is also working for the city. Year-on-year comparisons can be made in France only for the category of officials to whom Art. 25 ter of the *Loi Le Pors* applies (see above). In Romania, all public officials can be evaluated this way, in The Netherlands, none.

France does follow how the assets of some top officials grow, but its oversight authority (HATVP) does not thoroughly check the veracity of all reports.[300] Romania has a dedicated authority that – albeit understaffed with around 50 inspectors for millions of declarations – can and does check suspicious assets and interests declarations, using the trade register and the population register. The Netherlands does not have a criminal penalty for conflicts of interest, there is no authority that actively checks declarations, and only a part of all assets is checked, by the employer.

GRECO and EU

The Guiding Principles of the CoE do not mention conflicts of interest. GRECO's fourth evaluation round does concentrate on conflicts of interest but only of members of parliament, judges and prosecutors. An interesting observation can be found in its general report[301] on the fourth round: GRECO acknowledges the tension between the importance that a public official be well anchored in society instead of making policies or judicial decisions from an isolated position, on the one hand, and on the other hand the risk of entanglement of interests. GRECO seems to regard this tension as a cultural one, to be resolved according to national traditions, and stresses only the importance of transparency in this case. The second evaluation round did investigate conflicts of interest, under the topic of 'public administration and corruption'.

[300] The HATVP applies a selection based on yearly established policy priorities. See: https://www.hatvp.fr/en/high-authority/ethics-of-publics-officials/list/#what-is-the-monitoring-process-rp.

[301] Corruption prevention, members of parliament, judges and prosecutors. GRECO trend report, October 2017. See online: https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7

In this second evaluation round, the GRECO compliance report on The Netherlands of 2007[302] mentions conflicts of interest, stressing that there must be guidelines for officials about what should be reported. In 2020, there certainly are guidelines (in the form of codes of conduct, local regulations, and brochures), but the implementation of these is left to each individual public institution. The report on France (2004, long before the recent reforms)[303] mentions the *prise illégale d'intérêts* in the Criminal Code, and the fact that a series of secondary activities have been defined that public officials can do (see also above, under 4.2).[304] This report does not contain specific recommendations regarding the prevention of conflicts of interest. The report on Romania (2005)[305] contains among others the recommendation to extend the definition of conflicts of interest (which has not been done) and to "introduce an effective system for supervising declarations of assets and interests" (which has been attempted by founding the integrity agency, ANI).

The European Commission has published its EU Anti-Corruption Report in 2014 before discontinuing the underlying policy, see section 2.2.4. This report contains a thematic section on conflicts of interest and a section on each Member State. In general, it is not very positive on conflicts of interest practice across the Union. Conflicts of interest "form a recurrent pattern in many Member States", "[v]erifications on substance [of asset declarations] are often formalistic and mostly limited to administrative checks" with insufficient monitoring capacity, and the implementation of revolving door policies "is often weak" (p. 12). However, the annex on France[306] does not include any points for improvement regarding conflicts of interest. The annex on The Netherlands recommends extending declarations of interests to elected officials and to build an "effective and transparent" system to verify declarations. A framework for pantouflage prevention should also be developed.[307] The Romanian annex[308] mentions that the "requisite framework […] for independent verification of wealth, potential conflicts of interest and incompatibilities of public officials" is now in place (p. 7) but that it suffers from inconsistent political support. There is no specific recommendation regarding conflicts of interest but the general conclusion speaks of a persistent systemic corruption problem in this country. Romania is also under Commission scrutiny through the Cooperation and Verification Mechanism. The report from 2018[309] mentions conflicts of interest in relation to public officials only in the discussion of the PREVENT mechanism, which will be discussed in section 9.3.

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[302] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c791d

[303] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c5db5

[304] The report refers to the old law, but the new legislation contains the same principle: Secondary activities are prohibited, except for a list of approved ones.

[305] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7c18

[306] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf

[307] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_netherlands_chapter_en.pdf

[308] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_romania_chapter_en.pdf

[309] https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf

OECD

The OECD has published their Guidelines for managing conflict of interest in the public service[310] in 2003. This document begins with pointing out that in our modern society, new potential sources for conflicts of interest spring up due to the changing role and behaviour of public officials in their contacts with the private sector, with examples such as public/private partnerships, self-regulation, sponsorships. To this list can be added the large number of part-time public officials, especially in The Netherlands[311]. The OECD recommendations warn against a too-strict approach and stress the importance of a risk-based set of rules. They are aimed at "fostering public trust in government institutions" (p. 7). The recommendations are structured under the following headings. Under each heading, Some points of particular interest from the text of the recommendation are summarised below:

1. Identify relevant conflict of interest situations
   a. Provide a general definition
   b. Provide series of examples, inter alia focused on high-risk positions
2. Establish procedures for identifying, managing and resolving conflict of interest situations
   a. All private interests should be disclosed when entering the public service and after that periodically and with every significant change of situation
   b. Interests should be registered but not necessarily published, depending on the seniority of the position
   c. Measures can be: divestment, recusal, restriction of access, transfer, rearrangement of duties, resignation from private activity, or resignation from public office
3. Demonstrate leadership commitment:
   a. Management must set an example for the rest
   b. Management must be prepared to make decisions in individual cases (including prohibiting some activities)
   c. The local policy must be evaluated and adapted to remain effective
4. Create a partnership with employees: awareness, anticipation and prevention
   a. Provide guidance, assistance, and reminders
   b. Review 'at risk' areas/activities in the organisation (such as inside information, gifts, family/community expectations, activities after leaving public office)
5. Enforce the conflict of interest policy
   a. Ensure redress for breaches of conflict of interest policy (besides disciplinary, criminal sanctions) such as retroactive cancellation of affected decisions/contracts, exclusion from future processes
   b. Develop mechanisms for monitoring and control, and for complaint-handling
6. Initiate a new partnership with the business and non-profit sectors
   a. Involve business and non-profit sectors when (re)designing policies for conflicts of interest
   b. Review high-risk areas together with the private sector

The first recommendation is already followed by all three studied countries. There are legal definitions in place and each country offers public officials examples of illegal conduct, in legislation, executive rules, and information brochures. Recommendation number two has three focus points.

[310] See online: http://www.oecd.org/governance/ethics/2957360.pdf.

[311] In 2018, more than a third of Dutch public officials worked part time, see https://kennisopenbaarbestuur.nl/media/255736/web_trends_en_cijfers.pdf, page 12. In France, the overall statistic for the central government was less than 15%, see https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Public_employment_-_France&oldid=369547. In Romania it is not a common practice, but no recent data could be found.

The disclosure of all interests does only take place in Romania. France and The Netherlands leave it to the official involved which interests they disclose, with the exception of financial interests. All three countries have (implied) provisions for repeating disclosure. The declaration of non-financial assets does not take place in The Netherlands, in a limited way in France and for all public servants in Romania. Regarding the idea that the seniority of the position (determining the decision-making powers but also the exposure to pressure) should determine whether declarations are made public: In The Netherlands and in France this publication is done in a restricted way, indeed according to seniority, but in Romania every official's declarations are published, regardless of position.

The third recommendation refers to the role of management. In the interviews in all three countries, specialists have also expressed the opinion that the commitment of leadership is crucial. In this light, it is telling that in all three countries, most integrity positions within individual public sector entities are unpaid. But the differences within the countries may be large and are unexplored: it is not possible to infer general national conclusions on this recommendation. The same is true for the fourth recommendation, albeit that point 4b is addressed nationally in France and Romania, respectively by law and by national anticorruption strategy, and that in The Netherlands municipalities have a large autonomy to build local policies on tailormade risk analyses, but they do not in general make use of it: the majority of local policies regarding conflicts of interest and reporting of secondary activities follow the model documents and standards.

The fifth recommendation looks at the enforcement of conflicts of interest rules. The proceeds from illegal (unauthorised) secondary activities must be paid back to the State in France, even if there was no intent of fraud.[312] In Romania, the law explicitly provides that the decisions of public officials while in conflict of interest are void (Law 176/2010, Art. 23). But the main consequence in many cases will be a disciplinary measure that can range, as we have seen for all three countries, from a reprimand to dismissal. See also above under Sanctions. The problem is here, that disciplinary measures are difficult to track because they are not transparent – for perfectly understandable reasons of privacy protection. For this study, some institutional reports were obtained but these cannot be used to discuss national trends. In The Netherlands, there is only incidental national reporting. In Romania, the ANFP (*Agenția Națională a Funcționarilor Publici*, national agency for public officials) publishes detailed reporting, but the data on disciplinary measures are not specific for conflicts of interest. In France there are data regarding criminal convictions for conflicts of interest: between 2007 and 2016 there have been around 40 convictions each year for *prise illégale d'intérêts* out of a total of approximately 300 yearly convictions for integrity-related cases.[313] Recent national data on disciplinary measures were not available for this study.

The sixth OECD recommendation is to work with the private sector (businesses and NGO's) when designing policies and evaluating risks regarding conflicts of interest. In France, the national anticorruption agency targets both businesses and public entities, which makes working together easier. Such an institutionalised combination does not exist in Romania, and in The Netherlands in

[312] This provision was already in place in older legislation (Décret-loi du 29 octobre 1936 relatif aux cumuls de retraites, de rémunérations et de fonctions). The consequences can be significant, for example: The Tribunal Administratif de Paris, decision no. 1700522/2-2 of 2018, ordered the refund of almost 150 000 EUR to the Administration of Hospitals by a contract worker who had earned a secondary income from a management position in the private sector.

[313] Report of the French ministry of Justice, February 2018: Manquements à la probité: éléments statistiques. https://www.economie.gouv.fr/files/files/directions_services/afa/Fiche_manquements_a_la_probite_-fevrier_2018_-_V1.pdf

a very limited way[314]. Private sector policy design is out of scope for this study. From the interviews in the three countries it does not appear that high-risk areas are reviewed together with the private sector, although it is certainly possible that this happens on an ad hoc basis[315]. Such risk review processes, however, are not enshrined in the law other than the general legislation consultation procedures with the public that are specific for each country.

4.4. Analysis

From the comparison above, it becomes clear that Romania has adopted more restrictions than The Netherlands and France, on more topics, and that Romanian public officials have wider reporting obligations (personal and material scope) than officials of the two other countries. Why is this the case? Without going into detail, it is very well possible that the need to comply with outside conditions, primarily the EU conditions for accession, have stimulated successive Romanian governments to adopt farther reaching measures than in the two other countries. The frequent citing of EU pressure in memoranda accompanying legislation certainly points in this direction.[316] It is also possible that the EU Cooperation and Verification Mechanism (CVM) regarding Romania (see above) has helped keeping these measures in place, instead of abandoning them after accession which seems to have happened in other Member States without a CVM, even though this correlation is not so clear as it would seem at first glance.[317]

Regarding the justification for the significantly broader measures, bringing a larger administrative burden and more limitations of official's rights with them – It would be tempting to assume that, since Romania is significantly more corrupt than the other two countries according to all sources, it needs stricter measures to combat corruption. However, since this paragraph is about preventive measures applied directly to persons individually because conflicts of interest are individual, the premise for such a difference to be justified is that Romanian public officials are more prone to corruption, personally. They can be trusted less than other public officials and thus must be restricted by a series of interdictions, that more trustworthy officials would not have to suffer. Based on past results, such as bribery convictions, this seems indeed to be the case, but it is risky to project those results on today's officials. Or, in a shift of perspective, lawmakers in Romania might be less trusting of public servants than in the other two countries, even though the objects of their mistrust might not differ so much between France, The Netherlands and Romania. A full discussion on trust is however outside the scope, so that we will instead review some of the *effects* of the rules on conflicts of interest and see to what extent they can be justified from a burden/effect perspective.

In this study, it was not possible to obtain sufficient data on the implementation of conflicts of interest rules regarding self-reporting and the processing of non-public reports. The information and training efforts on this subject are already discussed in section 3.3. This means that the benefits in the equation remain theoretical because the number of reported/resolved cases of conflicts of interest is unknown. In any case, the question: "How many cases of corruption were prevented

[314] The Whistle-blower Authority publishes information material also for the private sector.

[315] See this example from France: http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/consultation-publique-pour-prevenir-la-corruption-30912.html

[316] For example, the explanatory memorandum for Law 161/2003: http://www.cdep.ro/proiecte/2003/200/20/0/eml_pl220_03.pdf (p. 8), or the one for Law 7/2004 http://www.cdep.ro/proiecte/2003/600/30/5/em635.pdf (p. 1).

[317] See the contribution of Agnes Batory in Schmidt-Pfister, 2012.

by these measures" would not have been answered by even the most thorough dataset, since illegal conflicts of interest tend to remain unreported, being 'hidden crimes' like other forms of corruption. It can be safely assumed that only a small percentage of conflicts of interest comes before the courts.

Therefore, here follows a short theoretical discussion on the proportionality of certain measures.

The prevention of conflicts of interest certainly has its merits, as reflected in the position it has in the various legal instruments described above. As mentioned before, one of the criteria borrowed from crime prevention theory is that preventive measures should be 'taking away incentives'. While individuals who aim to be corrupt from the start will not be deterred by rules preventing conflicts of interest, the group of public officials who do not plan corrupt actions but might be persuaded to 'do the wrong thing' if the opportunity presents itself could be helped not to stray if certain activities were made incompatible. In this light, conflicts of interest rules can play a determining positive role for this group (of unknown dimensions). And reporting obligations might help prevent public officials who act in good faith, from unintentionally finding themselves in a conflicting situation. Furthermore, rules regarding conflicts of interest can help protect the image of (and the trust in) the public authorities by avoiding even the appearance of putting private interests first. Finally, this type of rules prevents even individuals with corrupt intentions from entering in some of the most obvious conflicts, such as hiring their own children as assistants. If that was allowed, undetected or unenforced officials seeking to profit from the situations could hire whoever they wanted but if it is made illegal and the anticorruption agency checks compliance, it becomes a blocked avenue for corruption.

These advantages of conflicts of interest rules depend, however, on a clear internal and external communication of what the rules are and what purpose they serve, and on a consistent enforcement. If involved public officials (and indeed the general public) do not know what the rules are for, these restrictions and reporting obligations can create a culture of mistrust and of compliance as a formality only. And if the rules are not enforced, the public authorities may be perceived as weak or, worse, collaborating with former officials who use their inside information and relations for their own profit.

The restrictions and reporting obligations of public officials for the prevention of conflicts of interest can be time-consuming, costly, and limit the exercise of their fundamental rights and freedoms. To study the proportionality of the measures, an ad hoc test will be used, loosely based on the ECHR and CJEU conditions for proportionality, and on the four types of conflicts of interest rules described in the introduction to this paragraph.

Article 8 of the ECHR includes a prohibition of any interference with private and family life if it is not lawful and necessary for national security, public safety, economic well-being, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others. There is an ample discussion about the interpretation of these aspects.[318] According to the ECJ proportionality test, measures must be appropriate, necessary, and reasonable[319]. For the purpose of this discussion, we will assume that an interference with the fundamental rights and freedoms of public servants caused by a concrete measure is proportional if a) it will likely have a considerable contribution towards the prevention of corruption (appropriateness) and b) it is

[318] Summarized, for example, in the Guide on Article 8 of the European Convention on Human Rights, version of 31 August 2018, URL: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

[319] Developed in a series of decisions such as Internationale Handelsgesellschaft (1970).

necessary, in other words there is no alternative that interferes less with the rights and freedoms of public officials. To qualify the alternatives, we use the four types of conflicts of interest rules described in the introduction to this paragraph:

1. Prohibited activities
2. Activities subject to permission
3. Activities subject to reporting
4. Activities subject to ex post scrutiny

Besides reviewing whether existing measures are proportional, it is also useful to look for omissions: What is allowed that shouldn't be allowed? For both questions one must keep in mind that the only relevant purpose in this study is corruption prevention. Some rules may be judged disproportional for this purpose but can still be proportional for other purposes such as the prevention of embezzlement.

A relevant question is whether public officials have the same rights and freedoms as other persons, or rather, whether they have already agreed to a limitation when they entered the public service. Even though in some contexts a person cannot relinquish a right or a freedom, it is common practice in all three studied countries for public servants to have certain restrictions imposed on them, for example a restriction of the freedom of speech.

An important part of the appropriateness test is enforceability. If a rule cannot be enforced, or if the enforcement is disproportionally costly in terms of time, budget, and/or restrictions of fundamental rights and freedoms, its overall proportionality must be questioned. Another important part is the risk (probability times effect) of damage to the State's finances or image. A high risk warrants higher costs or limitations to fundamental rights and freedoms. This risk must be placed into perspective when it comes to devising countermeasures; Ministers are usually in a riskier position and the measures directed at them should not be more permissive than those directed at public officials.

Table 10: Incompatible activities above lists many measures, of which one case per country will be discussed below. The cases were selected by estimating the largest impact (positive and negative).

Proportionality case The Netherlands

The first set of rules to be analysed is from The Netherlands: It is prohibited for all public officials to engage in secondary activities, own securities or to have other financial interests or to engage in financial transactions if this (potentially) interferes with the good fulfilment of duties (Law regarding public officials, Art. 8). Let us take for example the officials of the Ministry of Economic Affairs and the Environment. This Ministry has adopted an internal regulation that includes this topic[320], comparable to the one analysed above, for the Ministry of Finance. The Ministry is potentially exposed to conflicts of interest on many levels: There are buyers, providers of subsidies and permits, and policymakers. Some of them have a reporting obligation. The scope of reports is all securities and other financial interests of themselves and those they manage for their spouse or dependents. Financial interests of the spouse or other third persons do not have to be reported. The reports are analysed by a dedicated compliance officer, registered, and the financial interests are prohibited by placing them on restricted lists. This list of restricted interests for a number of top officials contains 'all securities' according to Art. 13.1. Personal exceptions are possible. These must be discussed with the '*hoofd van dienst*' (head of service). For example, the Director-General

[320] Personeelsreglement EZK 2020, see: https://static.caorijk.nl/cao-web-production/uploads/document/file/5d4f55aa-78c0-488c-a9b6-b14ccaf8f266/70953_-_EZK_-_Personeelsreglement_interactief_V1.pdf.

of Enterprise and Innovation is such a head of service[321] and he or she must ask permission from him- or herself to allow exceptions for securities trading and/or exemptions from reporting their financial interests. The top management is a small group of people who know each other and have a considerable discretionary space. This deepens the risk and diminishes the force of this rule, that falls in the strictest category (prohibition).

All other public officials who work for the Ministry have no reporting obligation for financial interests, so that potentially interfering financial interests are prohibited for all officials, but reporting is only obligatory for some. In other words: top officials must report every interest if they are not exempted, and they can discuss with the compliance officer whether something is allowed. Other officials never report anything and must decide on their own if something is allowed. They can of course go to management on their own initiative, but this seems unlikely if a) it is a private subject, b) there are no explicit rules and c) there is no enforcement. Enforcement is only possible if someone blows a whistle or if incriminating information is revealed to management by accident. Management do not have the authority to order an inquiry into the financial interests of public officials without strong suspicions. It can be argued that reporting is only necessary for high-risk groups and that this is a risk-based approach recommended by the OECD. One of the reasons to watch the secondary activities and financial interests of top officials more closely is that they are more difficult to replace if they need to recuse themselves, especially in smaller organisations, so that if the prevention of apparent conflicts is not possible, at least the necessary transparency is in place. Another reason is the larger exposure to risks: because more depends on decision makers than on their subordinates, they generally have more discretionary power, and they decide on bigger budgets, they attract more pressure, or higher exposure to the public compared to lower-ranked officials. And there is the phenomenon of leading by – positive or negative – example: the potential influence that high-ranking officials have on their subordinates.

This is, however, a different mechanism than the one used for secondary activities, where all officials must report risky activities and those of the top group are made public. Following this logic, 'regular' public officials are at risk for secondary activities but not for financial interests and therefore they do not have to report, or the breach of privacy is so much more invasive that no reporting obligation could be established despite the risk. It is also possible that the rules are simply inconsistent.

But the question is whether they are proportional. Do these rules contribute to the prevention of corruption and is there no easier alternative? Although no evidence has been found for its effectiveness in the literature, it can be posited that if public officials are not only educated on conflicts of interest in general but also obliged to discuss concrete cases with their manager, this helps avoid situations where an a priori good faith position leads to an illegal situation through ignorance or negligence. The rules for the Ministry prescribe at least a yearly discussion. The involved official and their manager can discuss the case so that the latter can decide whether an actual or apparent conflict of interests exists of such a nature that the conflicting activity should be deemed incompatible with the public service role of the official. In this view, reporting is necessary to be able to make informed decisions when compatibility or incompatibility are not obvious.

Making reports public can contribute to public trust and contributes to possibilities of external control. The international instruments on conflicts of interest discussed above regard reporting and publishing reports as an accepted practice. The alternative to reporting (a measure of the

[321] Directeur-generaal Bedrijfsleven en Innovatie, at least in 2019, see https://zoek.officielebekendmakingen.nl/stcrt-2018-72171.html.

third degree of invasiveness) is no reporting (the least invasive), without the advantage of concrete discussions or stimulating public trust. Arguments for no reporting would be that 1) most of the law works this way – it would be inconceivable having to show that you did not breach all of the negative obligations of a public official; 2) there will inevitably be many 'false positives', a lot of reporting of things that did not need reporting; 3) the greatest risks are already covered by the criminal law, such as the offences of bribery, insider trading, or disclosure of confidential information[322]; 4) even smaller risks that lead to disciplinary offences are covered through the general obligation to be a 'good official'. On closer observation however, these arguments do not hold. In the first place, the purpose of reporting is not just demonstrating a clean conscience but also discussing what to do in complex situations. Regarding the second argument, the so-called false positives serve the purpose of adding to the general knowledge on conflicts of interest, provided that they are recorded and shared within the public service. The third argument does not hold because the criminal law represents the minimum threshold of socially acceptable behaviour for all citizens, while the prevention of conflicts of interest in public administration has the more ambitious purpose of maintaining the public trust and, internally, to stimulate behaviour that furthers the public interest. Regarding the fourth argument, it is true that there is a 'safety net' clause in Dutch legislation but concrete obligations based on defined do's and don'ts are easier to explain, to monitor and to prove in case of a disciplinary offence.

One can also argue that, on the contrary, the reporting obligation is ineffective because it does not go far enough, because too few risk situations are covered and because exemptions are possible. If one admits that reporting in itself can be an effective mitigating obligation and if this obligation includes reporting even the membership of a sports club if that could interfere with one's duties (for example when the institution where that sports club member works, rents event facilities from that club), then it is strange that owning stock does not have to be reported (at the Ministry of Economic Affairs) by the majority of public officials. There is also no reporting obligation for financial interests that are unrelated to securities, such as owning and trading land or other real estate. There is no reporting for any other situations or activities that might cause an illegal conflict of interests. One of the bidders to your tender is your neighbour? A person to whom you owe money is requesting a subsidy? Your mother owns a business that profits from a policy you helped design? Your family is pressuring you to talk to your colleague about priority on a waiting list? No reporting in any of these cases, except if the official involved remembers their training and discusses the issue out of their own initiative. In this line of reasoning, all risky situations should at least be reported and discussed with management if not withdrawn from immediately, but only for some of them a specific reporting obligation has presently been established. Even though the *Gedragscode integriteit Rijk* warns that the official must also use their own common sense and go to their manager with anything that could be an issue, this could create a false sense of compliance: Once I have reported my secondary activities and my financial interests, I am being a 'good official'. And the reporting is not registered centrally in The Netherlands but at the institutional level (if a dedicated person is appointed and tasked with keeping a register such as in our example), nor is it published for the public to scrutinise. The mechanism of enhancing public control and the public trust is thus not fully utilised.

The conclusion is that reporting on conflicts of interest contributes to prevention, enhancement of internal knowledge and upholding the public's trust. In The Netherlands, the reporting obligation is coupled with relatively frequent training (see above in 3.3) and to keep the administrative

[322] Art 363 Criminal Code., Art. 1 in conjunction with Art. 6 of the Law on Economic Crime (*WED*), and Art. 272 Criminal Code, respectively. See also chapter 2.

burden as well as the breach of privacy bearable, only risky activities must be reported. To avoid a false sense of compliance, the reporting rules should be stated in general terms, e.g. "Public officials must discuss any possible interference or apparent interference with their duties with management, including from secondary activities, financial interests, personal relations or assets. All reports should be registered in a database with limited access for knowledge sharing purposes. Anonymous yearly summaries are made available on the internet." In other words, the Dutch rules are proportional but may be disproportionally narrow: The lawmakers' decision to leave the initial assessment of what could constitute an interference with duty to the individual official is a policy choice that helps minimize administrative burden and invasion of privacy but enhances the risk and diminishes transparency of what possible interferences there are – it becomes a 'known unknown'. This choice is related to trust and the national view on personal responsibility, which is not a legal topic. Making this choice does imply a greater pressure on information and training and on hiring policies, because only with suitable people (i.e. people who are trustworthy out of their own conviction and who know how to take responsibility even if they are not managers) is this a suitable management system. Allowing exemptions for reporting financial interests puts the system more at risk.

Proportionality case France

In the paragraph on French former public officials above, it is discussed how all public officials must report their planned private sector activities before leaving, and that the HATVP can block these plans. To what degree do these rules contribute to integrity and corruption prevention, and is there an alternative? Are they proportional?

Let us say that I am a junior clerk at the Ministry of the Interior, working on integrity policy reporting. I have been appointed six months ago but I already feel that this is not a job for me. I decide to leave the public service and start a flower shop. But after resigning I still need time to set up my business, so I cannot be sure if I will indeed open the shop. Still, I must fill out the paperwork to report to my employer some months before my departure. My employer can approve my plans, confer with the deontology advisor if in doubt, or refer my case to the HATVP. That authority can approve my plans by declaring them compatible, without reservations, with the public office that I occupied. Or, I am a leading official that oversees a subsidy program for industrial innovation. Immediately after my resignation, I start working as a freelance consultant for the same industry without notifying my employer. The HATVP gets wind of my new activities despite its limited research capability, declares that I am incompatible but cannot enforce its decision.

The scenarios above show that requesting a compatibility decision before leaving the service is obligatory for all officials, regardless of their position or years of service. The former official is obliged to disclose personal information, usually not of a sensitive nature (starting a company or getting hired under a labour contract is information that would be disclosed to the authorities anyway, albeit not for the same purpose). Sanctions are only possible for those who still have the quality of public official (for example, because they have been temporarily relieved of duties to pursue a short-term private activity) or retired public official. They can be imposed a disciplinary sanction or a temporary reduction of their pension. Those who simply leave can only be sued for civil damages, if such damages can be proven.

It can be questioned whether this restriction of freedom is necessary for all public officials who – even temporarily – wish to leave the public service. After all, the most serious risks to society are already covered by the criminal sanctions for *prise illégale d'intérêts*. Also striking is the absence

of any differentiation. Whereas the mandatory reporting of financial interests only applies to certain high-ranking officials, the check on founding a business by the employer or the HATVP applies to all public officials, with no regard for their risk to the public image of the public sector. The higher the rank, the more exposure a departure for the private sector will get. Then there is the administrative burden involved in this procedure. While only a small percentage of the French public officials will leave their office in a given year, there are still thousands of decisions to be made[323]. If that can be avoided, it should be avoided. It would also be possible to shift *some* of the burden from the departing official to their employer, who would be charged with compiling the *dossier* and following up the decision of the Committee. It is also possible to leave *everything* to the employer, or the direct manager, of the former public official. This is the practice in The Netherlands. The advantage would be that the manager is probably better aware of the local context than a centralized institution. On the other hand, such a manager or employer does not have an interest to protect the general public image of the civil service, they have many other priorities to think about. And they may be naturally biased towards making no objections, since the official involved is leaving anyway. A specialised institution such as the HATVP does not have the potential bias caused by personal relations, and it has the protection of the general public interest as its priority. Centralised decision-making provides the additional advantage of easier knowledge-building and sharing, and thus of making consistent decisions. This does of course not mean that a central body should forego any contact with the employer of the departing official.

As a final point it can be asked whether such a check on leaving officials is necessary at all. It used to be voluntary in France before 2017. It still is voluntary in The Netherlands (although misuse of confidential information is still sanctioned even if one can work anywhere). In the Romanian practice, as indicated above, the incompatibility is instituted roughly for the same activities as covered by the French *prise illégale d'intérêts* in the criminal law, and for all other cases there is no check on where former public officials go. The Netherlands further has a practice of a voluntary 'cooling down' period when, before leaving for a sensitive private sector position, the almost ex-official receives other duties in her last months within the public service. This is a practice that, with some adaptation, could be introduced in the other countries as well, preferably incorporated in the appointment or the labour contract so that it can be individualised and also sanctioned as a contractual liability. It should be noted that the cooling down period is only some months while the period of reference in French law is three years. With or without cooling down, the practice of monitoring the compatibility of departures to the private sector is in its essence commendable, since the appearance of wrongdoing may be equally dangerous for the public trust than actual wrongdoing – hence the incorporation of apparent wrongdoing in many conflicts of interest definitions. Monitoring all departures is sure to prevent more problems than voluntary reporting. However, differentiating between high- and low-risk cases, automating the process for a lighter administrative burden, and introducing effective (contractual) remedies for incompatible officials who have left the service, are recommended. The effort could also be shifted from the former official to their former employer, who after departure could check the employment records and the trade register to see where they work and then, only in case of a possible conflict, take preventive measures such as warning certain public sector organisations that to engage with this person would constitute a risk of insider trading/breach of confidentiality/conflict of interest (favouritism). This

[323] The former Committee for public sector integrity made more than 4300 decisions in 2017 after it became mandatory (at the time of writing there are no data on HATVP processing, since the new procedure came into force in February, 2020). See the previously cited report from the French Parliament from 2018: http://www.assemblee-nationale.fr/15/rap-info/i0611.asp, page 27.

could even be published in an online register for maximum public scrutiny, in case of former top officials only – to limit the number of people whose personal data are published.

Proportionality case Romania

The most eye-catching obligation for Romanian public officials to prevent conflicts of interest is the reporting and publishing of declarations of interests and assets for all public officials. However, this procedure has also other purposes and will be discussed under section 6.3. We will discuss here the prohibition for public officials to hold any positions in the private sector that are (in)directly connected with the tasks of their public office. The law (161/2003, Art. 96) says: "Public officials […] may occupy positions in other areas of the private sector, that are not in direct or indirect relation to their duties as public official […] according to the official job description" [324] The law does not specify whether this applies only to paid positions, i.e. whether only paid activities in relation to the duties as official are prohibited or also unpaid ones. Ubi lex non distinguit…[325]

As noted above under the discussion of the different principles, Art. 94 of the same law prohibits public officials from exercising any other position, or as public official or having the 'quality' of public official, than the position they were appointed in. If this still left open the possibility of multiple appointments, par. 2 of this article goes on to specify that public officials cannot work in any other public institution, authority, or state-owned enterprise, except when designated as members in EU funded project teams, or by specific mandate (appointment) as a representative of the State or a public institution, to the board of a state-owned company or collective body. As an exception to the exception, such mandate may not include any legal acts related to the institution where the official is appointed. These mandates and appointments as representatives are usually given to high-ranking officials who are already more exposed to corruption, by the nature of their work, than 'rank-and-file' officials.

A Romanian official may thus work in the private sector (besides their full-time job – part-time work is a rare exception), but not in the public sector unless she is officially designated as a representative. These public-public incompatibilities are also encountered in France, where the law (Le Pors, Art. 25 bis) specifically includes other public sector activities as being susceptible to conflicts of interest.

Law 161/2003 was adopted without debate in the Romanian parliament[326] and its explanatory memorandum does not mention the specific motive or goal of these incompatibilities. The constraints that the law imposes on public officials are substantial, because any secondary activities that resemble your work as a public official, the work you are trained for and have expertise in, and can contribute the most with to society, are prohibited. For example, someone who is a policymaker in the Ministry of Sports and spends their weekends on the board of a local sports

[324] *„Funcționari publici […] pot exercita funcții în alte domenii de activitate din sectorul privat, care nu sunt în legătură directă sau indirectă cu atribuțiile exercitate ca funcționar public […] potrivit fișei postului"*

[325] No case law could be found where the dispute was about unpaid activities in the private sector. It is possible that ANI, the organisation that brings these cases before the court, considers them compatible even though this does not become clear from their guide on the subject.

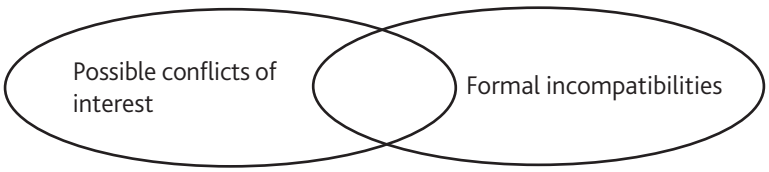
[326] Using a special constitutional procedure called 'assuming the liability of the Government' where the Government proposes Parliament to accept the legislative proposal as is, without amendments, or vote the Government out through a motion. In this case, the proposal was adopted. See for a discussion on the constitutionality of this phenomenon: https://www.ccr.ro/uploads/Publicatii%20si%20statistici/Buletin%202010/safta.pdf.

club. The interdiction prevents situations from happening where the secondary activity would lead to a likely conflict of interests, such as when our policymaker is also on the board of a national sports association. The choice to formally prohibit all activities resembling your day job instead of prohibiting „conflicting activities" like in the other two countries, is a broad blanket and must be justified. The Romanian Constitution contains in Article 53 the conditions for restricting the rights and freedoms: „The restriction can be imposed only if it is necessary in a democratic society. The measure must be proportional to the situation that caused it, be applied in a non-discriminatory way and without affecting the existence of the right or freedom in question." This is a similar formula to the ECHR proportionality test.

The question is thus, whether the prohibition in Law 161/2003 is necessary, and whether there is a less invasive alternative. It can be observed that this broad measure still leaves out many situations where public officials can be put situations of major risks, by engaging in secondary activities that have no connection to their job description. Take the example of the HR director for a municipality who develops apartment buildings in her spare time and could be tempted to use her contacts at City hall for the best opportunities.

It is of course possible to combine this rule with the conflict of interest rule in the same law. The HR director in the previous example was not formally incompatible but should still recuse herself from any decisions and committees regarding housing policy (see above for the discussion on the different definitions of conflicts of interest). If the broad definition of conflicts of interest is used, the one from the Code of Tax Procedure or the one from Law 98/2016, then the question can be raised why there is still need for a formal incompatibility if the conflict of interests that it is supposed to prevent is already prohibited by the conflicts of interest definition? There is a redundancy here:

Figure 1: Venn diagram of incompatibilities and conflicts of interest



The diagram shows that not only can you not cover all possible conflicts of interest with formal incompatibilities, there are also formal incompatibilities that do not cover any conflicts of interest and formal incompatibilities that would be covered by the broad conflicts of interest definition anyway.

A possible reason to maintain this formal interdiction would be the protection of the public authorities against the appearance of conflicts of interest in the eyes of the public. In another example, if a police official would run a security company in their spare time it would create an unacceptable appearance of private justice, even if the person in question does not enter any conflicts of interest. If this is the idea behind the prohibition, it is certainly understandable. But the example of the sports policymaker would not create a different appearance than the example of the HR director while one is forbidden and the other admitted by law. The effect of the broad prohibition is thus to create additional constraints that are not warranted by additional preventive effects.

In conclusion regarding this specific legal provision: Article 96 of Law 161/2003 prohibits many activities that are not only low risk but also potentially beneficial to society (think of a government financial expert who keeps the books for an NGO). Evidently, many private sector activities are still allowed, including ones, as we have seen, with a large risk of conflicts of interest. And to put this further in context: the prohibition to combine activities in the public sector is even broader. Should they be regarded as carrying a higher risk than private sector activities? The author did not find any arguments for such a position. In conclusion, it appears that the rule in Law 161/2003 is disproportionally broad. The proportionality between the risks prevented and the constraints imposed could be restored, in this author's view, by repealing the incompatibility rule, applying the broad conflicts of interest rule from the Code of Tax Procedure and Law 98/2016, and determining which secondary activities would create an inadmissible appearance of conflict of interests in order to prohibit those.

4.5. Summary

While the legal definitions of conflicts of interest have much in common in the three studied countries, the philosophy regarding incompatibilities for public officials differs significantly in The Netherlands in comparison to France and Romania. In the last two countries, and especially in Romania, there are more formal (explicit) incompatibilities during, and after, a career in the public service, while in The Netherlands the law and public policy reflect a culture of compatibility, where public officials themselves must decide whether a private interest interferes with their public service duties. The analysis shows that specific interdictions vary significantly, reflecting not per se what is forbidden or admitted (because there is always the general prohibition to let the private interest interfere with the public interest), but rather what national lawmakers found more important. As a result, these specific interdictions are easier to identify and to prove in disciplinary procedures or in court.

The obligation regarding internal self-reporting on assets, interests and secondary activities is broadest in Romania. On the other side of the scale, Dutch officials only must report when there is an actual conflict of interests, except certain high-ranking officials who must report secondary activities and financial interests. On this topic, there is significant divergence. The same is true for sanctions, with The Netherlands again as odd one out, lacking criminal sanctions regarding conflicts of interest.

Compliance with international instruments is in place in all three countries, with some exceptions. However, the analysis paragraph with a case study for each country shows that devising rules proportional to issues is not always successful.

5. Whistle-blowers and integrity counselling

5.1. Introduction

Preventing corruption by giving public officials the opportunity to disclose wrongdoing by their colleagues is considered a powerful tool in the anticorruption toolkit, not only by legislators' consensus but also based on data[327]. This chapter reviews what international and national law provide on the subject, after which a few topics are highlighted. First, this introduction explores some relevant principles.

Legal principles related to whistle-blowing

Civil servants must be *loyal* to the State and not disclose *confidential* information. These legal principles are enshrined in the laws of all three studied countries. The second principle follows partially from the first and partially from the right to privacy. The greater principle than that of loyalty to the State is the protection of the public interest (because the State also works in the public interest), so that in case of conflict, the second one must prevail. Only on this basis, public officials can and/or must report or ultimately make public confidential information against the principle of loyalty. Even if the information in question was not classified as confidential or would breach the privacy of individuals, the loyalty principle would still be breached, and the public interest condition would apply.

Another relevant principle concerns the *freedom of speech*, protected by numerous international instruments such as the European Convention on Human Rights discussed below. Civil servants have a freedom of speech that is restricted by the legitimate interests of the State that they must protect; by their appointment or labour agreement they consent to a conditioned freedom of speech. This restriction would be inapplicable if the interests that it protects are illegitimate. In such a case, the restriction would no longer be legally motivated and could not stand in the way of exercising the freedom of speech. We will see below that even information about stricto sensu legal issues can be reported to the public, if there is an overriding public interest to do so, thus protecting the reporting civil servant. The freedom of speech principle finds application in situations outside of the scope of dedicated whistle-blower legislation.

The principle of *transparency* also finds applicability in cases where the public interest to learn the facts overrides the – private or also public – interest to keep certain information confidential. We will not discuss this principle separately here because a separate section of this study (chapter 6) is dedicated to it, and because the interests it pits against each other are the same as with the loyalty principle.

Dependence on and incidence of whistle-blowing

Whistle-blowing that is unrelated to corruption, for example regarding harassment or damage to the environment, remains out of scope. Any misconduct can be reported of course, not just corruption-related issues. In the corruption literature and instruments, whistle-blowers occupy a

[327] For example, a US study of two million internal reports of wrongdoing in the private sector found that an active use of internal whistle-blowing systems is associated with lower fines and less material lawsuits against the employer (Stubben & Welch, 2018).

prominent place however, because of the naturally obscure nature of the phenomenon. In such cases detection and enforcement tend to rely much more on those willing to break the code of confidentiality. Whistleblowing proves to be so difficult, however, that governments or civil societies provide support for them (Loyens & Vandekerckhove, 2019) in various forms: legal, institutional, financial, or other. This is one of the functions of integrity counselling (the other being the advisory of public officials who are unsure how they should act correctly) and therefore the topic of integrity counselling has found a home in this chapter, including its organisation and attributes.

Few people are inclined to blow the whistle on misconduct. The Eurobarometer survey on corruption (European Commission, 2017, p. 93) finds that 81% of respondents[328] who witnessed corruption, did not report it – up from 74% in the 2014 report. According to a survey by the Ministry of the Interior, 8% of Dutch public officials had one or more suspicions in the previous 12 months of colleagues receiving gifts/services contrary to the code of conduct. Combining such percentages, even accounting for large margins of error, lead to unnerving amounts of unreported integrity incidents. And those who do report often find themselves suffering for it.[329] This reluctance combined with the importance of testimony in corruption cases suggests that improving whistle-blower conditions (removing barriers and/or improving incentives) could be fruitful.

This chapter compares in detail the national legal provisions and those from the relevant treaties the three countries are party to, and with the help of the extensive literature on whistle-blowers explores some avenues of improvement.

5.2. International instruments

The UN and the EU provide an international framework for the protection of whistle-blowers, as does the ECHR through its Article 10. Other international actors have published reports and recommendations on the topic, providing a recent body of research regarding whistleblowing in Europe.[330]

UNCAC

The UN Convention discusses whistle-blowers ("reporting persons" in its terminology – in this text, the two terms are used as synonyms) in two places. In the section on Codes of conduct, States Parties are encouraged to "facilitate the reporting of acts of corruption by public officials…" (Art. 8). The Technical Guide explains 'facilitating' as encouragement to report, informing to whom to report (reporting procedures, email addresses or phone numbers for reporting in private), and protection from retaliation. The last element is picked up again in the section on enforcement, where the parties to the treaty are asked to "provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities…" (Art. 33). The Technical Guide sees this article as an extension of the protection of witnesses and

[328] Netherlands: 61% did not report, France 86%, Romania 91%.

[329] There are many examples in the press. A small-sample psychological study claims that mental health issues are significantly greater in whistle-blowers (van der Velden et al., 2019). See also, for example, the declaration of the informant in this court case: ECLI:NL:GHARL:2019:734.

[330] For example: Worth, 2015, Schultz & Harutyunyan, 2015, (OECD, 2016), (OECD, 2017), Transparency International, 2019, Transparency International, 2013. An ISO standard on the topic is also in development, see https://committee.iso.org/sites/tc309/home/projects/ongoing/ongoing-2.html

experts, providing protection to those who possess information which is not detailed enough to constitute legal evidence (p. 105). The type of protection, against retaliation, is indeed similar, but to say that whistle-blowers are witnesses without detailed evidence is incorrect because that may or may not be true, and there are also other differences, such as in procedural role or obligations. The same document considers finding a balance between the rights of accused persons (i.e. the State and any individual officials held accountable) and those of the whistle-blower the main issue of relevant legislation. The UNCAC thus encourages supporting the act of reporting and protecting reporting persons. It also explicitly states that the anonymous reporting of corruption offenses to the authorities must be facilitated.

OECD

This organisation has published instruments containing whistle-blower recommendations within the framework of its 1997 Anti-Bribery Convention (see chapter 2). A recommendation from 1998 already encourages the member states to adopt procedures for the reporting of wrongdoing and to inform officials of their rights and obligations as reporters.[331] The Anti-Bribery Recommendation from 2009 recommends protection from retaliation measures.[332] The Integrity Recommendation from 2017 repeats these points and adds "providing alternative channels for reporting" and the possibility to confidentially report to an independent body with the power to investigate.[333] A recent report (OECD, 2017) elaborates some recommendations to encourage whistle-blowing and protect whistle-blowers:

- Raise awareness of existing protection and reporting channels with potential whistle-blowers
- Provide clear reporting channels
- Provide guidance and follow-up
- Consider financial rewards
- Ensure that criminal sanctions and civil defamation suits do not deter reporting
- Ensure data protection legislation does not impede reporting
- Protect whistle-blowers who report internally as well as externally
- Define reporting persons and protected disclosures broadly
- Ensure anonymity or confidentiality
- Impose sanctions for retaliation
- Provide civil remedies for whistle-blowers

The legislation of the three studied countries will be compared with the OECD recommendations.

Council of Europe

The CoE's most relevant instrument is their Recommendation on the Protection of Whistle-blowers of the Council of Ministers, from 2014[334] (following an earlier resolution and recommendation, from 2010). Article 22 of the Criminal Law Convention on Corruption obliges the parties to protect those who report corruption offences. Article 9 of the Civil law Convention on Corruption also obliges the

[331] (OECD, 1998). Abrogated in 2017 by the new Recommendation on Public Integrity.

[332] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD Council on 26.11.2009 and under review in 2020, see http://www.oecd.org/corruption/2019-review-oecd-anti-bribery-recommendation.htm for updates.

[333] OECD Recommendation of the Council on Public Integrity, adopted on 26.1.2017.

[334] See https://rm.coe.int/16807096c7. Later amended with updates, see: https://rm.coe.int/16806fffb1. See the explanatory memorandum here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ef5.

parties to protect whistle-blowers (instruments from 1999, see chapter 2). The Recommendation lists the ideal ingredients for whistle-blower protective legislation in eight sections. A summary of the most concrete recommendations is included below:

- Protect the rights and interests of whistle-blowers in law, legal proceedings and collective labour agreements;
- Specify the scope of what can be reported about, including at least violations of law and human rights, public health and the environment;
- Whistle-blower protection should cover the public and private sectors, irrespective of formal work relationship and also for unpaid work;
- Protection should include candidates and former workers;
- Whistle-blower rights may be restricted regarding national security, defence, intelligence, public order or international State relations;
- The legal framework for facilitating reporting should be effective, comprehensive, and coherent, and regularly reviewed, with only necessary restrictions that do not defeat the purpose of the rules;
- Persons must be protected from the reporting/publication of inaccurate or misleading information;
- It must be prevented that employers block, or retaliate for, reporting simply based on legal or contractual obligations of the whistle-blower;
- Channels for reporting include intra-organisational, to public bodies, and to the press (or, a member of parliament), while the first two should be encouraged;
- The confidentiality of whistle-blowers must be protected, "subject to fair trial guarantees";
- Investigations must be swift, measures must be taken effectively, the whistle-blower should be informed about the results;
- Whistle-blowers should be protected from any retaliation, even if mistaken, if they had reasonable grounds;
- Whistle-blower remedies may be affected if they do not follow established procedures. Following procedures may be used as evidence in court;
- The burden of proof should be reversed in court cases regarding retaliation, if the whistle-blower can show reasonable grounds that the measures in question were retaliatory;
- There should be interim relief provided for whistle-blowers, especially when they lose their employment;
- The relevant legal provisions and advising bodies should be widely promoted
- Free advice for (potential) whistle-blowers should be considered;

These recommendations, with the explanatory memorandum, will also be taken into consideration when comparing national legislation.

ECHR

The case law of the European Court of Human Rights deserves a special mention regarding its interpretation of Article 10 of the European Convention on Human Rights. This article protects the freedom of expression, including the freedom to 'impart information' which may only be restricted if prescribed by law, necessary in a democratic society, and in the public interest or to protect the rights and reputation of third persons. The 2008 case of Guja vs Moldova[335] hinges on the question

[335] http://hudoc.echr.coe.int/eng?i=001-85016. Mr. Guja was subsequently rehired and fired again, which led to the second Guja v. Moldova case in 2018 (http://hudoc.echr.coe.int/eng?i=001-181203) in which the Court concluded that his second dismissal had also followed from his whistle-blowing, applying the criterion that "an independent observer could reasonably conclude that [the second dismissal] was not unrelated [to the whistle-blowing]", and awarded again damages to the applicant.

whether interference with the freedom of expression, in the form of retaliation (dismissal) for a certain disclosure by a civil servant was necessary in a democratic society. The Court states that for civil servants, disclosure to the public is a last resort measure because of their duty of discretion, part of their loyalty to the State. If a civil servant has other options at their disposal, notably internal reporting, then a disclosure to the press is deemed disproportional.

Other factors weighing in for proportionality are the importance of the public interest involved, whether the disclosure is made in good faith and after verification by the reporting person that the information is accurate. It is not required that this verification be criminal evidence-grade – the ECHR describes the condition as "to the extent permitted by the circumstances". A disclosure in bad faith could still be a valid disclosure but would not grant the whistle-blower protection. The damage done by the disclosure is also weighed. A disclosure can be in the public interest but can also be against the public interest (when revealing military secrets, for example). Disclosures can also harm the confidence in public institutions, which could count as a public interest even if they are individual institutions and not the State as a whole, and individual persons (colleagues or managers) whose interests must also be considered, even if they are private. In the Guja case, the Court considered that the damage to the public confidence in the targeted institution did not outweigh the public interest in having information about undue pressure on the judiciary, because open discussion about such matters is "essential to democracy". The Court did not discuss whether misguided public trust in institutions, from not being told, is better or worse for the public interest than informed public distrust of institutions. Neither did the Court give criteria for the importance of the public interest for it to outweigh the opposing interests. This ECHR decision grants protection but does not, in fact, make life less complicated for potential whistle-blowers. Later cases, such as Heinisch vs. Germany and Bucur and Toma vs. Romania, confirm the developed methodology.[336] For now it can be concluded that Art. 10 ECHR can offer protection where the national law does not (Rooijendijk, 2019) because in some cases it can give protection unavailable through the national courts, to whistle-blowers who went directly to the press. The European Court of Human Rights has also developed case law to award compensation for damages incurred by whistle-blowers, which may not exist at the national level. Even with the introduction of the EU Directive discussed below, the ECHR's case law remains relevant, because the Directive does not impose financial compensation.

EU Directive

This paragraph is not a comprehensive critique. It discusses just the main provisions of the new Directive, for comparison with national laws of the studied countries. The Directive on the protection of persons reporting on breaches of Union law[337] aims to set a generic European standard for whistle-blower protection, in addition to the whistle-blower provisions in some existing EU legislation[338]. Its material scope is limited to breaches of EU law, not including some policy areas such as defence, justice, tax, and labour law. The material scope is also restricted by the provision

[336] From 2011 and 2013, respectively. See: http://hudoc.echr.coe.int/eng?i=001-105777 and http://hudoc.echr.coe.int/eng?i=001-115844 (English summary here: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-7395&filename=002-7395.pdf).

[337] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, November 26, 2019, p. 17.

[338] For example: Art. 32 of the Market-abuse regulation no. 596/2014, the Staff Regulations regarding EU personnel, Art. 11 of Directive 89/391/EEC on protection from retaliation, or Art. 71 of the Capital Requirements Directive 2013/36/EU.

that national legislation will not be affected if it regards classified information, legal/medical privilege, court deliberations, or criminal procedure. Even though the scope is limited, the Directive contains some general obligations for national authorities to adopt procedures and measures, for example to protect whistle-blowers from retaliation. It can be argued that these obligations are limited to the material scope of the Directive, but that would lead to multiple whistle-blower regulations in each public institution.

The personal scope includes any form of professional relationship, including contractors, former civil servants, trainees, and job applicants. The protective rights cannot be waived by labour contracts or otherwise. 'Work related activities' is the key concept, excluding those who may learn of wrongdoing through other channels (the spouse of a worker, for instance). Recital 36 calls these persons 'bystanders'. Contrary to what the Directive states, persons who do not depend on the organisation about which they report through a work relation, can still be affected by retaliation. In certain cases, these persons could be protected by Article 10 of the ECHR.

As conditions for protection, the Directive makes it mandatory for reporting persons to report internally, or through an external channel to the competent authorities.[339] The Member States can extend this protection. They are not obliged to allow for anonymous reporting but must protect the confidentiality of reporting persons. Public disclosure is only allowed

- when internal or external reporting did not lead to a timely response;
- the reporting person has reasonable grounds to believe that
  - the breach constitutes an imminent or manifest danger to the public interest or
  - there is a risk of retaliation from external reporting or the external report will probably be ignored.

Reporting persons must "have reasonable grounds to believe" that their information is true, but motivation is irrelevant – whistle-blowers who report out of spite, revenge or other goals that exclusively further their self-interest, are still protected. This contradicts the ECHR case law as mentioned above. Whistle-blowers can report on existing or potential unlawful acts or omissions, but also on those that "defeat the object or the purpose of the rules".

There is an extensive section on the protection against retaliation and support for whistle-blowers, including a reversed burden of proof. Member States are obliged to organise support measures in the form of information and free advice, but not obliged to grant financial support or rewards. Reporting persons are protected from liability, unless the acquisition of the reported information was a criminal offence in itself. In that case, national law applies. Remedies and compensation will also be in accordance with national law, as well as "interim relief measures" granted before the end of the legal proceedings.

These are some of the most important provisions. The new Directive must be transposed by December 17, 2021, including at the institutional level in the public sector. The Directive aims to put an end to fragmented and uneven protection for whistle-blowers, but it is hard to see how this can be achieved with a limited material scope and rules that allow for multiple deviations at the national level. Also, it will not be easy for a potential whistle-blower to discover which legislation applies to her situation.

[339] Initial versions of the Directive made internal reporting before external reporting mandatory. The adopted version gives the whistle-blower a choice, but encourages that the report first be done within the organisation.

5.3. National law

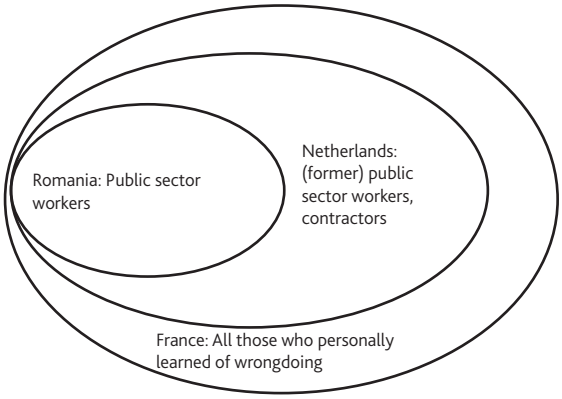
According to sources (OECD, 2016; Transparency International, 2019; Worth, 2013, 2015), many countries lack effective and/or comprehensive whistle-blower legislation. This is one of the reasons why the EU wanted to adopt rules on this issue. But Romania, France and The Netherlands all have dedicated whistle-blower protection legislation. The oldest is from Romania, that adopted a "Law regarding the protection of public sector workers who report breaches of the law"[340] already in 2004. It has never been modified. France adopted its *Loi Sapin II* in 2016 (Law regarding transparency, the fight against corruption and modernization of the economy)[341] with a chapter dedicated to whistle-blowers. In the same year, The Netherlands adopted its Law regarding the Whistle-blower Authority[342].

This is not the only applicable law. The special laws are completed by general provisions in each of the three countries, and by the ECHR protection of freedom of speech. These other provisions will be discussed below under the different topics. The comparison of the relevant provisions is divided into the topics below. Under each topic, the relevant rules from the three countries are discussed.

5.3.1. Personal scope

Article 33 of the UNCAC promotes protection of "any person" who reports corruption. But who has, in the studied countries, the right to be protected as a whistle-blower reporting on public sector institutions? And to whom can they report? Should the reporter be truthful, and are their motives important? These are the first questions to be treated here.

Figure 2: Who can blow the whistle and claim protection



Romanian law protects any public sector worker who has reported illegal behaviour in the public sector (with some exceptions, such as the courts and the prosecution service). From the wording of Art. 1 of Law 571/2004 it can be concluded that any person can report, but according to case law, this article must be interpreted in the sense that only those who work in the public sector are

[340] Legea 571/2004 privind protecția personalului din autoritățile publice, instituțiile publice și din alte unități care semnalează încălcări ale legii, Monitor Oficial no. 1214 of 17 December 2004.

[341] LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JORF no. 0287 of 10 December 2016.

[342] Wet Huis voor klokkenluiders, Stb. 14 April 2016, 147 and 148.

in the personal scope.[343] This personal scope should probably be extended to comply with the EU Directive.

In France, any physical person can be a *lanceur d'alerte* (whistle-blower) if they personally learned of wrongdoing. This is a different scope than prescribed in the EU Directive, because on the one hand it includes persons who learned of the wrongdoing without any relation to their work, and on the other hand, they must have personally learned of it, which is not a condition in the Directive. This last condition will have to be eliminated. In any case, being included in the personal scope does not necessarily mean that all those persons are also protected as whistle-blowers against retaliation, as we shall see in the section below on the extent of protection.

The Netherlands grants protection from retaliation to persons who work based on a labour contract or appointment. This includes civil servants who mostly have labour contracts since 2020, and those civil servants who still are appointed.[344] This is a considerably narrower scope than the Directive has defined. This protection is based on the Civil Code, Art. 658c[345]. The Dutch law on whistle-blowers, the *Wet Huis voor klokkenluiders,* does not determine who is protected but when the reporting is governed by it. The *Huis* can process the reports of civil servants, former civil servants, and (non-labour) contract workers. Candidates for public sector functions cannot report under this law, nor can workers in the judiciary and the intelligence community.[346] Reading these two laws in conjunction, it can be deduced that also former civil servants and contract workers (such as consultants) are protected from retaliation. The Law on public officials refers to the Law on whistle-blowers when defining the 'perceived wrongdoing' that is reported. This perceived wrongdoing (*vermoeden van een misstand*) is defined as the suspicion of an *employee*, while 'employee' is defined in the same law as a civil servant, employee, a person who formerly had one of those capacities, or a 'person who does work on another basis than a labour contract'. The judge may conclude that, having regard to the broad personal scope for admissible reporting, the law also gives protection to the persons doing the reporting. But this does not follow explicitly from the law. It is thus also possible that those who fall under the broad definition of 'employee' in the Law regarding whistle-blowers are protected when seeking advice from or reporting wrongdoing to the *Huis*, only in the sense that their identity will be kept confidential, but not in the sense that these same persons are also protected from retaliatory measures, because that protection is defined, more narrowly, by the Law regarding public officials and by the Civil Code.

Even assuming the broad version of the personal scope under Dutch law, we see that there is a significant difference in personal scope between the three countries. This difference should end in December 2021, with the transposition of the new European Directive. None of the countries explicitly include persons who are preparing to report but have not reported yet officially, nor does the Directive. However we shall see below that they are eligible for advice and support in some cases.

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[343] See Decison 4283/2018 Curtea de Apel Bucuresti. See also Decision no. 7568/2018 Judecătoria Bacau. In favour of the broader interpretation, see Decision 977/2018 of 19 February 2018, Tribunalul Bucuresti. A whistle-blower guide published in 2012 by a local ONG maintains the narrow interpretation (see https://activewatch.ro/Assets/Upload/files/ghidul%20avertizorului_web.pdf, page 5).

[344] A draft bill proposes to extend protection to contractors, interns and volunteers: https://www.internetconsultatie.nl/benadelingsverbod

[345] Before its abrogation on January 1st, 2020, the Law regarding public officials, Art. 125 quinquies offered the same protection.

[346] Article 4 of the Wet huis voor klokkenluiders. This means that the *Huis* is not competent to investigate reports made by these categories – persons belonging to them can still report to the judiciary authorities. When giving advice, however, the *Huis* is competent for these categories.

Regarding the question to whom the report must be made, France employs the strictest procedure, in three steps. First, the reporting person must blow the whistle internally: to their direct supervisor, the management of the organisation or a person designated to receive such reports (a *référent*). This is an alternative obligation. Only if they fail to act within a 'reasonable' period, the reporting person can go to the next step and report to the judiciary (the public prosecutor), the administrative authorities such as the AFA or the HATVP, or a professional organisation, for example, the Bar Association. Only in the last resort and when the second layer of institutions has not responded within three months, the report can be made public. The first two steps can be omitted in exceptional situations, when there is a "grave and imminent danger" or a "risk of irreversible damage". The latest GRECO report (2019) calls this procedure "cumbersome" and recommends, in the case of law enforcement personnel, that more training take place. Implementation of the new EU Directive will also require that the first two steps of the procedure be transformed into concurrent alternatives, even though the Directive states that internal reporting first should be encouraged.

The Netherlands chooses a different approach. The designated authority to report to is the *Huis voor Klokkenluiders* (Whistle-blower Authority, see chapter 2), but reports to this institution are inadmissible if the whistle-blower has not reported first internally (in their own organisation). This must be adapted to the new EU legislation, at least for cases that fall in the material scope of it. The implementing rules for State officials[347] specify to whom the report must be made as "the direct supervisor, a senior manager, a designated department or an integrity counsellor" (*vertrouwenspersoon integriteit).* Local authorities must adopt their own internal procedure[348]. It is not mandatory to report to the *Huis*; reports can also be made to the police, the Ombudsman, or any other competent institution. There is no legal provision for public reporting (to the media, to Parliament), a situation which must be remedied to implement the EU Directive. Indeed, those who make their report public may not be protected from retaliation under Dutch law, as we have seen above. The internal reporting phase can be omitted if reporting internally "cannot be reasonably demanded" of the whistle-blower, for example when the leadership of the reporter's institution is believed to be corrupt.

In the Romanian law, yet another solution is chosen. It explicitly states that reports can be made, alternatively, to the wrongdoer's direct manager, the leadership of the institution where the wrongdoer works, the disciplinary committee of that institution, the judiciary, the national integrity agency, Parliament, the media[349], professional organisations, and NGO's. This very inclusive list does not impose any preferential order, or reticence towards public disclosure. Only foreign

[347] See: https://www.caorijk.nl/cao/13-regels-en-voorzieningen-bij-melden-vermoeden-misstand and here the procedure, annexed to the collective labour agreement: https://www.caorijk.nl/cao/b/bijlage-12-procedure-na-ontvangst-melding-vermoeden-misstand.

[348] The Dutch sectoral organisation for local authorities, VNG, publishes a model procedure here: https://vng.nl/files/vng/brieven/2016/attachments/20160715_bijlage-1-voorbeeld-regeling-melden-vermoeden-misstand.pdf. According to this model, the report can be made to any superior or to the '*vertrouwenspersoon*', the confidential advisor/counsellor designated by the organisation. After the abrogation of the old Law regarding public officials, which provides that all public officials must have access to a special procedure for the reporting of wrongdoing, an internal procedure is mandatory for any organisation, public or private, if they have 50 employees or more.

[349] Messages on a Facebook page do not constitute reporting to the media, according to the Tribunal Brașov in decision 2137/2017, and as such do not convey the status of whistle-blower to the person who posted those messages.

institutions (such as the EU's OLAF) are excluded. According to the Directive, whistle-blowers must be encouraged to try it internally first. Potential whistle-blowers should, however, exercise caution when going to the press because when assessing which medium to use they must consider relevant legislation regarding confidentiality, the rights of individuals and those of public institutions. It is not at all certain whether the Romanian judge will view the liberty to report to the press as an absolute or relative right, and in the second case, which facts or legal provisions should stop the whistle-blower from going (directly) to the press.

Another question that concerns the personal scope is the good faith[350] criterion: The reporter must believe that what they are reporting is true and this belief must be based on some indication. This criterion is explicitly present in all three national laws: the Dutch collective labour agreement, chapter 13 related to protection from retaliation, the Romanian law on whistle-blowers in Art. 3 and the French law on whistle-blowers (Loi Sapin II) in Art. 6. The same criterion is expressed in the UNCAC, and in the EU Directive in Art. 5, under a), in that the reporting person must have "reasonable grounds to believe that the information reported was true…". This criterion protects accused persons against malicious accusations and allows them to take countermeasures (such as dismissal) without being blocked in court. In all three studied countries, false accusations can also lead to civil and even criminal liability.

Quite another issue is finally whether the reporting person's motives must be pure. The French law requires that a whistle-blower be without personal interest in the matter, as mentioned above. This excludes reports made out of spite, revenge, jealousy, competitional motives, etc. It also excludes the notion of whistle-blower awards, for that matter. The Dutch and Romanian law do not contain any criteria on the motives of the whistle-blower. The EU Directive states (recital 33) that the reporting person's motives should be irrelevant. The same rule applies in US law.[351] In the ECHR case law, however, motives do count. In the *Guja* case mentioned above, the Court states in point 77 that the "motives behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not". The ECHR goes on to say that personal motives "would not justify a particularly strong level of protection", without completely excluding the possibility of protection for those who report out of selfish reasons.

5.3.2. Material scope

Regarding the material conditions for whistle-blower protection, the questions are as follows: Are any topics excluded from protection, more specifically must the wrongdoing be illegal? [352] Should the report contain evidence or reasonable justification for the accusations?

Romanian law provides a list of topics about which the report must be made to qualify for whistle-blower protection. As a general requirement (Art. 3 of Law 571/2004), reportable issues must be illegal (including breaches of legal rules regarding professional conduct)[353] or contrary to the principles of good government, efficiency, efficacy, economy, and transparency. Article 5 appears to impose a supplementary requirement by stating that "the reporting of facts…is considered

[350] In Romanian: 'buna credință', in Dutch 'goede trouw', in French: 'bonne foi'.

[351] See the Whistle-blower Protection Enhancement Act of 2012, section 101. This law does use a good faith requirement.

[352] In the famous LuxLeaks-case, Luxemburgish prosecutors investigated the whistleblowers and charged them especially because what they reported about was not illegal (i.e. the secret tax deals did not break the fiscal law of Luxemburg).

[353] See under the paragraph regarding Codes of conduct.

whistle-blowing and regards…" implying that what those fact regard determines whether they are reportable under whistle-blower protection or not. Follows a list of 14 wrongdoings (in the same Article 5) of which some are specific (such as crimes against the financial interests of the EU) and others are very broad. For example: professional incompetence or negligence (Art. 5, under i) defective or fraudulent administration of public property (same article, under m) or breaching provisions of administrative law promoting the principles of good administration or protection of the public interest (under n). It is unclear whether Article 5 must be seen as a limitation of the scope of Article 3 or as an exemplification. There is also some overlap between the two, which is redundant in either interpretation. The model local procedure (see below under Procedures) states that Art. 5 contains a limitative enumeration.

The Dutch law (Art. 1, under d) specifies that the reported abuse must be

1. contrary to the public interest AND
2. be either
   a. illegal,
   b. a public health hazard,
   c. a personal safety hazard,
   d. an environmental hazard, or
   e. a possible operational disturbance of a public service or an enterprise through improper actions or omissions.

French whistle-blowers can report on violations of the criminal law (the French criminal categories of *délits* and *crimes,* excluding offences punishable by a fine), on 'grave and manifest' violations of international legal instruments binding France, of legal acts of international organisations where France is a member, of national laws and regulations, or on a serious threat or damage to the public interest (*Loi Sapin II*, Art. 6). This excludes, for example, conflicts of interest that are not criminally sanctioned. The following types of information are explicitly excluded from protection under the special law: military secrets, medical secrets, and exchanges between lawyers and their clients. Note that the French and Romanian law do not require the report to be in the public interest, although the French definition in Art. 6 does provide that the reporting person cannot do so in their own personal interest or out of spite (she should be "*désintéressée"*).[354]

In any case, the material scope in all three countries differs significantly from that of the EU-directive discussed above, which excludes a number of topics from the material scope and defines breaches of the law as including acts or omissions that "defeat the object or the purpose of the law" (Article 5, recital 42). The EU Directive scope is narrower, because not only is it limited to EU policy areas but also to breaches of the law, while in the three studied countries, reports can also be made about issues that are not strictly illegal but are, for example, a serious threat to the public interest (France) an environmental hazard (The Netherlands), or contrary to the principle of transparency (Romania).

The source of information is a second criterion. In France, the whistle-blower must have direct knowledge of the wrongdoing, but it is irrelevant where it comes from. In The Netherlands and in the EU Directive, it is the other way round: The information must be obtained within the context of an organisation where they work or have worked, but it is not specified whether the whistle-blower must have learned directly or can also have learned indirectly about the abuse. Romanian

[354] This can be nuanced in case law, such as in decision 4241/2013 of the Tribunal București, where the court refuses to qualify reports regarding strictly personal abuses as reports in the sense of the whistle-blower law.

law does not specify this either. None of the national laws require that the whistle-blower be knowledgeable about what they are reporting about or that it must be related to their own work tasks. The Dutch law requires only that the reportable information be obtained in the *context* of professional activities. This aspect could matter in court: if a whistle-blower has reported in good faith but without professional knowledge of what she was reporting about, and/or the basis for this good faith is simple hearsay, then how can the accused be protected against frivolous allegations? This is where the 'reasonable grounds' criterion comes into view.

This criterion is about whether the reporting person must present proof for their allegations and if that is the case, what quality the justification must have to be qualified as the report of a whistle-blower. The Dutch law, as the UNCAC and the Directive prescribe, requires that the suspicion of wrongdoing must be based on "reasonable grounds". The Romanian law provides a 'principle of responsibility' in its Article 4, which means that the reporting person must "sustain their allegations with data or indications…"[355]. The French law contains no requirement for justification; however, it is unlikely that the national investigating authorities, or the judge, will accept just any allegations however unfounded they may appear. It is also possible that, while in The Netherlands these reasonable grounds are a criterion for admissibility with the *Huis voor klokkenluiders*, in the other two countries cases cannot be declared inadmissible but will be judged unfounded if they do not present some justification, simply because *onus probandi incumbit actori*. In any case, the fact that this is a formal criterion in EU and Dutch law for protection as a whistle-blower could have three effects: to raise the bar for allegations, to create a protection against false accusations for those accused, and to show in an early stage the 'seriousness' of the case.

5.3.3. Procedures

This section briefly describes the procedures, if any, for public officials who wish to blow the whistle, and tries to determine what procedural constraints/conditions there are in the law, whether there are local procedures implemented in the public sector, what the consequences are if the person does not follow proper procedure, what the response can or must be from the authority that was reported to.

Procedural provisions are largely absent from the Romanian legislative landscape regarding whistle-blowers. As we have seen above, there is no prescription or restriction for public disclosure and there is no legal procedure for internal reporting. Individual public sector organisations can, but are not obliged to, establish their own procedures. The Ministry of Regional Development and Public Administration, which supervises local authorities in integrity matters, has published a non-mandatory model procedure[356]. Some cities, such as the capital Bucharest, use an online contact form for potential reporters[357] in- or outside the organisation. The Ministry in its latest report presents anecdotal evidence of the existence of local procedures, not exceeding 10% of Romanian municipalities (estimate by this author)[358]. Despite the freedom granted by the law, media reports

[355] See also, for example, decision 3447/2019 of the Tribunal Bucuresti.

[356] This document: https://www.mlpda.ro/userfiles/PS%2022%20-%20Avertizarea%20in%20interes%20public.pdf (accessed 15.5.2020).

[357] See https://integritate.pmb.ro/informeaza-ne. This form cannot be completed anonymously and there are no explicit confidentiality guarantees.

[358] The report (also previous years) can be found here: https://mlpda.ro/pages/rapoartedemonitorizare.

on whistle-blowers are scarce[359]. Recent and/or comprehensive data on whistle-blower cases could not be obtained for this study. Since 2010 there have been more than 1200 court cases related to the whistle-blower law. Analysis of a recent sample of case law[360] shows that in a significant majority of these cases, the whistle-blower law is not taken in consideration in the decision, being invoked by the party as supplementary grounds for their actions. The relative absence of media coverage, the unfocused use of the law in court, and the lack of local procedures denote insufficient familiarity with the legal protection of whistle-blowers in the public sector. Going back to the law, it should be noted that there are some procedural provisions related to disciplinary proceedings a whistle-blower may be subjected to. These will be discussed in the paragraph on the extent of protection, below.

As noted above, the Netherlands employs a two-tier framework for reporting wrongdoing: First inside one's own institutions and after that to the competent authorities. The law on whistle-blowers not only makes having a procedure obligatory, but also prescribes the topics it minimally must cover, in Art. 2. These include designation of the official who receives reports, a confidentiality obligation, and how the report is processed. This procedure must also be communicated[361], alongside information about how public officials can whistle-blow outside the organisation and what legal protection they can claim. Central government institutions have implemented this in the collective labour agreement (*CAO Rijk)*. Local government and other institutions have (our should have) their own regulations.[362] The association of municipalities (VNG) provides a non-mandatory model local regulation[363], with a detailed description of how the report must be processed and by whom. The *gemeentesecretaris* (~town clerk, the highest official at the municipal level) decides whether an investigation will be held. She also appoints independent investigators and decides whether external authorities must be informed. The reporting official must be informed about results of any investigation and can object to the findings. The model regulation also enhances the protection provisions against retaliation that can be found in the law, such as details on what can be considered retaliatory measures, and a role for the confidential advisor (see also below under Integrity counselling) as 'go-between' to keep the identity of the reporting person confidential.

The reporting person must follow the institutional procedure to be protected by the law and generally respect proper conduct.[364] If the internal procedure did not lead to an investigation or if an internal report could not be reasonably demanded from the whistle-blower, they can address the *Huis voor klokkenluiders*. Its procedure will be discussed here because it is the designated authority, but it should be noted that there are several other institutions the whistle-blower can go to if the internal procedure was unsuccessful or could not be started: the Ombudsman, the

[359] Based on the archives of the following news outlets and NGO's: adevarul.ro, romanialibera.ro, mediafax.ro, agerpres.ro, romaniacurata.ro, riseproject.ro, lumeajustitiei.ro, less than 10 public whistle-blower cases in the last 5 years. Consulted on June 2, 2019.

[360] The latest 30 published court decisions with at least one validated reference to Law 571/2004 as of 2.6.2019.

[361] A Dutch study showed that about 60% of respondents knew that a procedure existed (Graaf de, 2019)

[362] According to this report https://zoek.officielebekendmakingen.nl/kst-28844-103.odt from the Minister of the Interior, all but 2 local administrations had one in 2016.

[363] See here: https://vng.nl/files/vng/brieven/2016/attachments/20160715_bijlage-1-voorbeeld-regeling-melden-vermoeden-misstand.pdf

[364] According to the Dutch court (ECLI:NL:RBNHO:2019:3965), sending threats to your employer could disqualify you from protection as a whistle-blower because you did not report 'properly'.

police, the relevant national inspection (such as the national health inspectorate)[365], the provincial administration (if the issue was with a local administration), a sectoral confidential committee (*vertrouwenscommissie),* and others. This may be confusing for whistle-blowers. Each of these institutions has their own procedure and their own forms of protection of confidentiality and powers of investigation. They may or may not have the resources or be sufficiently active in picking up cases themselves or referring them to more relevant institutions. The reporting person cannot go to the press and maintain the right to whistle-blower protection, unless all the competent authorities have been contacted unsuccessfully. Being contrary to the EU Directive, this rule will have to be changed to include contacting the press, in certain cases even without any preliminary procedure.

The *Huis voor klokkenluiders* (see also section 2.4.6) is an independent public organisation with two branches, one for advice and one for investigation.[366] The advice department has public information duties, and it helps individual potential whistle-blowers with questions about what to do and where to go with their information. The investigational department of the *Huis* can review two things: wrongdoings themselves and retaliation against whistle-blowers. The product of the investigation is a public (anonymised) report with recommendations, without legally binding value. In the wording of Article 8 of the law: The *Huis* cannot establish civil or criminal responsibility.[367]

Potential whistle-blowers can address either department. The advice department can give advice in any way they see fit, refer the reporting person, or transfer requests to the investigational department – but can only disclose that person's identity with their consent. Any advice remains confidential. Addressing the investigational department directly requires a formal request (*verzoekschrift)* with identification of the reporting person, those accused and a justification of the suspicion. The department must start an investigation, unless it concludes that the request is inadmissible on grounds of non-compliance with form requirements, lack of justification, lack of public interest, lack of internal reporting, ongoing (criminal) investigation by other authorities or by the department itself, internal report was already correctly responded to, or *res judicata*. During an investigation, the department can stop working on it if the reporting person is not collaborating or does not respect confidentiality (ex. If they go to the press) or if it finds that the suspicion is obviously unfounded. A refusal to (further) investigate must be justified and communicated to the interested party, or parties when a formal investigation has already started.

The department can also conduct investigations in the private sector, but in public sector investigations it has the following special powers: It can call hearings and oblige witnesses and other interested parties to attend and it can request the delivery of documents. Justified refusal is possible, but the department judges whether the notified grounds for refusal are indeed sufficient. The disclosure of documents is not mandatory when they concern national security, official secrets, or if disclosure would be illegal. Interested persons may also refuse on grounds of auto-

[365] See this website: https://www.igj.nl/onderwerpen/themas/klachten-en-melden.

[366] In its short existence, since 2016, the Huis voor klokkenluiders has known a number of internal conflicts, leading to the resignation of board members and directors. According to a third party evaluation report from 2017 , the advisory role, taking the side of the whistle-blower, leads to conflicts with the investigative role, where objectivity is the requirement. The report recommended a 'restart' of the organisation. This restart led to continued dissatisfaction, about which the national Ombudsman wrote another report, in 2019. Practice will tell if a combination between advice and investigation in one organisation can be fruitful.

[367] The first two reports on investigations were published by the *Huis* in May 2019, three years after the start of the organisation.

incrimination. The department can call experts and interpreters and they can enter any location they deem necessary for the investigation, except personal residences.

Compared to the prosecution service or the administrative judge, the department's powers are significantly weaker. The question can be raised why a whistle-blower whose ultimate aim it is to make known the truth and to punish the guilty, would choose to report to the department instead of the judiciary. An investigation by a body with fewer powers and no binding solution would also be less beneficial to the public interest than a full judiciary investigation. It is possible, but not certain, that the *Huis* works faster than the court, is less costly for the whistle-blower because they do not need legal assistance, and can better guarantee the relative confidentiality of the reporting person, because a court decision is in principle not anonymous. Interference between (concurrent) judiciary and *Huis* investigations are also possible. The law regarding whistle-blowers provides that the two institutions must coordinate ongoing investigations and conclude a collaboration agreement.[368]

The French law (Sapin II) introduces an obligation to establish a reporting procedure for all larger public entities (municipalities with less than 10 000 inhabitants are not obliged, nor are public sector entities with less than 50 employees). As noted above, local procedures must be followed before the competent authorities can be contacted, even if it seems unlikely that the prosecution service would refuse to process a report on criminal facts on grounds of not respecting the internal procedure. A Government decision[369] details in Article 5 what the procedure should contain: how to send the report, how management will respond and when, and confidentiality will be guaranteed. Further detailing is provided by a *circulaire*[370], recommending among others that reports be made to the *référent alerte* and not directly to management. The receiver of the alert must first evaluate its admissibility (personal knowledge, good faith, no personal interest) and if admissible, send it to the management of the institution. The reporting person must be kept informed about any measures (or a decision that no measures are needed). As mentioned, if the report is not processed within a reasonable delay, the *lanceur d'alerte* can contact external competent authorities (prosecutor, AFA, etc.). Automated processing of reports is subject to special conditions, issued by the CNIL.[371] If a reporting person is unsure whom to contact, the Ombudsman (*Défenseur des droits*) is provided by the law as a general referrer (Art. 8, par. IV) and this organisation also provides (online) information and (custom) advice. This could especially be useful in cases where someone outside of a public institution personally learns of reportable facts since those persons cannot report to a 'superior'. In France there is also a *Maison des lanceurs d'alerte* but this is an NGO, not a public institution.[372] Finally, the Agence Française Anticorruption (AFA) can investigate procedures in the public and private sector, not individual cases, and refer cases for sanctioning only in the private sector.

[368] To be found here: https://huisvoorklokkenluiders.nl/wp-content/uploads/2016/06/protocol-HvK-OM.pdf.

[369] Décret n° 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'Etat, JORF no. 93 of 20 April 2017.

[370] *Circulaire* of July 19, 2018: http://circulaires.legifrance.gouv.fr/pdf/2018/07/cir_43813.pdf.

[371] The CNIL (Commission Nationale de l'Informatique et des Libertés) is the national committee on information freedoms, a public body. It has issued a 'general authorisation' with conditions for whistle-blower systems (to be viewed here: https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000035459127&fastReqId=386645448&fastPos=1). For example: confidentiality must be protected, but anonymity must not be encouraged by such an automated process.

[372] See their website: https://mlalerte.org/. Another NGO with the same mission: https://www.alertes.me

A brief review of existing procedures of French ministries reveals that they are very similar.[373] These procedures apply to public officials, labour contract workers and contractors. The following elements are common:

- A *référent alerte, or a* multi-person body (*collège de déontologie)* is designated as the primary receiver of all reports. Line managers who receive reports forward them to the *référent/ collège*. The ministries combine this function with the function for ethical counselling, the *référent déontologue*;
- The preferred method of communication is by physical mail, with the 'double envelope' to protect confidentiality (the Ombudsman uses the same procedure);
- The reporting person must include information that makes a later exchange possible – this could be their personal details, but they can also use a PO Box;
- Anonymous reporting is allowed at most ministries, but such reports are subject to close scrutiny of the facts and their gravity;
- All reports are entered in a confidential register;

The designated authority, the *référent alerte*, has no investigative powers but it is a judge of admissibility, objectively and subjectively: does the report concern reportable facts that are not covered by exclusions? Are the facts either of a criminal nature or of a sufficiently grave nature? Did the whistle-blower personally learn of the facts, or was it hearsay? The *référent* proceeds to acknowledge receipt of the report, to assess the admissibility, and if the report is admissible, to assess whether measures must be taken. If that is not the case, the whistle-blower received a motivated response. If the *référent alerte* considers that measures should be taken, they contact the appropriate authorities (disciplinary or criminal), ending his involvement.

So we see that there are significant differences between Romania, The Netherlands and France at this point.

We have discussed here only the general procedure dedicated to whistle-blowers. In the three countries, there are special procedures for the banking sector and for insurances, aviation safety, the military, the police, intelligence, and other specific sectors. They will not be discussed here. Note that these procedures can apply to public officials.

5.3.4. Incentives for reporting

Note that for this section we will only look at whistle-blower legislation in the three countries. Persons who report corruption offenses to the police or the prosecution service may be protected as witnesses under the criminal law – to a better or lesser degree than under whistle-blower law. And persons who report wrongdoing but do not qualify for whistle-blower protection under national law may still be protected under Article 10 of the ECHR (freedom of speech), notably on the aspects of protection from retaliation.

Aside from the specific procedural constraints that govern the procedures applicable to whistle-blowing public officials, it is of interest to discuss on the one hand the legislative provisions that may form an obstacle to reporting, and on the other hand some rules that may stimulate them. Two aspects will be reviewed: First, principles of loyalty (to the State, to the public interest) and confidentiality that make it the official's duty to report or not report. And second, arrangements

[373] Source: www.legifrance.gouv.fr. On June 12, 2019, the procedures of the following ministries were analysed: Education, Interior, Foreign Affairs, Culture, Agriculture, Higher education & Research. The other ministries did not, on that date, seem to have published a procedure in the French official journal.

that enhance or diminish the risks of reporting to the reporter's personal situation, such as protection from retaliation, rewards, and forms of support. Thus, from the reporter's perspective: How is she helped in making the decision to report?

Shifting the perspective from that of the reporter to that of the State, the importance of these provisions lies in the protection of confidential information that is in the general interest, the trust that the State must have in the obeisance of its servants, the protection of the privacy of private persons and, chiefly, the protection from injustice of individuals who speak out in the public interest. This mixture of potentially contradicting interests can lead to an ambivalent attitude of the State towards its whistle-blowers, who may be praised but also scorned. This attitude can be better understood when considering that the State exists only in the abstract sense and that the representatives of its interests are also defenders of institutional and personal interests.

Conflicting duties: loyalty and confidentiality vs the obligation to report

Loyalty, regardless of the source (including legal provisions, personal convictions, organisation culture) can be a stimulus for reporting, and it can be an impeding factor. The difference is determined by the nature of the loyalty and by whom loyalty is owed to. If the nature of the loyalty is to uphold certain values, such as integrity, the official is encouraged to report. If loyalty means to obey orders, then the opposite is true. If loyalty is owed to the State, or to the institution where one works (Solaz et al., 2019), then this may discourage or encourage potential whistle-blowers, depending on how that loyalty is best expressed in the eyes of the official. If the loyalty is to the public interest or to the People, the reporting person may feel that it supports blowing the whistle. Note that whistleblowing often does not involve disobeying direct orders but simply disclosing information, even though it is very well possible that those guilty of wrongdoing issue orders to block any disclosure, that work precisely through the mechanism of loyalty.

Therefore, it is relevant to see how loyalty is expressed in legislation – how explicit, and to whom. It is also relevant to study if obligations to keep information confidential can be a deterrent for would-be whistle-blowers. Then in some countries the law obliges officials to report. This stimulating factor will also be discussed briefly.

Romanian legislation covers loyalty in the Administrative Code, see chapter 2, imposing, among others, the following obligations on public officials under the explicit heading of loyalty: 1) Respect the Constitution and the laws; 2) Actively work to uphold the law; 3) Loyally protect the prestige of the institution they work for; 4) Refrain from any action that may harm the public image or the interests of that institution. It is easy to see the potential conflict, also without reporting any misconduct. It must be added, however, that the same law states as principles the supremacy of the law and the priority of the public interest. But there are direct obligations of loyalty towards the employing institution in this law, which cannot be found in the laws of the two other countries. Loyally following the instructions of superiors is covered by the Administrative Code in Art. 437, which also covers the right to refuse instructions "if [the official] considers them to be illegal", in writing and motivated. The same article mentions that the official will be liable if the instruction turns out to be legal. The official in question has the obligation to report these events to the superior of the one who issued the order. The Criminal law (Art. 267) sanctions public officials who do not report criminal acts of which they learned in the context of their duties.

France's officials (*Loi Le Pors*, Art. 25) are bound to obligations of 'dignity', among others, which may include an obligation to refrain from undue criticism of public institutions. But this must be concluded by the judge based on specific circumstances. Institutional codes of conduct may

include loyalty as a principle.[374] The law (Art. 28) does impose an obligation to follow the orders of superiors, which is not as broad as an obligation of loyalty to the institution. French officials must obey instructions, unless they are "clearly illegal" AND "can by their nature seriously compromise a public interest". In fact, French officials can have the obligation to disobey illegal orders, not just the right. This follows from the case law of the *Conseil d'État*.[375] Also, if the wrongdoing is of a criminal nature, public officials must report this without delay to the public prosecutor based on Art. 40 of the Code of criminal procedure.

In The Netherlands, the obligation of loyalty can be found in the Law regarding public officials, but only in the most general of terms, in the obligation to act as a 'good official' (see also chapter 2). According to the implementing code of conduct with mandatory status for central government officials, the good official must be loyal to the "public duty", which requires the "wisdom to make the right choice in difficult situations" (Art. 2.2). The obligation to follow instructions stems from the Law regarding public officials, Art. 6. A disciplinary sanction can be administered for neglect of duty if the official does not follow instructions or does not behave like a 'good official'. The law does not mention grounds for refusal of instructions, but from case law it can be deduced that officials in some circumstances may refuse to follow 'obviously unreasonable' instructions[376].

Regarding classified information, the discussion can also be brief. The only objective is to show that each country has specific legal provisions on this topic, that present a risk and an impediment for whistle-blowers.

In Romania, the duty to protect confidential information can be found in the Administrative Code, Art. 439. This article prohibits any disclosure except of "information of public interest" – any information that is not classified as being in the public interest is therefore confidential and cannot be disclosed. This prohibition is sanctioned at the disciplinary level. At the criminal level, the Criminal Code contains prison sanctions or criminal fines for disclosing secret information or information that is "not designated for publication". A conviction for *illegally* divulging state secrets means 2 to 7 years in prison.

For France's public officials, the basic text is Art. 26 of the *Loi Le Pors*. In the first place, they are bound to "professional discretion" (i.e. not divulge information to the public) unless explicitly instructed otherwise. They are also criminally liable for breaching professional *secrecy* (Criminal code, Art. 226-13), that is, disclosing information that is classified as secret is punishable by one year imprisonment and a criminal fine of 15 000 EUR. Note that there are special legal provisions for breach of state secrets, military secrets and specific professional secrets.

In the Netherlands, divulging state secrets is punishable by up to six years imprisonment (even 15 years in certain circumstances).[377] The duty of confidentiality (subject to disciplinary measures) is based on Art. 9 of the general law regarding public officials. Everything confidential "according to its nature" must not be disclosed.

Romanian legislation is the most explicit and demanding regarding loyalty to the institution where the official works. At the other end of the scale, in The Netherlands the loyalty principle

[374] Such as this one, from the Ministry of the Interior: https://www.legifrance.gouv.fr/eli/decision/2017/2/17/INTI1705071S/jo/texte

[375] The famous 'arrêt Langneur' of November 10, 1944. See Sourzat, 2018 for a discussion.

[376] See for example ECLI:NL:RBAMS:2014:2871 and ECLI:NL:CRvB:2008:BF8387.

[377] Dutch criminal code, Art. 98 to 98c.

is interpreted in such a way that officials are encouraged to not let it stand in the way of doing the right thing (even though 'the right thing' is open for interpretation). French legislation takes a middle road. On the subject of confidentiality, there seems to be no significant difference in risk. An explicit duty to report (criminal) wrongdoing exists only in Romanian law.

The issue is whether a public official who wishes to report must weigh the importance of what they wish to report against the breach of loyalty or confidentiality obligations that they are about to commit.[378] In principle, the answer is no: If the official is reasonably convinced that the matter to be reported is true, if they follow proper procedure and if the matter corresponds to the material conditions of whistle-blower protection (e.g. that the matter is illegal, or a threat to public security – see above under material scope) then it should not matter if the institution acquires a bad reputation, if their superior forbade them to report, or if confidential information is exposed. In fact, this is exactly what whistle-blower protection laws are for. Of course, in The Netherlands a whistle-blower may not be protected anyway when publicly exposing matters, because this action is not (yet) provided for in the law. But a breach of secrecy can also occur when reporting within the organisation, so that in fact the issue is the same in all three countries. It can be submitted that, even if reporting of wrongdoing by breaching confidentiality or loyalty provisions does not void whistle-blower protection, the reporting official is at risk if the judge argues that reporting officials are still bound to their obligation to fulfil their tasks with professional diligence, which could include a certain proportionality decision by the reporter. The limits of protection will be further discussed in the next paragraph.

Protection of identity

Retaliation is much less of a risk if those who would wish to retaliate do not know the identity of the person who exposed wrongdoing. Even in the absence of retaliation, a whistle-blower may wish to keep their identity hidden, to prevent them from being regarded as a traitor, a snitch. Confidentiality and anonymity concerns are among the chief impediments for reporting corruption (Artello & Albanese, 2020). Therefore, in this paragraph we look into arrangements to preserve the confidentiality or even anonymity of reporting persons. It should be noted that total anonymity was not at all popular among those who actually had reported, as shown in a Dutch study (Graaf de, 2010). Interviewees said it would be unfair to report anonymously. Also, due to the insider knowledge that many whistle-blowing reports require, it can often be deduced from the circumstances who the reporting person may have been.

Aiding reporting persons by keeping their identity confidential is not an absolute value, however. It is in the public interest that (criminal) wrongdoing be known, sanctioned and that repetition is prevented, but anonymous reporting can hinder investigations because a witness statement and/or additional information cannot be obtained, and it may also be at odds with criminal procedures requiring that the identity of the accuser be known to the defence. The UNCAC technical guide counsels the States Parties to "consider the feasibility of ensuring anonymity to reporting persons" (p. 108) and its Article 13 even states that anonymous reporting of corruption offenses (by a member of the public) must be facilitated. ECHR case law allows anonymous witnesses in the sense that their identity is known only to (certain) authorities, but this is not identical to anonymous reporting.[379] Still, in all three studied countries it is possible to report criminal (corruption) offenses

[378] Would-be whistle-blowers may also feel loyal to colleagues or others, but we limit ourselves here to the legal context.

[379] With sufficient safeguards as to satisfy the provisions of Art. 6, under 3, d), ECHR. See for example the case of Doorson v. The Netherlands, 1996.

anonymously through various arrangements outside of the formal whistle-blower procedure[380]. Wrongdoing within the framework of this study may fall or not fall under the criminal law. The anonymous reporting of integrity breaches that are not criminal offenses is very limited. As noted above under Procedures, some internal procedures provide for it in France. Dutch and Romanian procedures do not include the possibility for anonymous reporting. In all three countries, the situation may thus arise where a public official, barred from anonymous reporting as an inside whistle-blower, can still choose to report anonymously as a citizen.

Real anonymity – in contrast to situations where the authorities know the identity of the 'anonymous' witnesses – is thus the exception. It is an avenue open to certain whistle-blowers in France and to those who circumvent specific whistle-blower reporting channels to report through anonymous general crime reporting channels. But a 'next best' step, for those who wish to report without suffering any negative consequences, is confidential reporting where only some designated persons know the identity of the reporter. We will now review the possibilities for confidential whistle-blowing in the three countries, limited to the confidentiality guarantees in whistle-blower procedures, leaving aside the provisions of general criminal or administrative procedure.

The Romanian whistle-blower law contains multiple confidentiality provisions. If the whistle is blown on corruption offenses or EU funding fraud, the identity of the reporting official must be protected ex officio as if they were a protected witness.[381] This implies that reporters of, say, mismanagement of public funding (other than EU funds) will receive no such protection and the exposure of their identity is only constrained by the general confidentiality provisions in Art. 439 Administrative Code – which is quite comprehensive but works outwardly and may not constrain internal communication in this case – and in general privacy legislation (GDPR). However, if a disciplinary investigation is started against the whistle-blower, the disciplinary committee cannot disclose the identity of the reporting person to their manager or other persons exercising control, if the report was directed against those persons.

The Dutch law on whistle-blowers states that internal reporting procedures (that all organisations of at least 50 employees must have) must contain the option for workers to report confidentially to "an advisor", as well as obligation for the employer to keep reports confidential, if the reporting official so requests. This means that public institutions of less than 50 personnel do not have such an obligation under the special law, nor does any public institution if the reporting person did not

[380] In Romania, anonymous reporting is not regulated but the prosecutor's office must act on any report that is sufficiently credible and extensive, also if they are anonymous. A private initiative, on the website https://www.piatadespaga.ro/adauga.html where anonymous reporting is the standard option, is supported by the national agency for public officials. In administrative law however, Art. 7 of Government Ordinance 27/2002 excludes anonymous reports from processing. In The Netherlands, there is a service called Report crime anonymously (https://www.meldmisdaadanoniem.nl/), a partnership between (mostly) public institutions. The Dutch FIOD, the organisation that investigates fraud, simply states that anonymous reporting is possible: https://www.fiod.nl/ik-wil-anoniem-blijven-kan-dat/. There are also other private initiatives. A French example is the anonymous reporting option granted by the financial markets authority (https://www.amf-france.org/Formulaires-et-declarations/Lanceur-d-alerte). At the EU-level, OLAF offers a similar option for fraud reporting. See https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud_en. Examples from other countries: The Austrian government has a portal for reporting economic crime and corruption: https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=1at21. The UK offers the possibility of anonymous corruption reporting here: https://www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption/.

[381] i.e. according to the law regarding the protection of witnesses, Legea nr. 682 din 19 decembrie 2002 privind protecția martorilor, M. Of. 964 of 28.12.2002. This protection is the task of the national office for the protection of witnesses (ONPM).

specifically request it. This is an example of a choice between the interest of the whistle-blower and that of the organisation. To weaken the confidentiality obligation is to strengthen investigations. The law could have stated that all reports are confidential unless the reporter waives this right, but the opposite was decided. Once the report is sent to the *Huis voor klokkenluiders*, confidentiality provisions are strengthened. In the first place, the *Huis* is by way of exception freed from the obligation to send information regarding its counselling activities, investigations, or whistle-blower reports to its overseer, the Minister of the Interior (Art. 3 of the law). In the second place, Article 3j provides that the identity of reporting persons may not be disclosed without their permission – the reverse solution compared to the internal procedure. In the third place, *Huis* officials also have a general obligation to not disclose any information that is or should be reasonably assumed confidential, not even between the advice and investigational departments (Art. 3k and 3i)[382]. The investigational department has the discretionary power to confront reporting persons with reported persons, however under application of Article 3j the department would be obliged to organise the confrontation without revealing the whistle-blower's identity.

The French law, Chapter II of *Loi Sapin II*, dedicates Article 9 to the protection of confidentiality, of the reporting person as well as the persons targeted by the report. In internal or external procedures, the identity of the reporting person can only be disclosed with their permission, except to the judiciary authorities (prosecution service or judge). The same restriction applies to the identity of the reported person, until the veracity of the report has been established. Breach of this confidentiality is a criminal offense, punishable by up to two years imprisonment and a fine of 30 000 EUR.

Protection from liability

Through their reporting, whistle-blowers may breach legal provisions (e.g. regarding state secrets, rights of third persons) and be exposed to administrative (disciplinary), civil, and even criminal sanctions. To protect the higher public interest and stimulate public officials to report, whistle-blowers may be protected from some or all of these sanctions, the exclusion ground being subject to good faith reporting and/or other conditions. Such protection cannot be absolute – in an example *ad absurdum* would the official who murdered a colleague then be shielded from prosecution if they reported the murder themselves.

The EU Directive (see above) provides exemption from liability for reports within its material scope: provided they had reasonable grounds to believe that the respective information was necessary for revealing a breach (as defined by the Directive), reporting persons "shall not incur liability of any kind" (Art. 21) for disclosing it nor for obtaining or accessing it (except when the acquisition was in itself a criminal offense). This applies, for example, to the disclosure of trade secrets or personal data. But government classified information is excluded from the scope of the Directive, so that whistle-blowers would not be protected by EU law if they disclose that information. A factor to be examined is how this provision will be transposed: If the protection from liability takes the form of ulterior annulment of fines, this is quite different from a situation where fines cannot be imposed at all.

In national law, some exemptions from liability can be found. The Romanian whistle-blower law offers as protection the possibility for the judge to annul administrative (i.e. disciplinary, civil) sanctions. There are no whistle-blower liability exemptions as such in Romanian law. In France, the *Loi Le Pors* (Art. 6 ter A) protects public officials from disciplinary liability for good faith reporting.

[382] This general obligation reflects the confidentiality obligation in the general law on administration (Awb, Art. 2:3). Officials are exempted from it if there is a legal obligation to disclose or if disclosure is made necessary by the fulfilment of their duties. Arguably, this does not apply to the interdiction to disclose reporters' identities, being a separate provision.

Article 122-9 of the French criminal code establishes that, if the disclosure was 'necessary' and 'proportional' and if proper procedure was followed, the reporting person is protected from criminal prosecution – not if the reporting person in good faith thought that it was necessary, but under objective conditions. The article does not protect reporting persons who disclose military secrets, and it does not protect against civil procedures.

From January 1st, 2020, Dutch public officials are no longer protected by the Law regarding public officials because the subject matter is now regulated in collective labour agreements. The current agreement for central government personnel states that "your employer must protect you against possible negative consequences of your report". It is unclear what the scope of the employer's obligation is, and who protects the reporting official if it is the employer who is threatening her with retaliation – a realistic scenario. Are civil servants protected from disciplinary measures that affect their rights, such as dismissal or withholding of salary, and from civil or criminal liability? This will have to be determined in practice.

Since we have seen that disclosing state secrets is a crime in all three countries, it can be an extra burden for would-be whistle-blowers in the public sector to know that they can be prosecuted and that their freedom may depend on how the criminal judge weighs conflicting legal provisions. Another issue is civil damage; protection from civil suits by third parties who suffered damages, for example someone named in good faith, but in error, in a report on wrongdoing but who was subsequently cleared. Can they sue the whistle-blower for damages? They can, in all three countries, especially if the injured party is in good faith themselves and does not sue for retaliation.[383] And they could win. This is a risk for whistle-blowers that cannot be legislated away without touching the civil law principle that damage must be repaired by those who cause it. Instead, other solutions could be envisaged such as a whistle-blower relief fund out of which such damages could be paid, or a guarantee by the State to pay for them if proven in court, or even an insurance scheme[384].

Protection from retaliation

Related to the liability for damages or breaches of criminal or administrative law, reporting persons also risk retaliatory measures by their (former) employer or third persons. The difference between retaliation and the situation in the paragraph above is that the measures taken against whistle-blowers here are a form of revenge, of private justice as it were, often disguised as sanctions for misconduct by the whistle-blower. There are multiple forms of retaliation and of protection from it. Retaliation can include disciplinary measures, court charges for (fictitious or real) damages, discriminatory measures, attacks on reputation through the press or the spreading of rumours. They can be justified by blaming the whistle-blower ("She told the authorities and violated her confidentiality clause"), citing different reasons ("We had to move him to a temporary office 300 km away since we lacked space") or no reason at all, such as when a reporting person inexplicably finds himself buried in work or, on the contrary, with nothing to do all day.

Protection from retaliation varies in material and personal scope, burden of proof, and conditions[385]. In Romania, as guarantee for the fair treatment of a whistle-blower, the press must be invited

[383] See also recital 103 of the EU Directive, on the rights of persons who suffer prejudice by public disclosure.

[384] An idea proposed by Codru Vrabie.

[385] As an anomaly, the whistle-blower procedure of the French ministry of foreign affairs seems to require a formal identification as whistle-blower for any protection to take effect. See https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037160494&dateTexte=&categorieLien=id, Art. 3.

whenever disciplinary committees convene to discuss sanctions against a reporting person.[386] Romanian law does not offer further protection, other than in labour suits against employers. Contrary to CoE recommendations, there is no reverse onus[387], however the court examines ex officio the applied sanction (disciplinary or fine) against common practice for similar misconduct. French and Dutch law provide explicitly that reporting officials may suffer no reprisals because of their reporting and that disciplinary measures following a report are presumed to be retaliatory. Romanian law does provide that those who seek the advice of an ethics counsellor cannot be sanctioned or prejudiced in any way because of that, but ethics counsellors are not (usually) within the passive personal scope for whistle-blowing.[388] France (and the EU Directive) has also instituted a reverse burden of proof, in the sense that measures taken by interested parties against whistle-blowers after they blew the whistle are presumed to be retaliatory, and those who took the measures must prove that they were not.[389] Note that civil suits or accusations of crimes do not fall in this category under current French legislation. There is a logic behind this: In contrast to disciplinary measures, civil or criminal law retaliation can be stopped by the court before it can come into effect. But it is a burden on a whistle-blower having to defend themselves from retaliatory claims in a costly civil case while having to prove that they were made in bad faith (the burden of proof for the facts remains with the claimant, of course). This is one of the issues that the EU Directive aims to address.

French reporting persons are protected if they report crimes or conflicts of interest, or if they are whistle-blowers who followed the procedure. The material scope for qualification as a whistle-blower (see above, under Material scope) is however broader than the material scope for protection from retaliation, so that some whistle-blowers may seek protection of the courts in vain (contractors, or third persons with personal knowledge of the facts but who are not in a professional relation with the institution in question). In The Netherlands, there is an accent placed on following proper procedure. Dutch case law shows that whistle-blowers who did not follow procedure forfeited protection.[390]

It is clear that protection from retaliation differs considerably between the three countries, being the strongest in France. But the practical effect of the protection in all three countries is that the whistle-blower can keep their job or be reinstated, which may be something that neither party wants if the relations at work have soured over the whistle-blowing. In that case, the whistle-blower may be able to appeal to the judge and may be awarded an honourable dismissal with compensation. But this depends on unpredictable national judiciary practice.

Financial incentives

Financial incentives can take the form of reimbursement of costs incurred, compensation for future losses, but also supporting benefits that may come with the status of whistle-blower as a form of official recognition, or even financial rewards for reporting or successfully ending wrongdoing.

[386] In court, this can lead to annulment of disciplinary sanctions on procedural grounds, see for example http://rolii.ro/hotarari/58942693e490097804001054.

[387] The law is silent and Romanian case law does not indicate acceptance of reverse burden of proof. See Tribunal Bucuresti, decision no. 1835 of 1.4.2019 and Curtea de apel Alba Iulia, decision no. 739 of 4.7.2018.

[388] Administrative Code, Art. 451, par. 9.

[389] Loi Le Pors, Art. 6 ter A

[390] See Jurisprudentie Arbeidsrecht 2002/35, Kantonrechter Amsterdam, 04-12-2001, 99C14549 (with comments by Vegter). See for more recent case law for example ECLI:NL:GHAMS:2014:4587 or ECLI:NL:RBNHO:2019:3965.

The CoE recommends 'interim relief' for whistle-blowers. In the UK, the Employment Rights Act of 1996 (section 123) confers a compensation (not a reward) for employees and other workers who are dismissed because of protected disclosure, to be established by the labour court. In the US, there are several programs where whistle-blowers can be awarded a percentage of the recovered amount, mostly in the area of tax fraud and securities fraud.[391]

None of the three studied countries offer rewards, with the exception of fiscal whistle-blowers in France, who are entitled to a bounty, established at the discretion of the Director-general of public finance.[392] Compensation for some of the incurred legal costs can be awarded to employees and officials of the central government in The Netherlands, after a final court decision, based on the collective labour agreement[393]. A more general provision may entitle a Romanian whistle-blower to similar compensation under Art. 428 Administrative Code. In France, in the absence of such a provision, whistle-blowers must seek indemnity in court.[394]

Cultural differences may be cited as the reason why in the US there are several reward programs for whistle-blowers but in the studied countries virtually none. In corruption matters, at least, because bounties do exist in criminal law and financial incentives exist in competition law, for legal persons. The EU Directive does not prescribe whistle-blower rewards, nor does the UNCAC. The OECD presents them as a suggestion.[395] We will now take a quick look at the literature available on the effectiveness of such an arrangement. Rewarding whistle-blowers (in addition to compensating for their damages) should stimulate good-faith whistle-blowing without causing a discouraging level of negative effects such as a rise in malicious, opportunistic, or simply low-quality reports (small cases, lack of evidence). But it is also a question of principle: The argument runs that reporting persons should not be paid for something that is their duty anyway. In light of the scarcity of whistle-blower reports in Europe, a Swedish working paper (Nyreröd & Spagnolo, 2018) suggests that rewards should be seen as compensation for retaliation rather than a bounty.

Experimental research shows a connection between financial incentives and intention to report in a US study of 80 accountants (Andon et al., 2018). An experimental study on rewards for self-reporting in collusive bribery situations finds a positive correlation between reporting and rewards only if the would-be reporter was also exposed to a penalty (Abbink & Wu, 2017). A study where an industry that rewards whistle-blowing is compared with others that do not, finds a significant positive correlation between a financial incentive and whistle-blowing by employees, but in a very small sample (Dyck et al., n.d.). A study in Ghana (Ayagre & Aidoo-Buameh, 2014) found no impact of rewards on whistle-blowing. Finally, US versus UK policy papers show opposite attitudes towards

[391] See for example US Code section 3730 on so-called qui tam procedures against false claims (False Claims Act). Another program is run by the Securities and Exchange Commission (SEC) that oversees the stock market: https://www.sec.gov/whistleblower.

[392] Article 109 of Loi n° 2016-1917 du 29 décembre 2016 de finances pour 2017, modified. Implementing decision: Décret n° 2017-601 du 21 avril 2017 pris pour l'application de l'article 109 de la loi n° 2016-1917 du 29 décembre 2016 de finances pour 2017.

[393] Similar local agreements may also contain this provision.

[394] See for example Decision no. 13MA02680 of 23.02.2016 by the Cour administrative d'appel de Marseille, where a whistle-blower was harassed after reporting and was awarded 5,000 EUR in moral damages.

[395] Whistleblower protection: encouraging reporting. OECD, 2012, http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf. See also the OECD recommendations under section 5.2 above.

whistle-blower rewards,[396] while an Australian parliamentary committee recommends using them.[397] It is prudent to conclude that the literature does not give an unequivocal recommendation to implement rewards mechanisms. On the other hand, if for murders and kidnappings rewards are promised, and reporting cartel members may be exempt from penalties, there is no fundamental cultural impediment for rewarding whistle-blowers. It can be submitted that, because the risks associated with whistle-blowing are so high (loss of career, social status, prospects, and threats, lawsuits), a mechanism that promises to compensate for these risks should at least be tried.

5.3.5. Protection for accused persons

Malicious or vexatious[398] allegations, as the UNCAC Technical Guide calls them, must be prevented as much as possible and if not, they must be swiftly dealt with. If the damage is done, the falsely accused person has a remedy in court. Bad faith reporting, i.e. knowingly false (calumnious) accusations, are always reprehensible and are sanctioned in the criminal law, in all three countries. France's law regarding public officials makes this explicit in Article 6 ter A, last sentence. In the case of accusations that are true but are motivated by personal gain or, for example, revenge (such as persons who feel they are unfairly dismissed and blow the whistle on their former employer), the right of the whistle-blower to be protected can be argued about (the EU Directive says motivation is irrelevant), but the accused should still be sanctioned.

A different case is where the damage done by the whistle-blower is disproportional in comparison to the wrongdoing they want to prevent or end. Such disproportionality may create unnecessary victims. The Dutch *Huis voor Klokkenluiders* in one of its first case reports[399] develops the theory that when a reporting person does not observe the principles of proportionality and subsidiarity, and/or not follows proper procedure, or fails to keep the report confidential as much as possible and to collaborate with the investigation, they may not be entitled to protection as a whistle-blower. A similar argumentation can be found in the case law of the Conseil d'État.[400] In Romania, the whistle-blower law contains the principle (Art. 3, under g) that no one can use whistle-blower protection to diminish sanctions for "more serious deeds". This argument should be used with caution because it does not take into account that whistle-blowers not only find themselves in a subordinate position, but that they also often stand alone. In such circumstances, criteria for how to behave may be loosened. A parallel can be drawn with the concept of self-defence or excessive self-defence: The whistle-blower defends the public interest with means that may be proportionate or not.

One of the best protections for falsely accused persons, or persons whose guilt has not yet been established, is the same confidentiality that can be used to cover up wrongdoing – a double-edged sword. The Romanian law or model local procedure contain no mention of keeping the identity of

[396] See this report from British financial authorities (2014): https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf. It concluded that awarding financial incentives to whistle-blowers should not be introduced in the UK. See also a critique of the first report by the National Whistleblower Center, a US NGO: https://www.whistleblowers.org/wp-content/uploads/2018/11/boe-report.pdf.

[397] See this report from 2017: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/~/media/Committees/corporations_ctte/WhistleblowerProtections/report.pdf

[398] These are legal terms, at least in the US, but may have a more general connotation here.

[399] https://huisvoorklokkenluiders.nl/wp-content/uploads/2019/05/Gebruik-keurmerk-eindrapport.pdf

[400] See http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2016-05-11/388152: The Conseil d'État ruled that whistle-blowers must respect integrity and common decency.

the accused person confidential. On the contrary, the explicit possibility of public disclosure as a first step makes this legislation extra risky for accused persons. French and Dutch laws have built in some safeguards. In the first place, internal reporting is the norm in these countries. This limits any unnecessary damage through exposure – while it also limits the whistle-blower's options. In the second place, the measures by the authorities do not (initially) involve broad disclosure. The position of the accused in internal regulations could be improved however, since they are often overlooked and are not explicitly granted the right to defend themselves in preliminary procedures (van den Brekel, 2019). France's procedures keep the lid on disclosure by routing whistle-blower reports first through the own organisation and subsequently through the courts or professional organisations. Public disclosure is an ultimate escalation measure. The identity of accused persons in France is as well protected as that of whistle-blowers and sanctioned in the same way (criminal sanction, maximum 2 years in prison or fine of 30,000 EUR). In The Netherlands, if internal reporting failed or is impossible, the *Huis voor klokkenluiders* will investigate and this investigation is confidential (other investigating authorities will probably also keep the proceedings confidential). Its report is made public, but without personal data (as a rule).

If harm is done to reputation or income or otherwise, the accused person's remedies are the same in all three countries: they must lay their claim before the civil court, where whistle-blowers do not enjoy special protection, although they may be disculpated on general grounds.[401]

5.4. Integrity counselling

Training is meant to prepare public officials for dealing with possible corrupt situations. When a concrete situation is at hand, the involved official can also seek help with questions about whether certain behaviour is allowed and/or ethical, and about what they should do in the situation they find themselves in. It is also possible that a potential whistle-blower is unsure of how or where to report and requires advice. Yet another scenario is that a public official feels that she has become the victim of retaliation for reporting and needs assistance.

The first stop is management, but sometimes the issue is too sensitive to discuss with management, or they may be involved in wrongdoing themselves. The persons that offer help as a second line of support are called confidential advisors, integrity counsellors, or ethics counsellors – used as synonyms here. They can work within the organisation where the person in question works, or outside of it. They can be natural persons, committees, or even organisations such as the Dutch *Huis voor Klokkenluiders*. Some counsellors have a passive role, they are supposed to wait until officials come to them. Others have also the task of educating and training officials, and some even coordinate integrity efforts in their organisation or offer legal advice to officials who wish to report wrongdoing. They may or may not be the same persons that help public officials with issues regarding discrimination, harassment, and other wrongdoing outside of our scope. The role of integrity counsellors differs from country to country and between different organisations in the same country.

In this section we are asking how the three studied countries have organised support and counselling for would-be whistle-blowers on corruption-related issues. How are counsellors trained and paid, what are their tasks, what is their status, what are the conditions for being a counsellor, is it full-time work? How independent are they? What are their powers of investigation, if they investigate?

[401] For example Art. 1353 of the Romanian Civil Code, on the exercise of legal rights. Other grounds for non-liability may include freedom of speech such as protected by the ECHR.

Do they have to report criminal conduct to the prosecution or the court, even information disclosed to them in confidence? Are their reports published (anonymously)? What are their activities and where can they find support if needed? Do reporting persons know of them, go to them, or find other channels?

In the Netherlands, there is an internal point of contact formed by local confidential counsellors (*vertrouwenspersonen integriteit*) and a national organisation, the *Huis voor klokkenluiders*, where officials can go to for advice about their integrity issues. For the national organisation, see above under section 5.3.2 and also section 2.4.6. About 95% of municipalities and ministries had a counsellor in 2016, appointed internally or contracted externally.[402] Public organisations with more than 50 employees must offer them the possibility to consult such a person about suspicions of an integrity breach.[403] This can be an internal or external confidential advisor. In a recent report (ICTU, 2019), a survey of Dutch central government workers shows that in case of integrity problems to report, they would mostly go to direct managers (37%), colleagues (12%) or an internal advisor (25%), but not an external one (2%). The same report shows that about 75% of the respondents knew who their confidential advisor was. External advisors are paid, internal ones usually not.

Another report (Graaf de et al., 2013) mentions that about 60% of the surveyed confidential advisors had received special training, and one organisation had a periodic training scheme for integrity professionals. Most reporting persons go to line management, of whom about 25% were trained. Their recruitment is often informal – sometimes just a verbal agreement with management – and does not come with a formal task description. Theoretically, this could create a dependence where the advisor can be relieved of their duties or pressured to share information, however in practice this was not identified as a risk in Dutch research[404]. Confidential advisors incidentally talk to others in intervision-style (peer coaching) meetings. The same report, confirmed by a report from the *Huis voor Klokkenluiders* (Hoekstra et al., 2018), finds that these advisors are often public officials with a long experience and university education. Again the same report from 2013 indicates that the primary activity of most confidential advisors is listening to and reflecting with the persons that approach them. Some (about 8%) spent most of their time on information and education in the organisation, although about 35% considered that education was not one of their tasks. A very small minority of internal advisors has no other position, it is common that they spend a few hours each month on integrity advice next to their regular position. About half of the respondents were also advisor on issues such as harassment.

Dutch confidential advisors are mostly passive, in the sense that they wait until officials come to them. Potential whistle-blowers can consult a confidential advisor, but the advisor will only help them with advice on the steps to take. They do not play a formal role in the whistle-blowing process such as advisors in France can do. They do not have any formal powers except the right (and the duty) of confidentiality – which is more limited than for the confidentiality of lawyers. Complaints to confidential advisors do not have to be registered and there is no obligation to publish statistics. Many organisations do have internal integrity reporting where the confidential advisors have reported the number of complaints and how they were handled. Note that only a small part of integrity issues is related to corruption as defined in this study.

[402] Monitor integriteit en veiligheid openbaar bestuur 2016, Ministerie van BZK, November 2016, page 107.

[403] Wet Huis voor klokkenluiders, Art. 2.

[404] It is possible that precisely because counselling is usually unpaid work, counsellors do not risk to lose any income if they act against management.

In France, the landscape looks a bit different than in The Netherlands. The role of the *référent alerte*[405] has already been briefly described under the Procedures paragraph, as a receiver, recorder and passer-on of alerts. This role may, at the institutional level, be combined with others, such as the *référent déontologue* (ethics counsellor) and/or the *référent laïcité* (counsellor on matters of religious neutrality). For social issues such as harassment, yet other *référents* may be designated. At the national level, the Ombudsman is appointed by law to guide reporting persons and protect their rights in all stages of the procedure.[406] The roles are not always exercised by the same person, however. This means that advice on integrity matters may be given by one person, while integrity complaints must be made to another person. This separation of roles can be intentional, but they are certainly complementary. Interviews in The Netherlands have revealed that the relationship between advisors, who take the side of the whistle-blower, and investigators, who try to be objective, can be strained. But French confidential advisors have no investigative mandate or powers, so that the risk of conflicting interests may be smaller.

In any case, the role that is meant for counselling, or confidential advice, is the référent déontologue. The référent alerte (which can be the same person/group of persons) does not give advice per se. Article 28 bis of the *Loi Le Pors* phrases it as follows: "Any public official may consult with an ethics counsellor, whose task it is to give them any useful advice regarding the ethical obligations and principles mentioned in Article 25-28 [ethical behaviour, conflicts of interest, asset reporting, etc.]. This advisory role is without prejudice to the responsibility and powers of the head of service." Like the référent alerte, the référent déontologue can be a person, a group of persons, or a legal person. Multiple institutions can share one référent. This happens in practice in smaller municipalities that share HR facilities (the CDGs, centres de gestion). The variety where a *collège de déontologie* assumes this role has been chosen at most ministries, see above under Procedures. The *Décret n° 2017-519*[407] contains some other provisions about this role: Confidential advisors are appointed for a fixed term, which afterwards can only be changed with the express consent of the advisor. Confidential advisors are frequently high (former) officials, for example the city of Marseilles has appointed a retired judge, Strasbourg a sitting judge, the Lille metropolitan area appointed the local ombudsman and the Lyon metropolitan area an academic. The Ministry of the interior appointed Mr. Vigouroux, a well-known author on integrity and chamber president at the Conseil d'État.[408] In contrast to the Dutch situation, there were no examples found of confidential advisors who are 'simple' public officials who advise their peers. Sometimes, the name of the *référent* is not even made public.[409] This could favour objectivity but also make it less easy for officials to trust them with their issues. But the fixed term and the choice of external persons do strengthen the independence of the confidential advisor. It remains the question, however, if this

[405] See the aforementioned Décret n° 2017-564. The *référent alerte* should be positioned in such a way as to dispose of the authority, competence and means to fulfil their tasks. The référent can be a natural person, a legal person or an entity without legal personality (e.g. a *collège*).

[406] Loi organique n° 2016-1690 du 9 décembre 2016 relative à la compétence du Défenseur des droits pour l'orientation et la protection des lanceurs d'alerte, JORF n°0287 of 10.12.2016, modifying the Loi organique no. 2011-333 du 29 mars 2011 relative au Défenseur des droits (the Ombudsman law).

[407] *Décret du 10 avril 2017 relatif au référent déontologue dans la fonction publique,* JORF no. 0087 of 12.4.2017

[408] See for more examples and a discussion on the difference between a *collège* and a single advisor: http://observatoireethiquepublique.com/wp-content/uploads/2019/05/Note-3-Elise-Untermaier-Bilan-R%C3%A9f%C3%A9rent-D%C3%A9onto.pdf.

[409] Such as in Bordeaux, see https://www.bordeaux-metropole.fr/Metropole/Bordeaux-Metropole-s-engage/Referent-deontologue.

practice does not impede officials who wish to keep issues within the own organisation. Decision 2017-519 does not mention remuneration or covering of expenses – this is established at the local level. Specific training is available commercially, like in The Netherlands and Romania, but not mandatory. The most recent GRECO report on France mentions that the advisors do not receive specific training[410], but some support is available from the HATVP[411] and the new anticorruption strategy aims to remedy the lack of training (see 2.5.6). The law only provides that the material means must be made available to confidential advisors to do their job (computers, etc.). The amount of work amounts to a few hours per month, based on the reviewed activity reports.[412] This may change somewhat, because *référents déontologues* now also have the task to consult the employer on plans of public officials to start commercial activities (see also section 4.2).

Regarding investigative powers, the 2018 parliamentary report on integrity management discussed before[413] cites a law professor: "[The advisor] has almost no powers: assessing the admissibility of a request, gathering information without power of constraint, hearing any relevant person (again without constraint), having access to administrative records, sending reports on wrongdoing (by substituting for the official who came for advice?) […] without legally provided independence and answerable to the 'hierarchy'."[414] Deciding on admissibility is a great power to bar the way to assistance, but the advisor cannot forcefully investigate the cases they admit. As mentioned, the confidential adviser must keep received information confidential. Information from whistle-blowers can be disclosed only to the judiciary, but information from other integrity cases are subject to the general confidentiality rule for public officials. Annual reports, if any, show only anonymous aggregate results.

The Romanian confidential advisor is called a *consilier de etică* (ethics counsellor) and has a broader role than in the other two countries. This role was introduced in 2007[415] and is presently governed by the Administrative Code, Art. 451-457[416]. From a structural reading of the law, it can be implied that the Romanian advisor can only work with public officials and other workers that 'exercise public power'. This would mean that administrative support staff has no access to the advisor, which may be unfairly discriminating and not in the public interest. But it does not become clear from practice whether they are refused access. It would in any case be possible at the institution level to extend the advisor's role to contract personnel. The *consilier*'s explicit mission is:

– to give advice on integrity issues when asked and if they notice someone needs it (because their conduct violates the rules),

[410] Published in January 2020. See https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/16809969fc, p. 19.

[411] The HATVP published a guide for *référents*, for example: see https://www.hatvp.fr/wordpress/wp-content/uploads/2019/04/HATVP_guidedeontoWEB.pdf.

[412] Advisor for the *communes* in Rhône and Haute-Loire: 28 requests in 2018 requiring on average less than 1 hour of work. No whistle-blowers (https://extranet.cdg69.fr/sites/default/files/BaseDocumentaire/2018_euk_cdg69_referent-deontologue_rapport.pdf). A *collège* for 5 *départements* in the East received 55 requests between 1.6.2018 and 31.5.2019 which they processed in two meetings (https://mon-site-internet.e-bourgogne.fr/documents/portal1980/links/20190722-1700--premier-rapport-annuel-des-referents-detontologues.pdf). Other reports show similar data.

[413] See http://www.assemblee-nationale.fr/15/rap-info/i0611.asp

[414] The words are of Mr. Colin of the University of Aix-Marseille. Translation by the author.

[415] Law 50/2007, M.Of. 194 of 21.3.2007.

[416] These articles are in the section on the rights and obligations of public officials, the section containing similar provisions that was covered by Law 7/2004 on the Code of Conduct, before that law was abrogated by the Administrative Code.

– to organise training and information sessions, and
– to monitor compliance with the rules of conduct through analyses and reports.

Surprisingly, this advisor is not one of the many persons or entities that can be contacted by a whistle-blower (see above, under Personal scope). The role of the confidential advisor remains thus limited to that of advice and the advisor cannot receive reports from whistle-blowers, unless specifically designated by the management of the respective institution.

This advisor must be a public official, appointed for each individual institution (exceptionally there can be two in a single institution), usually from the HR department (something that is advised against in Dutch brochures, for the risk of dependencies and conflicts of interest, on the other hand workers there may have more expertise).

As 'in house' public officials, Romanian integrity counsellors are not remunerated, and it is a task that must be performed next to the other duties of the official in question. The institution where they work must appoint them formally with a task description and support them with the means to carry out their tasks, including funding for information and training sessions. The institution is also obliged to let the advisor be trained themselves.

The counsellor is independent in the sense that he or she "is not answerable to hierarchical structures and does not take instructions from anyone" (Art. 452, par. 5). To preserve this independence, there are some special incompatibility cases provided in the law, so that the ethics counsellor does not have any ties with the leadership of the institution or its disciplinary committee. Also, the status of ethics counsellor cannot be revoked without hearing the National Agency for Public Officials (ANFP). Ethics counsellors are still subjected to a performance evaluation by their direct manager, who may not evaluate the counsellor's activities related to monitoring and advice work, only to policy analyses, information and education activities and analyses of complaints from clients of the civil service. Such an evaluation would seem futile if the ethics counsellor does not take instructions from anyone, however its result is not instructions but a 'qualification'.

The advice of the *consilier* is confidential. Only if he or she learns of criminal acts, the public prosecutor can (and must, as a public official's duty) be informed. Confidential advisors do not investigate integrity breaches, this is the task of management. This means that except in case of criminal acts, a report to the confidential advisor is not followed up except by an aggregate report to the ANFP.

In the Romanian configuration, a special role is reserved for the ANFP. Article 401 of the Administrative Code gives it the task of "regulating and monitoring the application of rules regarding the conduct of public officials and the activities of ethics counsellors…" As part of this task, the Agency keeps a database register where counsellors can file reports[417], it organizes training standards for counsellors, advises them if needed, it gathers data from disciplinary procedures, and compiles aggregate reports on the conduct of public officials.

From these reports[418], a wealth of data can be gathered. Some findings about the activities of confidential advisors from the latest available data:

1. Questionnaire respondents from the ANFP itself (2019) knew almost all (94%) that they could go to an ethics counsellor, while 56% thought that the counsellor could solve their ethical dilemma;

[417] The ethics counsellors report through an online portal, governed by the procedures in this ANFP regulation: http://www.anfp.gov.ro/R/Doc/Ionut/OPANFP%20nr.%201442.pdf.

[418] See the ANFP website, here: http://www.anfp.gov.ro/continut/Rapoarte.

2. More than 20,000 public officials were trained on the Code of Conduct in 2018 (the latest report available). The report gives a list of topics but does not detail what the training looked like. At the very least this number of public officials was exposed to information about integrity (this is about 15% out of a total of 135,038 public officials in 2017).[419]
3. In 2018, 4392 public officials received advice from an ethics counsellor (approx.. 3% of the total of 2017), even though only 951 had asked for it.
4. Among the list of principal topics of consultation, some could indicate corruption issues (such as accepting gifts, or conflicts of interest).

A note on training: The ANFP and the Ministry of Regional Development and Public Administration also organise integrity training, but these are less frequent and only possible on a project basis due to a lack of structural financing. There are no separate data on reports from whistle-blowers although they may be mixed in with the rest. Reports from reporting persons can be advised about by ethics counsellors – indeed there are no other institutional entities for such a purpose – but the reporting structure was set up to implement the rules of conduct, while the whistle-blower law remains relatively unknown.[420]

Summing up the findings on integrity counselling, we see that all three countries have people in place at the institution level, whose task it is to give confidential integrity advice to those public officials who seek it. In the Netherlands, their role is the most modest and the most informal. Confidential advisors in the three countries are not focused on whistle-blowers, except those in France who double as *référent alerte*. Romanian advisers, who cannot receive whistle-blower reports unless specifically (and exceptionally) designated, have a formal reporting and support structure behind them from the national association for public officials, unlike in the other two countries. They are also the only ones with training requirements and formal (partial) independence from the structure where they work. In none of the three countries they get sought out much (France's *référents* exist only since 2017). Comparable statistics are not yet available. Romanian advisors have the broadest mission: advice, training, reporting, and policy contributions.

5.5. Analysis

This paragraph contains some observations on key points of whistle-blower legislation in the three countries.

Scoping issue

According to the UNCAC, any reporting person must be protected. It should be obvious that persons who can be a whistle-blower are the same as those whom whistle-blower legislation grants protection from retaliation. In court, the judge will probably look at the spirit of the law. But in all three countries, the letter of the law could be improved.

In The Netherlands, public officials and contract workers are protected from retaliation by the Civil Code and the collective labour agreement. But the Law on whistle-blowers determines that also reports from (former) external contractors, volunteers, or interns are admissible. This last category is thus protected by the law on whistle-blowers, in the sense that their confidentiality is

[419] Public officials can also be exposed to rules of conduct through introducing it as a mandatory subject for entry exams (similar to the French practice) or by posting them on the institutional website.

[420] None of the training topics for ethics counsellors in 2018 included information on whistle-blowers. See also this report from Transparency International (2011): https://www.transparency.org.ro/politici_si_studii/studii/avertizarea_de_integritate_europa/RomaniaCountryReport.pdf

protected, but not by the Civil Code, which leaves them vulnerable to retaliation. Retaliation can happen outside of the labour sphere (e.g. by terminating a services contract on a pretext) as well as inside of it (e.g. retaliatory disciplinary measures).

In France, the personal scope for reporting is also broader than the one for retaliation, as the reporting person can be anyone while the protective provisions only apply to public officials (Loi Le Pors, Art. 6 ter A) and contract workers, interns and participants in recruitment procedures (Labour Code, Art. L. 1132-3-3).

In Romania, the law is not completely clear regarding the personal scope. The majority view seems to be that only public servants can be whistle-blowers, but this does not necessarily follow from the text, or from some of the case law. Keeping the narrow interpretations means that all those who can report are also protected from retaliation. But the broader interpretation leads to part of the reporters not being covered by antiretaliatory provisions.

Internal reporting requirement

The EU Directive's adopted form no longer requires internal reporting as a preliminary step, as the draft did. Internal reporting is now an alternative to reporting to competent authorities. But national legislation has not been revised yet at the time of writing (the deadline is in 2021). In the Netherlands and in France, the authorities will dismiss the case for lack of internal reporting, unless the whistle-blower proves that that first step was closed to them. The court might already apply the Directive, however.[421] The requirement for internal reporting is understandable because it helps keep a lid on information that is – presumably – confidential for a reason. It also appears that many whistle-blowers prefer it (Roberts et al., 2011). However, it may not be in their or the public's best interest. It may also not be the most effective form of reporting, according to a recent literature study (Apaza & Chang, 2017, pp. 4–5). A recent Dutch overview (Nelen & Kolthoff, 2018, p. 517) cites three studies in the literature regarding internal reporting systems suggesting that current internal reporting systems have little effect.

Because those who are in the best position to blow the whistle are insiders to critical public service operations and that in a typical public institution there are only few of those persons, internal whistle-blowers run a risk of being 'outed' even if their identity is not revealed: Many will know who had access to the reported information. The obligation of internal reporting is thus a hurdle for confidentiality and compromises the hope that the whistle-blower's identity remains confidential if the case comes before the competent authorities.

Another critique of the internal reporting requirement is that a reporting person would not be protected and indeed be inadmissible for further investigation and liable for breaching of secrecy laws, if they had contacted anyone outside of the organisation instead of the designated persons – their labour union representative[422], their lawyer, an NGO, or their spouse.

Furthermore, considering that corrupt behaviour in public organisations may often not be incidental and may often involve part of the management, it is easy to see that this same management would be ill equipped to deal with a whistle-blowing case. Even if the manager who was reported to was not corrupt and could resist protective instincts, they would not be best positioned to investigate

[421] The EU Court of Justice has established conditions for the direct effect of non-transposed Directives in the case law starting with Van Duyn v Home Office (1974), C-41/74.

[422] See this advocate's message: https://whistleblowerprotection.eu/blog/change-the-whistleblower-protection-directive-or-it-will-not-work/

their peers – in addition to the interest that management has in preventing any scandal that could make them look bad. The combination of these factors: loss of confidentiality, and disincentivised management, make the condition of internal reporting a flawed one.

How to prevent unnecessary public disclosure but provide better guarantees to whistle-blowers at the same time? For example, an outside body with investigative powers would not only be impartial towards the whistle-blower and better able to maintain confidentiality but would also be equidistant as to the solution. But investigation is not the same as advice and these functions must not be mixed in one body. For the adviser takes the part of the whistle-blower while the investigator must be impartial. There should thus be one body for receiving reports and advising whistle-blowers. Depending on the circumstances, this advisory body can transmit the report to the prosecution service (but without revealing the identity of the whistle-blower, or even subrogating in their position). The advisory body can bring/defend the case of the whistle-blower before the administrative judge, labour court, criminal court, or civil court. For administrative law cases, a separate common body could be set up also, where the affected organisation (ad hoc) and other interested parties (such as government inspections, trade unions, permanently) are represented. Such a disciplinary body would directly represent the Government and could decide, hopefully more quickly than the administrative judge, on management interventions, disciplinary action (these two in the form of obligatory advice to the management of the affected institution), but also on compensation or even rewards for whistle-blowers. Evidently, such a solution would be for the public sector only and have its own drawbacks, such as that outside interference may disturb the efficiency of work processes or that outside interference creates authority problems (can outsiders say what management must do, what mandate do they need etc), plus the fact that the management of the own organisation is (probably) more knowledgeable about the persons and backgrounds involved.

Pitfalls for whistle-blowers

Below are some issues that make it more difficult for whistle-blowers to successfully complete a reporting procedure.

A first pitfall: Reception of a report by designated entities is no guarantee that the underlying wrongdoing will be ended. In The Netherlands, if the employer organises a formal investigation without sufficient material effort and does not discover the reported wrongdoing, then the whistle-blower is not admissible before the *Huis voor Klokkenluiders* or the judge[423] unless the whistle-blower proves that the internal investigation was unserious. The legal presumption is against the whistle-blower. According to the law on whistle-blowers, the investigative department of the *Huis* will dismiss the case if the initial internal report was "duly processed".[424] This is easier to fake than to disprove. That does not mean that the hurdle cannot be overcome, but it does put the

[423] This report by the *Huis voor Klokkenluiders:* https://huisvoorklokkenluiders.nl/wp-content/uploads/2019/05/Gebruik-keurmerk-eindrapport.pdf, on a reporting person who contested the internal investigation following his report and was dismissed from his position, cites the judge as follows (page 16): "After investigation by [employer] and subsequent declaration that there had been found… no wrongdoing…[claimant] should have accepted the conclusions of [employer].

[424] The report mentioned in note 91 nuances, but not necessarily clarifies this legal provision (p. 26). On the one hand, the *Huis* states that a reporting person, in principle, must accept the results of an internal investigation following their report. On the other hand, in the case at hand the non-acceptance by the whistle-blower of these results was justified, because "he could, based on his own observations, reasonably presume that the investigation was insufficient". But that is true of most reports on wrongdoing, or they would have been admissible in the first place.

whistle-blower – who is already the weaker party – at a disadvantage. The same is true for France, where reporting to external authorities is only open if the internal recipient did nothing. If they did something half-heartedly, the whistle-blower has no other legal avenue. According to page 11 of the *circulaire* mentioned above[425], the whistle-blower can only send their report outside their organisation if the admissibility of the report was not decided upon within a reasonable period, set by the receiver of the report. If the admissibility assessment is manifestly unjust, or if subsequent measures are not taken or not deemed necessary, the whistle-blower can only hope to have that decision annulled by the administrative judge at the end of a separate procedure, and start again. The circular does mention that the whistle-blower can send their report to the external authorities if the institution itself fails to take the necessary measures, but this does not follow from the law itself.

A second pitfall: Like the first pitfall, this one does not apply to Romania because it concerns a flaw in procedures that Romania does not have. The assessment whether a reported issue is *grave et manifeste (*serious and clear)*,* or in Dutch law whether the *maatschappelijk belang* or the *ernst van de misstand* (public interest or gravity of the wrongdoing) are sufficiently high, lies initially with the employer who may, in other words, decide in a discretionary way whether the reported issue requires any action. In yet other words, the fate of the investigation is in the hands of a group of people of which at least one (the accused person/persons) have every interest to play down the issue. As observed earlier, management is not interested in trouble either, if only because they have other factors that push and pull them. Under these circumstances, the butcher must judge his own meat, as the Dutch saying goes. As with the first pitfall, a whistle-blower not satisfied with the assessment of their report will find some evidentiary hurdles ahead.

A third pitfall: The receiver of the report may not be in the position to do something about the issue. In all three countries they must assess the admissibility of the report (although this is provided explicitly only in France) and according to their possibilities, take action: either report to (senior) management, if the receiver is a confidential advisor, or take measures themselves if the receiver is a manager or (in Romania) the disciplinary committee or external authority. In France and The Netherlands, if you report to a confidential advisor, they can help you protect your identity by serving as intermediary between whistle-blower and management. But advisors have no other powers.

Looking at the French procedures, the only thing that the receiver of the reports does, is reporting to management or informing the prosecutor's office – something which the whistle-blower could have done themselves, without any procedure. It is possible that the report coming from a designated authority is taken more seriously, but there are no follow-up obligations or facilities in the French ministerial procedures for the designated receivers of reports. Another advantage could be the increased confidentiality, which is more difficult to obtain in a court procedure (more defendant's rights), but there is a catch – it is entirely possible that the disciplinary or the judiciary authorities must turn to the original whistle-blower for their testimony, if the documented evidence is insufficient or does not stand on its own. And then either the procedure cannot continue because the identity of the whistle-blower must be protected (as was guaranteed during the initial procedure), or the whistle-blower finds themselves exposed in the overriding public interest. Ideally, the court puts the whistle-blower in a protected identity program for witnesses. It is possible that this is more of a problem in France than in the other two countries, because of the better confidentiality guarantees during the initial procedure combined with the explicit provision that the judiciary must be told the identity of the whistle-blower, if requested in a court procedure.

[425] http://circulaires.legifrance.gouv.fr/pdf/2018/07/cir_43813.pdf

But the issue exists in The Netherlands and Romania also. Line managers who receive the report may be untrained (according to De Graaf et al, 2013, less than 10% of Dutch managers reported that they were trained) for receiving and processing reports, and for investigating, and most probably an individual manager rarely receives reports from subordinates on corruption-related wrongdoing. Managers usually do not have lots of time and may not see the immediate advantage of investigating a whistle-blowing report that spells trouble. Instead, there is an incentive to delay and appease, or to pass the issue on to others (HR, legal counsel). The above pleads for the involvement of specialist persons or bodies, integrity coordinators, whom managers must brief on any integrity issue and who will record, advise and follow-up to see if action has been taken, without usurping the manager's decisional power. Smaller organisations can share such coordinators.

A fourth pitfall: Whistle-blowers should be able to trust that those they turn to for help are on their side, while this is not always the case due to procedures. The most pregnant example of this is France, where the *référent déontologue* is there for any advice on integrity questions, while the *référent alerte* is there to not only keep the whistle-blower's identity confidential, but also to assess whether their report is admissible. And the référent alerte upon admitting the report must forward it to management and perhaps even represent the whistle-blower if the latter wishes to keep her identity protected. This means that on the one hand, the *référent alerte,* often the same person or group as the *référent déontologue* must give disinterested advice on a matter where, on the other hand, they do have an interest in, being directly involved in the follow-up of the case. The *référent* must first counsel the whistle-blower, subjectively, then review the eligibility of the case, objectively, then represent the whistle-blower towards management, again subjectively. The same critique could be made of the Dutch *Huis voor klokkenluiders*, where a case that has been taken in by the advice department is turned over to the investigative department, that looks quite different at the case. Therefore, these two departments are separated by confidentiality provisions. It may be difficult, however, to ensure the necessary independence in this way.

Cuddling versus Gatekeeping

What is the best attitude of the State towards public officials who report wrongdoing? Should they be treated as a regular petitioner, or like a claimant in a civil case, making their own case and bearing the burden of proof? Should they be treated, instead, similarly to the vulnerable witness or even the victim of a crime, to be protected and represented by the public prosecutor? Should they be regarded as risks in need of mitigating measures? As persons who perform a service to the State? Persons who do their duty? Who step up as courageous exceptions?

Judging from the legislation in the studied countries, all of the above apply. And indeed, those who call themselves whistle-blowers report on a range of disparate issues, of which some are of a private interest. For example, managers or counsellors may receive reports from officials who have been passed over for promotion, consider it unfair treatment, wish to disclose their grievances and style themselves as whistle-blower.[426] Some persons who report to the press do so out of revenge, malice, or a difficult mental health situation[427] Others report on small fraud or incidental bribes. Yet others reveal the most shocking criminal activities that lead to high-level dismissals, the collapse

[426] This kind of issues can of course be serious and relevant, but is unrelated to whistle-blowing and must be handled through the procedures of labour law.

[427] See for example this press report: http://www.interpretermag.com/karen-hudes-rts-whistleblower-who-believes-world-bank-controlled-by-second-species/.

of corporations and the recovery of assets – without, initially, planning to publicly disclose secrets, but just to report wrongdoing to management out of a sense of duty.

With this in mind, it would be wrong to embrace all reporting persons as victims or witnesses, and it would also be wrong to treat them all as enemies of the State like authoritarian regimes would do. The three studied countries have each chosen a relatively balanced approach, with assistance and protection but also with safeguards. The best response to the initial approach by the reporting person depends on the type of report, which cannot be known beforehand. Therefore, some sort of triage is needed at the 'gate', the first point of contact.

The fact remains, however, that the whistle-blower is the weaker party, that their benefits to society must be exploited at maximum and that the treatment of one whistle-blower may affect the willingness of others to come forward. And at this moment, very few public officials do report wrongdoing. So how could they best be incentivized to report with proportional mitigation of the risks (disclosure of secrets, false reports, opportunistic reports)?

It is submitted that procedural impediments for whistle-blowers should be as few as possible. They should be able to report inside or outside their organisation to a designated authority by their own choice. Designated authorities should be able to protect both the reporter's identity as well as any secrets they might tell just as well as the own organisation. External authorities do not present the risk of a hostile reaction towards the whistle-blower since the attacked interest is not theirs. Many of those who plan to blow the whistle feel safe enough in their own organisation to go to their management. Others do not and should not have to prove that they could not have 'reasonably' blown the whistle internally. Maybe they were just afraid. That should be enough reason. Some impediment must be put in place, however, for public disclosure, for unlike disclosure to a designated external authority, going public can do irreversible harm to legitimate public interests or to private persons.

Another advantage of being free to choose to whom to report, is not to risk being sent from one office to another. Integrity advisors, managers, the police, the prosecution service, specialised institutions such as ANI in Romania, AFA in France, the *Huis voor klokkenluiders* in The Netherlands, or the various ombudsmen, should all be ready to receive reports. They can afterwards share them (with protection of identity) in one database with an online interface, for statistics, prevention of double reports, and processing of cases. The online interface can also offer a form where whistle-blowers can report directly. All possible recipients must be trained on the subject so that they can quickly sort bona fide public interest whistle-blowers from others at the gate, and give relevant information to would-be whistle-blowers, for example about the risks.

Apart from freedom of operation, effective protection is a vital incentive for whistle-blowing, according to a broad consensus that is reflected in all the discussed international instruments and in the laws of all the three countries in this study. We have seen the various forms of protection above. The identity of a reporting person should be kept confidential unless she chooses to reveal it. If the identity becomes known inadvertently, measures should be in place to prevent losses (of income, safety) and to compensate if those losses occur. These measures should be effective. For example, granting the whistle-blower the option to file a claim for loss of income after closure of the procedure, does not provide money for food or rent while the procedure is ongoing.

There could even be a public fund to compensate whistle-blowers for losses and to pay civil damages to accused persons who were reported on in good faith and on reasonable grounds but were cleared by the court. Measures such as this, as well as rewards to whistle blowers, can be

costly and the proof of how serious governments take their whistle-blower protection efforts will depend on whether they are willing to provide a considerable budget to that end.

Other measures can help combat immaterial discomfort. For example, whistle-blowers would feel at lot less alone or lost in procedures if they had an advisor assigned to them, who would be able to give advice, decide on protective measures on the spot and represent the whistle-blower in court, with the authorities, or with (former) employers. This service could be free of charge for vetted and admitted whistle-blowers.

Institutional policy discretion

Whistle-blowing does not only have advantages for the public interest, but also to the organisation in question: The explanatory memorandum of the CoE Recommendation, pt. 9, phrases it as follows:

> "Organisations that let those who work for them know that it is safe and acceptable for them to report concerns about wrongdoing are more likely to (a) be forewarned of potential malpractice, (b) investigate it, and (c) take such measures as are reasonable to remove any unwarranted danger. Thus implementing internal whistleblowing arrangements are increasingly understood as part of establishing an organisational ethos of integrity, delivering high standards of public and customer service and managing risk in a responsible manner."

One could even claim that organisations who do not take any measures act against their own interest as well as the public interest, and for that reason alone should be scrutinized more closely.

Within the legal framework of each studied country, organisational autonomy is considerable. Public institutions can adopt detailed or global procedures, appoint one or many advisors, give them broad or narrow tasks, train management weekly or every five years, prepare automated tools or not, reserve a large budget or a small one (or none at all).

A concrete example of this is the role of confidential advisors, which can be shaped substantially at the institutional level in all three countries (the law is the most detailed in Romania). Because the success of the confidential advisor depends on their independence, powers, means, and image, is just having the position in your institution no guarantee for a functional preventive role. It can be just formal. Powerful managers of public institutions who do not welcome interference (for legitimate or other reasons) can thus formally meet all the legal requirements and still have a weak functional advisor that is ineffective for corruption prevention. Such institutional leadership is not subject to any further audits unless something goes very wrong. And then it is too late for prevention.

Lawmakers can also say: We want to assign this responsibility to institutional management, we want to trust the management in principle and not put in place any extra controls or audits. If a confidential advisor (or any corruption prevention specialist) is given powers, they must also share some responsibility, however not being part of management makes it more difficult to hold them accountable. But in principle it would not be wrong, depending on the culture of the organisation, to establish a small, passive role for the confidential advisor, as someone whom you can contact if management is unavailable for any reason. In other words, a plan B. The consequence of giving institutional management freedom and responsibility, or even department managers such as in the City of Amsterdam, is that large differences will appear that are out of the government's reach. However, corruption prevention also means taking measures when there are no burning issues at that time. Managers may have insufficient incentive to adopt and promote such measures, because there is no clear advantage (as long as there is no serious integrity incident).

In other contexts, it is quite common for managers of institutions to be subject to close oversight, for example in finance. Abandoning audits by accountants or public audit offices would be highly controversial. This is an area where enforced discipline across public organisations is standard, but in the area of anticorruption local management is given much more freedom. This is inconsistent. One could argue that financial policy is more important, however through corruption the same large amounts of money can disappear. Also similar to financial management, when corruption or the appearance of corruption plagues an institution, trust in the public institution may decline.

Final remarks

Whistle-blowers are often dedicated officials who care about their work. They feel a loyalty to the mission of their organisation and to their colleagues, which can make them feel that disclosing corruption is a form of treason. There is also the fear of retaliation and negative consequences for their family (loss of income, for example) or the sheer publicity that they would have to endure. Another hurdle is that potential whistle-blowers are unsure whether they will indeed be protected by the law in case of retaliation. It can be concluded from the (case) law that not all those who, in good faith, consider themselves whistle-blowers, are granted protection by the court.

The impediments are powerful. And the measures against retaliation would, assuming they are indeed effective, only take away some of those impediments. Other measures, for example informing and training about how courageous it is to speak out and that you are really helping your organisation if you decide to blow the whistle, possibly combined with a reward, could help alleviate some of the psychological burden. Still, reporting wrongdoing is not normal behaviour for officials, with their duty of loyalty and discretion. Therefore it would be surprising to see a significant increase in whistle-blowers as a result of improved (EU) measures, and why it would be unwise to think of whistle-blowers as the main weapon against corruption.

This chapter shows that the procedures in place can be improved but even so would not solve all of the whistle-blower's problems. Whistle-blowing will probably remain an exception, even with ideal procedures, because of the personal risks that are almost unavoidable. If whistle-blowers are one of the main weapons against corruption, the artillery falls short. If there are X wrongdoings, a part of that will be observed, and a small part of that will be reported, and a part of that will be acted upon decisively. It can be stated that this situation requires finding other ways of detecting wrongdoing. Automated detection by software could be an avenue, one that is indeed being pursued already in the private sector. Some of the problems with whistle-blowers would certainly disappear, because you cannot bully or shame a piece of software or reduce its pay. There may be other issues, however. Chapter 7 will discuss automated corruption prevention after chapter 6, which concentrates on corruption prevention by transparency and monitoring.

6. Transparency and monitoring

6.1. Introduction

To prevent corruption, it is not enough to develop efficient rules, inform and train staff about them, fund them, and monitor their implementation. Some public officials will still put their own interests above general ones, abusing their position in the public sector. To sanction such behaviour after the facts have been discovered, states use criminal or disciplinary law. But between prevention and repression, or parallel to them as it were, instruments can be employed to *detect* wrongdoing and, ideally, nip it in the bud. This is why monitoring and detection are included in this study. These instruments can be requests for documents, audits, monitoring of video-images, statistical analysis, and others. They can also be used to signal weaknesses or risks. But they carry a cost and must not deteriorate the public service they are meant to improve. This chapter discusses the legal provisions and policy on some of those instruments.

Then, transparency mechanisms are included here because they are a condition for this oversight – not a panacea (Lindstedt & Naurin, 2010). Despite its sunny image, transparency certainly has downsides (Fisher, 2010) because decision-making structures may modify their behaviour (e.g. avoid risks, or behave opportunistically) if they know they are 'being watched'. Note that in the context of corruption prevention, this is in fact a positive outcome; even if public officials shift their corrupt actions to behaviour that cannot be detected by transparency alone, transparency still made corruption more difficult. But public managers may also use transparency for blame-avoiding, and transparency policy may even lead to a tighter control of sensitive information instead of more openness (Hood, 2007). One study (Strimbu & González, 2013) found that more transparency could just lead to larger bribes instead of less corruption. But it is a *conditio sine qua non*: If a monitoring entity has no access to the necessary information, then nothing can be monitored. Transparency is defined here as the degree to which the methods used by public institutions grant public or private sector petitioners access to information they hold. In a classification of transparency according to its purpose, of democratic deliberation, predictability, and accountability (Bauhr & Grimes, 2017), the only purpose relevant here is the last one.

The principal question for this chapter is an application of this notion of transparency to the subject matter studied in this work: *How can public and private entities access information from public institutions that can be used to detect signs of corruption, and what use do those entities make of their access?* In this context, 'access' means providing information on request, making already provided information available for reuse, and publishing information on proper initiative. 'Useable information for detecting corruption' is, broadly, information about public spending and granting of rights and privileges, such as contracts, subsidies, allocations, permits, waivers, and related documents (e.g. reports on the execution of a contract). 'Information' means documents or databases or any already aggregated information, produced or received by a public institution. Out of scope are the transparency of legislation and its preparatory process. Finally, 'entities' are public sector audit departments and institutions as well as private sector NGOs focusing on transparency and corruption, and journalists – but not whistle-blowers, who per definition deliver corruption information outside of established channels. Monitoring for signs of corruption can be done from the inside, which some scholars call 'vertical transparency' (Heald, 2012), and from outside an organisation, where inside monitoring (by audit departments or fraud units or similar

groups in the public sector) has the advantage of being able to enforce measures, while outside monitoring has the advantage of having no vested interests or the risk (small or large) of superiors wishing to sweep results under the rug.

To discuss this question, first the national transparency legislations of the three studied countries are aligned against each other and against the international instruments. Then we zoom in on a few transparency topics that are especially relevant to corruption prevention: the transparency of lobbying interests, the transparency of incompatibilities, interests and assets of public officials, and finally, briefly, that of public spending. The third part of this chapter is dedicated to how well the press and anticorruption non-governmental organisations (NGO's)[428] can use transparency to monitor the public sector and to a comparison of existing auditing mechanisms inside that public sector in the three countries, with auditing being broadly defined, as data verification of compliance with corruption and integrity legislation, separate from enforcement.

6.2. International instruments and national law

This paragraph sums up the most important provisions in the relevant treaties and in national law and practice regarding transparency, specifically the transparency of information relevant to corruption prevention as defined in the introduction, and regarding oversight and monitoring of corruption prevention practice in the public sector.

6.2.1. International instruments

The international legal instruments for corruption prevention that are used throughout this study, contain several texts related to transparency and monitoring. All in all, the international legal instruments offer less concrete handles for national legislation than one might expect on the subject of transparency and monitoring, and certainly less than on other topics such as incrimination of corruption or asset recovery. One can speculate about the causes for this, but the lack of specificity is reflected in national legislation, as we shall see below.

ECHR

In some circumstances, Article 10 of the ECHR, on freedom of expression, can be used to obtain information from a public authority. It reads: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." If a public watchdog requests readily available information that is in the public interest with the aim of sharing it with the general public, then any legislation interfering with this must be prescribed by law and necessary in a democratic society.[429]

CoE

The Council of Europe adopted a convention specifically for the promotion of transparency in 2009, called the Convention on Access to Official Documents[430], in 2009 (the Tromsø Convention). It has been ratified by 9 member states[431], while the threshold for entry into force lies at 10 ratifications.

[428] Used in this chapter as a synonym for CSO (Civil Society Organisation).

[429] See for example the 2016 case of Magyar Helsinki Bizottság versus Hungary, ECLI:CE:ECHR:2016:1108JUD001803011.

[430] The text of the Convention and its explanatory report can be found here: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205

[431] Status of May 5, 2020.

None of the studied countries have even signed it. One of the few journal articles on this convention (Edel, 2011) calls this disappointing and suggests that administrative transparency is difficult to obtain because of a long embedded 'culture of confidentiality' in public administration.

The final considerations of its preamble state that a right to access to official documents "fosters the integrity […] and accountability" of public officials and that the 'natural state' for official documents is to be public. This principle is reflected in French law. The Explanatory Report goes a step further by stating that the measure of transparency of public authorities is an indicator whether they oppose corruption.

The first article of the Convention establishes the text as a minimal set, with a narrow definition of 'public authorities': only government and administrative functions in the State, plus natural or legal persons exercising administrative *authority*. The Convention leaves it to the parties to broaden this definition for themselves. The definition of 'official documents' is a broad one, including documents that are 'held' by public authorities without any limitation as to their purpose, status, or reason how they got there.

The interpretation of the word 'document' becomes increasingly important when applied to data in a database (or even a collection of data in multiple, distributed databases). Large datasets ('big data') are thought of as a potential instrument to analyse and find (suspect) behaviour patterns, for example in building permits, hospital supply contracts or roadworks inspection reports. The right to access to this kind of data may be limited by formal restrictions (they are no documents in the strict sense of the word), by technical difficulties or by time/cost impediments that may cause a request to become 'manifest unreasonable', a ground for refusal. The Convention leaves interpretation of the notion of 'document' to the parties.

As a general provision, "everyone" should have access to official documents, a right that must be "given effect" by national law. Requestors do not have to justify their request, they can remain anonymous if at all possible, and the formalities of the request should be minimal (Art. 2 and 4). Importantly, the authorities must help the requestor find the document they want (Art. 5). Terms must be short and indicated beforehand, costs must be reasonable and refusals must be subject to judicial review (Art. 5, 7, and 8).

Notwithstanding the principle of transparency, some interests must be protected or at least evaluated against the right to access. In a standard CoE approach, "Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate…". Follows a list of reasons for limitations, such as public safety, the confidentiality of criminal investigations or economic interests.

UNCAC

The UNCAC prescribes transparency as one of the principles that should underlie anti-corruption policy (Art. 5) and recommends 'systems that promote transparency' to be adopted by the states parties (Art. 7). Transparency should also be a principle in HR policy, party finance (Art. 7), procurement (Art. 8), and the private sector (Art. 12). Furthermore, there are two articles dedicated to the topic: Article 10 on publishing information and procedures to allow the general public access to information (in the literature usually referred to as 'freedom of information' or FOI), and Article 13 entitled 'Participation of society' obliges the parties to ensure effective access to information by the public. Actively publishing information is not an obligation, nor is any other concrete measure for that matter, because the UNCAC obliges the states parties to take measures

to enhance transparency, but how they should do that is only suggested. The "freedom to seek, receive, publish and disseminate information concerning corruption" as described by Article 13 may only be restricted for privacy concerns or for reasons of national security, public order, health, or morals. All those grounds can be freely interpreted by national governments and so restrictions in practice can be quite far-reaching.

In the same treaty, monitoring has a less salient role even though accountability, for which monitoring is a prerequisite, is one of its purposes according to the first article. Monitoring anticorruption measures is something to be 'considered' according to Art. 61. Monitoring is integrated in some of the topics: The parties are recommended to have measures in place for detecting and monitoring cross-border movement of cash and other negotiable instruments (Art. 14, on money laundering), public procurement must be audited[432] and have a system of oversight (Art. 9), Art. 58 recommends sharing financial data internationally and establishing a financial intelligence unit, and for the private sector there are detailed prohibitions for acts that can facilitate or hide corruption, such as "the recording of non-existent expenditure" (Art. 12). This article does not apply to the public sector; there are similar but less detailed provisions about public finances in Art. 9, par. 3.

Aarhus convention

The United Nations have also adopted a treaty on access to information, but it only applies to environmental matters: The Aarhus Convention[433] of 1998, ratified by all three studied countries. In this instrument, the right to information is viewed through the scope of protecting the environment as a duty and a right of each citizen (preamble). The provisions on access to information in Article 4 closely resemble the national legislations of the three countries, for example:

- The requestor does not have to state an interest
- Requests may only be refused on grounds such as protection of confidentiality or intellectual property
- If documents contain exempted information that can be separated from the disclosable information, the part that is not exempted should still be disclosed (Art. 4, point 6).

Some of the active information provision obligations are more extensive. States parties must:

- Keep their information up to date
- Publish a register of documents
- Publish the facts on which they base their policy decisions
- In case of imminent threats to health or the environment, all relevant information must be disseminated immediately

The provisions of this convention can be used as recommendations for practice in other policy fields.

[432] Auditing is more specific than monitoring, being based on predefined criteria, but the terms are used together in this chapter because they are both instruments of oversight, of verifying how something was done or is being done in the public sector.

[433] See the text here: https://www.unece.org/env/pp/treatytext.html

OECD

The OECD has started some transparency initiatives over the years, focused on a certain field, such as transparency in aid funding, taxation, or lobbying.[434] On that last topic, the OECD has composed a set of high-level guidelines in 2013, featuring transparency[435]. The most relevant of these guidelines is that NGOs, businesses, the media, and the general public must be enabled to "scrutinize lobbying activities".

6.2.2. European Union

The Treaty of Maastricht (1992) contains Declaration 17 on the right of access to information[436]. It links democracy and public confidence to "the transparency of the decision-making process". The Treaty of Amsterdam also proclaims a right to information, and this right is currently enshrined in Article 15 of the Treaty on the functioning of the European Union, alongside the obligation for EU administrative bodies to 'work as openly as possible'.

The main instrument of EU secondary law is Regulation 1049/2001 on public access to documents[437]. It provides that citizens of the EU have a right to access any document that is not restricted by the Regulation's Article 4. Grounds for refusal in this article can be the public interest (security, defence, economic/financial policy, or international relations) or the protection of privacy (including commercial secrets and IP).

The European Parliament has adopted a resolution on transparency in 2017,[438] explicitly coupled with accountability and integrity, where detailed desiderata are stated on lobby registers and (less detailed) on public spending, economic governance, and the EU budget.

The EU Parliament, Commission and Council all have a public register of internal, preparatory documents such as meeting minutes, reports, and policy briefings[439]. The documents are shown by title and they can be requested through a form (a request which can be refused, however, on the grounds mentioned above). The registers contain in principle all final documents since 2001, but based on Art. 9 of the Regulation, sensitive documents may be kept out of the register. The institutions also offer the possibility of requesting documents that are not in the register, through a web form. They report yearly on the access to documents. The Commission also runs a pilot

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[434] See for example these publications: https://www.oecd.org/gov/ethics/lobbyists-governments-and-public-trust-volume-1-9789264073371-en.htm, chapter five of http://www.oecd.org/dac/effectiveness/making-development-co-operation-more-effective-9789264266261-en.htm, and https://www.oecd.org/tax/transparency/.

[435] See here: https://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf.

[436] See the final Act here: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf, page 229.

[437] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.05.2001, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049. Despite a revision proposal from the Commission from 2008 and another one from 2011, this regulation was never changed. There is also sectoral legislation, for example Directive 2003/4/EC on public access to environmental information, implementing the Aarhus convention.

[438] See the file with the resolution and underlying documents here: http://www.europarl.europa.eu/doceo/document/A-8-2017-0133_EN.html.

[439] See the Commission register here: https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=home

project where one of the departments publishes the documents that were released on request, for reuse by others.[440]

The Commission report for 2018[441] shows that about 7,000 requests for documents were received in that year, of which 80% were (partially) disclosed, while 40% of the refusals were overturned following confirmatory applications. This is a large percentage, indicating excessive strictness in the first or excessive leniency in the second instance, and in any case significantly dissenting opinions within the Commission. About one-third of the applications came from Belgium (up from a quarter in the previous year), suggesting that it might not be just ordinary citizens from all over the EU who request information, but rather professional petitioners from Brussels. Unfortunately, the statistics do not show to what extent a document was disclosed, so that 99% blacked out counts for the same as 1% blacked out. The time to response is also missing in the report – an important factor for effective access to information. Review of a sample from DG Health applications shows that grounds for refusal are not elaborated. It just says, for example, "MS position comitology" (indicating that it is an internal deliberation, an exception under Art. 3, par. 3 of the Regulation) or "Protection of personal data". Original applications are handled by the DGs, while the Secretariat-General handles appeals (called confirmatory applications). Confirmatory decisions are more elaborately motivated.[442] If the refusal of access is confirmed, the applicant can turn to the General Court or the Ombudsman. Both these review institutions have the right to access secret documents, but the Ombudsman in case of refusal cannot do anything else than informing the European Parliament about it.[443]

The institutions publish various other types of information. For researchers of mismanagement, fraud and corruption, the Commission database of funding recipients[444] called the Financial Transparency System may be useful, although it does not show recipients for all EU funding because most of it is distributed by the Member States. There is also an open data portal, with datasets that the institutions considered useful to publish.[445] There are data on such disparate subjects as projects financed by the EIB, barley plantations per area, or substances prohibited in cosmetic products. Their usefulness depends on the completeness, recency, and the ability of the data to combine them with other data.[446] Finally, the Commission publishes a Transparency Register that is discussed in paragraph 6.3 on lobbying registers.

6.2.3. National law

Building on the general overview of the national legislation of the three countries in Chapter 2, below is a list of the most important provisions of the national FOI laws.

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[440] Examples of requested documents and replies to requests can be found here: https://webgate.ec.europa.eu/dyna/extdoc/. This is a pilot project covering the Health and Food Safety department (DG Santé).

[441] The most recent one from the Commission: https://ec.europa.eu/info/sites/info/files/com-2019-356-annual-report-access-documents_en.pdf.

[442] See for example the discussion in this case before the EU General Court: ECLI:EU:T:2018:429.

[443] See the Ombudsman Implementing Provisions: https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en.

[444] Financial Transparency System accessible here: https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/funding-recipients_en

[445] EU open data portal: http://data.europa.eu/euodp/en/data/

[446] For example by using linked open data formats.

The **Dutch** law contains two core provisions for our purpose, one regarding passive transparency and the other active transparency. Article 3, contains the following rules:

a. Anyone can request information, without proving an interest;
b. The requested information should be written and regard an administrative matter;
c. The request should be sufficiently precise;
d. The information will be disclosed if no exception applies (security reasons, for example, or information regarding personal opinions of individual officials)

Article 8 and 9 provide that the administration concerned should disclose 'information' about its policies, the preparation thereof, and their implementation.

Romania's FOI law is Law 544/2001. The most relevant provisions of the law include:

– Article 5 of the Law lists types of information that every authority or public institution should communicate of its own initiative (the implementing rules state that most of these organisations should at least publish them on their website, including disabled access);
– Article 7 requires the relevant authority to send the requested information within 10 days in writing, or in 30 days in complex cases. A refusal to provide information should be motivated and communicated within 5 days from reception of the request;
– All public tender contracts must be made available to interested natural or legal persons (not to the general public) as specified by Article 11;
– Apart from the limitation in Article 11 there is a list of exempted categories in Article 12. Personal data are of course exempted from the obligation to disclose, but also information about national defence, public safety and public order, the 'deliberations of the authorities' and information regarding Romania's economic and political interests, if it is classified according to the Law' (Art. 12, under a) and b)). This article appears to impose a double requirement for refusing disclosure: 1) the information has to fall in one of the categories stated in the article and 2) the information has to be classified. Per a contrario, classified information in other categories should be disclosed according to this law. However, there is also a lex specialis on classified information.[447]
– There is a dedicated chapter (Articles 15-20) about media access to information of public interest. One interesting obligation is for public authorities that, by their own rules, perform activities in the presence of the public (for example sessions of Parliament, but also most Court sessions), to allow the press to attend these activities.
– Personal sanctions under the regime of Law 544/2001 are disciplinary in nature[448], but the Courts[449] can award damages to requestors who were denied information.
– Article 13 determines that: "Information facilitating or hiding violations of the law by a public body cannot be classified and is information of public interest".

[447] Legea nr. 182 of April 12, 2002 privind protecția informațiilor clasificate (protection of classified information). Published in M. Of. nr. 248 of April 12, 2002.

[448] Administrative sanctions are thus established by the Administrative Code or the Labor Code, depending on the type of work relation.

[449] The public litigation section of the Tribunal, in this case. The Romanian judiciary system has a 'judecatorie' (general court of first instance) however this court doesn't handle public law cases. The competent section of first instance is called in Romanian `secția de contencios administrativ`, in France the (separate) court of first instance in administrative litigation is called `Tribunal de contentieux administratif` and in The Netherlands, the first instance judge is the 'sector bestuursrecht' of the 'rechtbank'.

The **French** law, the Law regarding relations between the administration and the public, also contains some important articles:

- Article L300-2: Administrative documents are defined as 'any document produced or received, related to the public service, by any body governed by public law or any private law entities with a public mission;
- Article L311-1 institutes the general rule that, when requested, any administrative document should be either published online or disclosed to the requestor;
- Article L311-2 establishes the exceptions to this rule, for example, the right to information does not apply to unfinished documents, preparatory documents (as long as the administrative decision they are preparing hasn't been made yet), documents that already have been made public, and documents that are subject to special rules (state secrets, etc.). The same article grants public institutions the liberty not to comply with 'abusive' requests;
- L311-5 expands on the exempted categories of secret documents: documents regarding judicial procedures, national defence secrets, deliberations of the Government and others;
- L311-6 protects the privacy of personal data;
- L311-9 and R311-11: The requestor may choose the format of the delivered document, within the technical possibilities of the public institution in question, but the latter may charge reasonable photocopying and postage fees;
- R311-12, R311-13, and R311-15: If the public institution does not reply within a month, this is considered a refusal. From the date of refusal, the requestor has two months to seize the *Commission d'Accès aux Documents Administratifs* (Committee for Access to administrative documents, CADA);
- L312-1-1 obliges public institutions to publish certain categories of documents online, for example: 'Regularly updated data of economic, social, health or environmental interest' and 'regularly updated databases, produced or received, that aren't published elsewhere';
- L330-1 obliges public institutions to designate an official responsible for processing requests for information;
- L340-1 defines the Committee for Access to administrative documents as an 'independent administrative authority' tasked with ensuring the freedom of access to administrative documents. This Committee acts as an administrative appeals body and has to issue an official opinion before the requestor (who has been refused access to information) may seize the courts.

A resume of the most important aspects of these laws can be found in the table below.[450] Other transparency laws, such as Romania's law on the transparency of decision-making[451], are not discussed here because the focus is on access to administrative documents to verify the work of public officials.

[450] An interesting question is, why would governments adopt such laws if the results (public access to information) might well create risks for those same governments? In the case of Romania it is argued (Schnell, 2018) that adopting a policy with the expectation that it will not be implemented well enough to be a problem for the adopters, can go awry when, due to the political landscape, implementation cannot be controlled by the government and when put on the public agenda can only be scrapped with forbiddingly high costs.

[451] Law 52/2003, see section 2.4.4.

Table 12: Summary of principal FOI rules

	France	Romania	Netherlands
(implied) principle of 'accessible, unless'	Yes	Yes	Yes
Principle that all accessible documents must be actively made available[452]	No	No	No (but see below on proposed new legislation)
Designated official/ dept. for responding to information requests	Yes	Yes	No
What can be accessed	'Administrative documents':[453] received or produced by entities with a public task for the execution thereof. No form requirements, examples include source codes, statistics, memos, reports	'Information of public interest': Any information regarding or resulting from the activities of a public entity, regardless of form or communication method.	'Documents regarding administrative matters': recorded information in any form on public policy, including its preparation and execution.
Who can access	Any person	Any person	Any person
Actively publishing information	Yes. Mandatory publication (with exceptions, privacy, etc.) if electronically available: - Documents published on request, with their updates; - Documents that constitute 'public information', in a directory; - Any databases not published elsewhere, with updates; - Information of economic, social, health or environmental interest, updated regularly; - 'reference information' for reuse.	Yes. Mandatory: - Regulations regarding the institution that is publishing them; - Organisation chart, contact details, powers, and mandates of the institution; - Financial sources, budget, balance sheet; - Own activity report, programs/strategies; - A directory of documents 'of public interests' and the categories of documents produced/managed; - Information on how to contest a refusal of information.	Yes. Mandatory: information on policy, if that information is 'in the interest of a good and democratic administration', to be published by any administration directly involved in the policy. The extent of the information is not specified; public entities can publish policy summaries to comply.

[452] The Law regarding relations between the public and the administration, Art. L312-1-1 and Art. L322-6 provide that most public institutions must publish and at least yearly update a register of public information. All documents that appear in this register, if electronically available, must be published online. Which documents must be published thus depends on the definition of 'public information'. From Article L322-7 might be concluded that not the actual documents are published, but a set of index data. In any case, Article L322-6, to which art. L312-1-1 refers, applies to the reuse and not the original access of documents. In this context, 'public information' is information already made public by the administration.

[453] This means that information not contained in documents may not freely be accessed. According to French case law, the responding authority should not have to research and assemble information in order to respond to requests (Marique & Slautsky, 2019, p. 91)

	France	Romania	Netherlands
Reuse of information[454]	All public information in 'administrative documents' may be reused if not infringing on IP rights of third persons.	Special law[455] for the reuse of public administration information to "create new information products and services", commercial or not (does not apply to news media). Reuse must be requested.	Special law[456] allowing reuse, on request, of any public information that does not infringe on the IP rights of third persons, except information held by libraries, educational institutions, public broadcasting services. Personal data cannot be reused for incompatible purposes with the initial request.
Legal time for response by administration	1 month	5 days for refusals, 10 days for normal requests, 30 days for complex requests. There are shorter deadlines for requests from the media.	As quickly as possible, but within 4 weeks
Complaints about refusal of access	CADA, a specialised institution (after that, the administrative judge)	Complaint with the refusing institution. After that, administrative judge.	Complaint with the refusing institution (in some cases optional). After that, administrative judge.
Cost	Requestor may be asked to support in advance direct and indirect costs of providing documents, including equipment depreciation.	Cost of photocopies may be charged.	Cost of reproductions may be charged.
Exception categories based on content	1. Absolute: opinions from the Conseil d'État, investigations of the competition authority, the transparency authority (HATVP), and documents regarding the accreditation of medical facilities and personnel. 2. Any document if disclosure would affect: a. The secrecy of the deliberations of the Executive;	1. Defence, national security, public order, if classified[457]; 2. Deliberations of authorities or national economic/political interests, if classified; 3. Commercial/financial information that affects the principle of fair competition;	Absolute: deliberations of the council of ministers, information that could harm national security, commercial secrets, and personal data (unless obviously no infringement on privacy).

[454] National law must comply with the EU rules on this topic, in Directive 2003/98/EC on the re-use of public sector information and the new Directive (EU) 2019/1024 on open data and the re-use of public sector information, to be transposed into national law by July 17, 2021.

[455] Lege nr. 109 din 25 aprilie 2007 privind reutilizarea informațiilor din instituțiile publice (Law no. 109/2007 regarding reuse of information from public institutions), M. Of. 300 of May 5, 2007. It is unclear whether a request must be made also for documents that are already published on the website of the public entity.

[456] Wet hergebruik van overheidsinformatie (Law on reuse of government information), Stb. 2015, 271.

[457] Classification (governed by Law 182/2002, M. Of. 248 of April 12, 2002) is not an automated procedure, but it is an active act of a designated official at the document level. Therefore, documents that have not been labelled with a classification (secret, etc.) would in principle have to be provided on request.

	b. Secrecy of national defence; c. Foreign policy; d. National, public, or personal security or that of public administration IT systems; e. Monetary and credit matters; f. Judiciary procedures (unless exempted); g. Criminal investigations and prevention; h. Any other legally protected secrets; i. Documents revealing personal data are only accessible to the person involved.	4. Personal data; 5. Criminal or disciplinary investigations if disclosure creates a risk for persons or for the investigation; 6. Judiciary procedures if disclosure affects due process or parties' legitimate interests; 7. Information that affects protective measures regarding minors.	Relative (if the interest of publication is smaller than the interest of secrecy)[458]: international relations, economic or financial interests of administrative bodies, criminal prosecution, inspection, control and oversight by administrative bodies, privacy, the interest of the addressee to learn of the information first, and the prevention of undue benefit or disadvantage for involved or third persons.
Exception categories based on status	1. Incomplete documents 2. Preparatory documents	None	Personal opinions on policy in documents that reflect internal deliberations.

The provisions are remarkably similar. The most notable exception is the French CADA (see also below) that handles complaints regarding refusals to provide requested information, while the other two countries do not have a central entity for that. Regarding the material scope, The Netherlands has the most limited rule, namely that the information requested from an institution must relate to the policy of that institution. The Netherlands is also the least clear on what public institutions must actively publish. As mentioned in chapter 2, in the Dutch Parliament there is a bill going through the legislative procedures, based on the principle that all documents created by public institutions must be published on the internet, a reversal of the current situation where documents are published on request. At the cut-off date for this study, the bill was on hold waiting for impact studies, ordered out of concerns that the implementation would be too costly and far-reaching.[459]

6.2.4. National practice

This section aims to describe in broad strokes the current practice in each country, in other words how is the FOI law implemented. First we look at some data on the processing of FOI requests and the human resources who handle those requests for public institutions. Active transparency is described briefly after that, followed by main policy aspects. At the end of the section we will try to draw conclusions on how apt this practice makes the transparency instrument for citizens to detect signs of corruption.

[458] This is called a 'Public interest test' (Marique & Slautsky, 2019), absent from French and Romanian legislation. There are indications, however, that Romanian courts do use this test when evaluating refusals to release information that fell under the exemption rule, for example Decision no. 111/2015 of the Court of Appeals in Constanța (http://www.rolii.ro/hotarari/589a2a7fe49009ac350019a9). The authors consider the public interest test a 'safety valve' to disclose document with confidential information if that would be in the overriding public interest.

[459] See this quick scan on the impact of the proposal: https://www.eerstekamer.nl/overig/20170613/quick_scan_impact_wet_open_2/document (in Dutch).

Requests handling

There are not enough data for a direct comparison between the countries regarding this aspect. Additionally, there is a risk of differing definitions of 'requests'.[460] Therefore the numbers in this section are not shown in tables, to avoid the impression of comparability. They are meant just to help sketch the phenomenon and to find its contours.

In each of the three countries, central and local government authorities allow the request of information online. The requestor must complete a form that includes their name and an (e-mail) address that the information can be sent to. Motives are not necessary but a precise description of the requested information is (Marique & Slautsky, 2019, p. 87), otherwise the response will be that the requested information does not exist or the delivered documents will be incomplete. You must know what documents you are looking for. The administration is not obliged to provide documents that are not specifically included in the request. Institutions may still, as a rule, comply with imprecise requests. But overprotective institutions can use this requirement for an excess of secrecy. This is the problem of the 'unknown unknowns': not only do you not know what a document contains, you also do not know that it exists. In Romania, case law shows that claimants have to prove the existence of documents of which the public institution declares that they do not exist.[461] It also appears from Romanian case law that institutions can refuse access to documents if they contain personal data, instead of having to disclose them without the personal data.[462] Dutch[463] and French[464] case law shows that too broadly described requests may be refused, albeit incidentally.

As to the number of requests received, in Romania this was around 57,000 in 2010 and 47,000 in 2016 (Radu & Dragos, 2019). A study for the Netherlands shows 18,000 in 2010. 9,000 of which were to the police and about 1,200 to ministries. For 2016 there are only data on ministries, about the same as in 2010 (de Graaf et al., 2019). For France, no such general data could be found. The CADA received about 7,000 complaints in 2018 and 6,600 in 2016, which is an unknown percentage of the total number of requests since the rest did not reach the CADA.

The Dutch study cited above estimates that 13% of administrative decisions on requests is appealed against. No such data exist for Romania or France. After administrative appeal (which in France is lodged with the CADA), the requestor can go to court. Romania's database of court decisions yields 1963 decisions for the year 2018 on the relevant type of complaint[465]. The Netherlands court

[460] To illustrate: according to a World Bank study, early FOIA practice in Romania was "likely to report all routine interactions with citizens as requests under Law 544, probably as an old reflex to show a high volume of activity in the periodical reports" (Ioniță & Ștefan, 2012).

[461] See for example Decision 1532/2009 of Curte de Apel Ploiești, http://www.rolii.ro/hotarari/5899b8f1e490091c4700215e

[462] At least in older case law. See for example Decision 2675/2010 of Tribunalul București, http://www.rolii.ro/hotarari/599e4ca5e49009d0290012c2.

[463] See for example this decision from the State Council, the highest administrative judge: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2011:BP7115

[464] See this CADA opinion: https://cada.data.gouv.fr/20180286/. It is debatable whether in the circumstances of this case, the same request would have had to be processed under the GDPR regime.

[465] This database contains all Romanian court decisions since 2009, with the exceptions of cases regarding national security and cases involving minors. The search on http://rolii.ro was conducted as follows: "Obiect dosar" set to: Comunicare informatii de interes public (Legea 544/2001) and "Perioada" from January 1, 2018 until December 31st, 2018.

database gave 320 results for the same year.[466] A French database showed 349 decisions of the *tribunaux administratifs* for 2018[467].

How long does it take to get the information? Data for The Netherlands from 2010 show that 71% of the *municipalities* handled all requests in time (that is one month, with the possibility of extending to two months).[468] According to a press investigation however, in the first half of 2019 71% of the requests to *ministries* received a late response.[469] In Romania, data on throughput are not included in all mandatory annual FOI reports. Individual municipalities do include them; the Bucharest report for 2018[470] shows that, out of 1,180 accepted FOI requests, in 151 cases the reply was too late (more than 30 days), this is 13%. The number for the second city in Romania, Cluj Napoca, is 3% in the same year[471]. The third city, Iași, shows 5%[472] and the fourth, Timișoara even 0%[473]. For France, no data could be obtained.[474]

Cases that arrive in court are measured statistically. A recent report from the Tribunal in Bucharest (the court for appeals against refusals on FOI requests and the largest court in Romania by output) shows that about 70% of all court cases were solved within one year, of which about 50% within 6 months.[475] The national figure for The Netherlands on administrative law cases before the *rechtbank* is between 80% and 90% cases solved within one year on average.[476] In France, it takes on average more than 1,5 years to reach a decision in cases before the *tribunal administratif*.[477]

Summing up: Phrasing requests can be difficult, there are relatively few requests, refusals and complaints are significant and judiciary review takes months, making requests on time-sensitive issues useless. It must also be concluded that the transparency of the transparency process itself does not lead to comparable insights. All three countries have legislation for transparency that does not, in practice, deliver the necessary transparency on its own procedures to monitor their effects.[478]

[466] The search on www.rechtspraak.nl had parameters 'WOB' in free search field and "datumbereik" from January 1, 2018 to December 31st, 2018. Note that the Dutch database is not exhaustive, not all court decisions are published.

[467] For this search, the commercial product "doctrine.fr" was used, with filters "demande documents administratifs", "2018", and "TA".

[468] See the report: Monitor wet dwangsom, https://zoek.officielebekendmakingen.nl/blg-189078.pdf, October 2012. The report does not mention whether the 71% regards the period of one month or the prolonged period of 2 months.

[469] De Volkskrant, September 4, 2019: https://www.volkskrant.nl/nieuws-achtergrond/ministeries-steevast-laat-bij-verzoek-om-openbaarheid-termijn-vaker-wel-dan-niet-overschreden~b34862eb/

[470] Source: http://www.pmb.ro/institutii/primaria/rapoarte/rap_l544/docs/legea544_raport2018.pdf.

[471] Source: https://files.primariaclujnapoca.ro/2019/06/19/raport-544-2018.pdf

[472] Source: http://www.primaria-iasi.ro/imagini-iasi/fisiere-iasi/1556874501-raport%20lg%20544_2018%20(1).pdf

[473] Source: https://www.primariatm.ro/uploads/files/rapoarte_L544/Raport_L544_2018.pdf

[474] Multiple requests for information to the CADA remained unanswered.

[475] See http://portal.just.ro/3/Documents/ANEXE%20BILANT%20statistica%20T%20BUCURESTI%202016.doc, p. 68.

[476] See 'Kengetallen rechtspraak 2017': https://www.rechtspraak.nl/SiteCollectionDocuments/kengetallen-2017.pdf.

[477] See the 2018 report from the *Conseil d'État:* https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/194000539.pdf (p. 33).

[478] Such observations may seem unfair to hard-working officials who try to process large FOI requests as best they can under the circumstances. They do not, as such, question the good faith or diligence of individual officials or institutions, but only point out that the desired effect of controlling the administration is not what it is made out to be wen looking at policy statements.

Human resources

Local professionals in each studied country implement transparency legislation. Because of the effect on the overall efficiency of FOI practice, it is relevant to see how much staff there is for handling FOI requests and how well trained they are. Insufficient time and/or expertise may lead to delays, unjustified refusals (or on the contrary, undue disclosure of secrets). In Romania, France and in The Netherlands, the front line of transparency practice is manned by public officials at the individual institutional level, who are tasked with publishing information and/or responding to requests under FOI legislation. In France, many public institutions had not designated such an official in 2016, even though the legal obligation to do so exists since 2005. Those that had designated an official had made replying to requests for information an additional task, on top of the official's other work (Marique & Slautsky, 2019, p. 78). Romania's larger public institutions usually have designated the mandatory official or officials, but the small ones have not (such as small municipalities, of which there are thousands, and small specialised agencies). This despite the legal obligation in Art. 4 of Law 544/2001 to appoint a person or designate a department for this task.[479] In The Netherlands, public bodies do not have to designate a specific official to respond to FOI requests, but ministries and other (large) bodies usually appoint several persons for this task (Maas-Cooymans & Van der Sluis, 2010).

Do the officials who respond to FOI requests receive training, considering the complexity of the subject and the considerable case law in all three countries? Five years after the national law came into effect, half of the Romanian officials were not trained, according to an NGO report from 2007[480]. An evaluation on active transparency from the government's general secretariat (overseeing implementation of the law) from 2018 still recommends organising trainings as a novel measure[481]. Romanian officials have a personal legal obligation of continuous improvement and 'competence' is one of the principles underpinning the new Administrative Code.[482] In France the situation should be better, because the CADA "regularly organises courses and training for [FOI request handlers]" (Marique & Slautsky, 2019). However, CADA training only reaches few of these officials[483]. In The Netherlands, FOI training is available from commercial training agencies, but no national data could be obtained on how many public officials have been trained because there is no central coordination.

[479] Source: Interviews with Romanian NGO representatives. Small municipalities do not receive the number of FOI requests of larger public bodies, but the ones they do receive should be handled by a trained official who has allocated time for it. The issue that there is insufficient specialised staff in small municipalities is a general one, not limited to corruption prevention. Compared to France, where there are also many small municipalities, in Romania there are few initiatives of structural collaboration between local authorities, where specialised personnel could work in shared service centres, like the French Centres de Gestion (CDG).

[480] Transparency International/Asociația Pro Democrația: Raport privind liberul acces la informațiile publice din Romania, 2007.

[481] See the report here: https://sgg.gov.ro/new/wp-content/uploads/2018/11/Analiza-rezultate-monitorizari_23.11.2018-1.docx

[482] See Administrative Code (OUG 57/2019) Art. 368 under 'profesionalism' and 458.

[483] See the 2018 annual report https://www.cada.fr/sites/default/files/rapport_2018.pdf mentioning training activities starting with in that year, with two workshops reaching some tens of persons, while their network of local officials responding to FOI requests consists of more than 1700 persons.

Active transparency

In the paragraph on national law (section 6.2.3) we have seen that public institutions in each country have a limited active transparency obligation. There is no obligation to publish everything that is publishable.

Technically, it is perfectly possible to make public all public sector information that is not secret, simply by pushing it automatically from the local document management system (special software, or simply a designated folder in a file management system) to a website or even a central government portal, once the information has been marked as definitive and adopted/approved and not marked secret. Likewise, certain fields in documents may be marked confidential (such as fields for personal data, or boxes containing commercial secrets) so that a document can be published automatically without the confidential information in it. Such a way of working would do away with all the personnel and material costs for FOI request handling, but probably increase the cost for IT services. From an organisation viewpoint however, it may be complex to adapt procedures and sometimes legal changes are required for implementation (such as obtaining a legal basis for digital signatures). Another difficulty is that not all relevant documents that are held by the public institution originate in the document management system. Documents can be hand-written letters received from third persons. Information in databases or official's phones can be 'documents' in the sense of the law, for example messages between officials in a messaging app.[484] But whatever the arguments, in practice no automatic publishing as a rule exists even though all three countries have included in their laws that transparency is the norm and secrecy the exception.

On top of the information they are legally obliged to publish, public institutions also voluntarily publish so-called data sets, in the form of documents or (database) tables. The institutions choose if and what they publish. Tens of thousands of data sets have been published in each country, on a broad variety of topics, from road safety to public contracts to childcare. These initiatives are usually labelled with the term Open Government Data. The three studied countries, but also the EU, have central websites to make these data sets available to the public[485] All three countries are also members of the Open Government Partnership[486] committed to publish ever-growing numbers of open data sets.

The question here is, whether active transparency practice includes data that are useful for the detection of corruption.

According to the respective FOI laws, the following data must be published in each country (also shown above):

[484] For example, the highest administrative judge in The Netherlands ruled that WhatsApp messages, even from officials' private phones, could be requested under the FOI law. See the decision: https://www.raadvanstate.nl/@114477/201800258-1-a3/.

[485] France: data.gouv.fr, Netherlands: https://data.overheid.nl/, Romania: http://data.gov.ro/, EU: https://data.europa.eu/euodp/en/home

[486] Website: https://www.opengovpartnership.org. The member states to the partnership each have their own subsite.

Table 13: Mandatory publishing of data

France	Romania	Netherlands
- Documents published on request, with their updates; - Documents that constitute 'public information', in a directory[487]; - Any databases not published elsewhere, with updates; - Information of economic, social, health or environmental interest, updated regularly; - 'reference information' for reuse.	- Regulations regarding the institution that is publishing them; - Organisation chart, contact details, powers, and mandates of the institution; - Financial sources, budget, balance sheet; - Own activity report, programs/strategies; - A directory of documents 'of public interests' and the categories of documents produced/ managed; - Information on how to contest a refusal of information.	Information on policy, if that information is 'in the interest of a good and democratic administration', to be published by any administration directly involved in the policy. The extent of the information is not specified; public entities can publish policy summaries to comply.

Does this information include data on public spending and the granting of rights and privileges, how the relevant decisions were made, and by which public official? In theory, in all three countries public institutions must publish information on those topics. A few examples:

- France: any documents that are 'public information' must at least be included in a directory with its title. This includes yearly accounts, organisation charts showing who is responsible for which department, and so on;
- France: 'information of economic interest' should include data on public contracts (awarded to whom, value of the contract, services/works to be performed);
- Romania: the mandatory organisation chart and financial resources are explicitly mentioned;
- Netherlands: 'information on policy' should include who is responsible for a certain policy and how much it costs.

This shows that at least in theory, the existing legal provisions on mandatory publishing of public information are useful when looking for signs of corruption. To test this in practice, below is a 'snapshot' of three relevant topics on local administration websites[488] of the four largest cities in each country.

[487] But not exhaustively, according to this CADA opinion: https://cada.data.gouv.fr/20172569/

[488] Including the main website plus related online local public databases such as the issues of the local official gazette. Review conducted on October 21, 2019. Searchable content only.

Table 14: Snapshot of local detection topics

	Organisation chart with names of managing officials	Spending information on subsidies	Detailed information on real estate spending (renting, buying, maintenance)
Paris	Yes	Yes	Yes
Lyon	No	Yes	No
Marseille	Yes	Yes	Yes
Toulouse	No	Yes	No
Bucharest	No	No	No
Cluj-Napoca	Yes	Yes	No
Iași	No	No	No
Timișoara	No	Yes	No
Amsterdam	No	Yes	Yes
Rotterdam	No	No	Yes
The Hague	No	Yes	Yes
Utrecht	No	Yes	Yes

This illustrative table shows that, if someone would like to know what subsidies were handed out in a particular year, what real estate transactions the administration completed, and which public official was responsible for the correct execution of those activities, only in two of the twelve cities displayed could the person have found an answer by studying the material made available through active transparency. The table also shows that, compared to what public institutions are legally required to publish, many of the largest cities in the three countries fall short. Smaller municipalities, with less means and personnel, can be expected to perform worse. Other sources show the same picture: A Romanian NGO counted published activity reports, an obligation under the law. Almost 70% of public institutions published such reports in 2014 but only one institution had published all reports since it became mandatory (the law is from 2001). Several ministries and large municipalities had no reports published at all.[489] The Dutch law does not create any obligations for public institutions to publish specific information. It is unclear whether publishing 'information on policy' means all information on policy or some information on policy. Even in the first interpretation, it would remain a discretionary decision whether any specific information is 'in the interest of a good and democratic administration'. In any case, a lack of information cannot be remedied through the administrative court (de Graaf et al., 2019, p. 181). In France, the legal obligation is recent (it dates from October 2017, introduced by the new *Loi pour une République numérique*) and no data were available yet on the implementation.

FOI and open data policy

Who oversees transparency policy? In The Netherlands, individual public institutions each have their own policy related to the FOI law. Policy is coordinated by the Ministry of the Interior, in

[489] Societatea Academică Românească, Transparența instituțională în România şi Republica Moldova (2016), see http://sar.org.ro/wp-content/uploads/2016/04/Rapoarte-activitate.pdf

a non-binding way, related to specific FOI requests and issues such as amendments of the law. There are some policy agreements on active transparency.[490] The new draft law (see section 6.2.3) includes the possibility of appointing an 'information commissioner' with similar prerogatives as the French CADA. The Romanian practice is overseen by the government's general secretariat (SGG, *secretariatul general al guvernului*), which irregularly produces procedures and policy papers[491], and one evaluation dating from 2017 (see note 479). In France, the CADA is the central organ that emits opinions (on request), coordinates with local FOI officials, organises training, and acts as FOI 'ambassador' in the public sphere.

In all three countries, there is a distinction between 'traditional' FOI policy – the laws that have existed since the 1980s in France and The Netherlands, and in Romania since 2001 – on the one hand, and more recent 'open government' policy on the other hand. All three countries have recent open data policies and teams that coordinate their implementation. In France, this is the DINUM, an interdepartmental policy unit[492] under the aegis of the prime minister, working with the ministries to push their digital agenda. It has developed various initiatives, of which Etalab[493], since 2011, is the best known. They coordinate open data politics and have set up a number of 'platforms', portal web sites that contain data sets and interfaces on such topics as geodata, company directories, or transport data. According to the latest activity report, the projects represent a total investment of 2.5 billion EUR.[494]

In Romania, open data policy is coordinated by the central government's Open Government team, a directorate of the general secretariat of the government. They run a portal with data sets[495] and support various initiatives, from publishing state budgets that are intelligible for ordinary citizens to better public consultation on draft laws. The most recent action plan[496] contains a mandatory integrity training for public officials through an e-learning platform, and a corruption information campaign aimed at the general public, establishing a clear link between open government and anticorruption policy. The role of the open government directorate is broader than that of DINSIC, with a fraction of the budget. The total budget for the three-year plan is about 2 million EUR.

In The Netherlands, the responsible policy department is a directorate of the Ministry of the Interior.[497] Various public sector organisations, such as ICTU, work on policy implementation.[498] The

[490] For example this one on the income of top officials: https://zoek.officielebekendmakingen.nl/kst-28479-67.html

[491] Such as this one, on active transparency goals: http://gov.ro/ro/guvernul/sedinte-guvern/memorandumul-cu-tema-cre-terea-transparentei-i-standardizarea-afi-arii-informatiilor-de-interes-public

[492] Direction interministerielle du numérique, see website: https://www.numerique.gouv.fr/dinum/. Since 2017, this directorate replaces a previous 'secretariat for the modernization of the public sector' established in 2015. The latest legislative change is from October 2019: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039281619.

[493] Website: https://www.etalab.gouv.fr/qui-sommes-nous. The collection of data sets can be viewed at data.gouv.fr.

[494] Report of October 18, 2018. See: https://www.numerique.gouv.fr/uploads/Bilan_DINSIC_2017-2018.pdf

[495] See here: http://data.gov.ro/

[496] National Action Plan 2018-2020, see: http://ogp.gov.ro/nou/wp-content/uploads/2018/11/PNA-2018-2020-1.pdf.

[497] The directorate 'Informatiesamenleving en Overheid' (information society and government) under the directorate-general 'Overheidsorganisatie' (organisation of the public sector).

[498] See their open data portal here: https://www.open-overheid.nl/open-data/. Another example is the organisation that organises the publishing of legislation: https://www.koopoverheid.nl/. There are also regional and local initiatives in the three studied countries.

latest 'digital agenda' policy plan[499] that was sent to Parliament in March 2019 contains examples of open data projects, one of which concentrates on using open (big) data for detection of mostly drug-related activity[500]. The improvement of the reuse of open data is one of its actions. The total budget for the digital agenda is 55 million EUR per year until 2021.

However, in France and The Netherlands, the open data policies do not have a specific component on corruption or fraud. The Romanian plan for 2018-2020 does contain actions on integrity promotion and public information on corruption. All policies do present data that the public could use indirectly (i.e. with substantial analytical efforts) to detect wrongdoing, such as financial data (budgets, beneficiaries of subsidies, contracts) and identification data (such as data on companies, land registry).

Data that are actually available on the various platforms in the three countries and that *could* lead to detection of wrongdoing, include:

- Amounts paid to vendors by the Romanian Ministry of Justice, per month (can be cross-checked against the trade registry and the organisation chart to see if someone is hiring their relatives or neighbours);
- Public tenders organized by the French government in 2017, including the companies who won the tenders with the value of the contract (can be checked to see if someone is overpricing their products or services, which is a corruption red flag);
- Permits granted by the city of The Hague, including date requested and date granted (to see if someone receives permits suspiciously fast);

Concluding remarks on national practice

In its report on the implementation on the national FOI Act from 2017, the Romanian Government's General Secretariat noted that the use of open data in the public sector had grown, but that there was still a "tendency" to try and block access to documents of public interest.[501] The same thing seems to be true for France, where "transparency is not really embedded in […] administrative culture" (Marique & Slautsky, 2019). Also in The Netherlands, there have been critiques over time from journalists, members of Parliament and academics[502]. The 2018 GRECO report calls this criticism worrying and urges the government to adopt the new transparency bill. It seems that 'clients' of the FOI legislation are suboptimally served in all three countries.

The public administrations of the three countries are ambiguous about transparency. Open data policy can easily be embraced because it is voluntary. When it comes to publishing information due to a FOI request, administrations are protective – but not necessarily illegally so: there is no indication that refusals to disclose information are overturned in court in a disproportionate

[499] See: https://www.rijksoverheid.nl/documenten/rapporten/2019/02/28/rapport-nl-digitaal-data-agenda-overheid.

[500] See the initial plan of the project here: https://zoek.officielebekendmakingen.nl/stcrt-2017-48699.html Another example is the publishing of statistical data on crime: https://www.criminaliteitinbeeld.nl/. The national bureau of statistics (CBS) is involved in both.

[501] The report can be found here: https://sgg.gov.ro/new/wp-content/uploads/2018/09/RAPORT-DE-MONITORIZARE.pdf.

[502] See this report: https://www.recht.nl/doc/evaluatieWob2004.pdf, this parliament memo https://zoek.officielebekendmakingen.nl/kst-30214-1.html, and this article from an anchor of the public broadcasting organisation: https://nos.nl/nieuwsuur/artikel/2280251-van-de-hoofdredactie-wob-maakt-ambitie-zelden-waar.html.

number, in any of the three countries. An illustration might be the Dutch policy plan discussed above, which says in the introduction that information 'should be open' but a few pages down that only 'some' government data is open. And adoption of the new Dutch FOI law is held up on grounds of high costs. Active transparency of all information that is not secret or private is not a technical problem, as we have seen above, but one of acceptance. The GRECO report mentioned above cites interviewees saying that there was a "culture among government agencies to consider information not public, unless there was a good reason to make it public (rather than the other way around)".

The information gathered in the paragraphs above also shows that in all three countries, officials at the institution level who respond to requests for information are in many cases not specialised, and on the 'demand side' the number of questions is not as large as one would imagine. This may be related to the critiques noted at the start of these remarks – even if we would take the Romanian example, apply a large margin of error and suppose that there are a 60,000 requests per year, out of a population of 18 million registered voters, the number is very small. Less than 1% of them makes a FOI request annually. For The Netherlands and France, the numbers are lower than that. In The Netherlands, the total number of requests is about the same as the estimated number of journalists[503] – each journalist would file one request per year. It should be mentioned that the administrative burden created by a single request may be large.

The difference with the GDPR[504] principle of data protection by design is striking. There is no transparency by design in any of the three countries, despite policy claims to the contrary. This does not mean, however, that everything should be transparent. There are very good reasons for non-disclosure. This section does not take into account that some data may not be published due to privacy concerns. Privacy is certainly a justification for not publishing personal data. Nevertheless, it diminishes transparency and thus the possibilities for the public to detect corruption without having to file a request for documents under the FOI law. Even filing a request might not help, since the presence of personal data may be grounds for refusal. Searching for connected data that reveals corruption risks, suspicions of corruption or even corrupt actions depends for a large part (not completely) on information on the identity of the public officials involved, because otherwise a civil, disciplinary or criminal responsibility cannot be established.

Finally, in comparison with the recommendations from the international instruments – be it a convention not entered into force (Tromsø) or one on environmental matters (Aarhus) – the studied countries all have the required legislation in place with the required elements such as low costs, relatively short timeframes, exceptional and motivated refusal and the possibility of judicial review. On the contrary, none of the countries implemented the active stance of public authorities in helping citizens look for information, such as prescribed by the CoE convention, or in publishing and maintaining document registers such as prescribed by the UN convention, and practiced by the EU institutions.

So, we see that in general transparency practice, all three countries have similar issues. Based on the picture in this section, it can be submitted that that FOI laws are neither a frequently used tool for the general public to detect signs of corruption, nor one that is actively optimized for more frequent use, in any of the three countries.

[503] According to this branch organisation report from 2015: https://www.svdj.nl/de-stand-van-de-nieuwsmedia/hoeveel-journalisten-zijn-er-eigenlijk/

[504] The EU General Data Protection Regulation, which entered into force in May 2018.

6.3. Three specific issues

Lobbying registers

Transparency in the sense of making lobbying visible, so that the pluralism of interest representation can be monitored (Michel, 2018) can be furthered through lobbying or transparency registers: online lists of registered natural persons and the causes that they lobby for.

The relation to corruption is a complex one. On the one hand, the link between lobbying, a set of private (collective) interest activities to inform and convince lawmakers and officials of a certain viewpoint, and corruption may not be obvious. Lobbying occurs when government rules are unfavourable to certain interested parties, it is not illegal and may even be considered necessary in a democratic society – to make your voice heard as a legitimate interest group. On the other hand, the difference between lobbying and corruption may also not be obvious. Public officials should act in *the* or *a* public interest and not in a private one, even if private interests may coincide with public ones. Talking to interest groups can be necessary for officials to obtain necessary policy information but letting themselves influenced unduly can create undesired inequalities. Lobbying can take place on a tilted playing field, where some have access to lawmakers/officials and others do not. There is a thin line between the offering of information and support by lobbyists and the explicit quid pro quo to individual persons that would make it a criminal bribe[505] – a line that can be drawn thinner depending on the degree to which the lobbying process takes place behind the scenes.

Some scholars see a trade-off between lobbying and bribery (Harstad & Svensson, 2011) in the sense that a business will sometimes use bribery and sometimes lobbying to further its interests, as substitutes, depending on the conditions (Campos & Giovannoni, 2007). In the same vein, lobbying can also be the first step of influence trafficking, a criminal offense in Romania and France[506]. Trading in influence is not incriminated in The Netherlands, despite recommendations from GRECO[507]. The Dutch authorities found that it was conceptually impossible to separate illegal from legal trading in influence (i.e. lobbying) and that the criminal law is not the best way to deal with the phenomenon.

According to the legal definitions, the first difference between lobbying and bribery is the presence of a *quid pro quo,* or not. The second difference is the nature of the influencing. The definition in the Romanian criminal code goes further than the one in the French criminal code and in the CoE criminal law convention on corruption (by omitting that the influence should be 'improper'[508]), arguably incriminating any paid lobbying activity.

Without going into further detail, it follows from the literature and practice that lobbying activities pose a corruption risk; therefore their transparency is justified. The CoE and OECD both recommend a register.[509] This section briefly describes the efforts of the three studied countries and the EU to bring this transparency about.

A first, general observation is that lobby activities aimed at EU or national officials are less transparent than those aimed at members of Parliament or government Ministers/members of

[505] It would be a bribe if the person offering the benefit is doing it for himself. If he were offering benefits as a middle man, he would be peddling influence.

[506] See also chapter 2.

[507] See the Netherlands compliance report on the third evaluation round (2010), https://www.coe.int/en/web/greco/evaluations/netherlands

[508] However, what 'improper' means remains unclear (Slingerland, 2018, p. 53).

[509] CoE Parliamentary Assembly: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17832&lang=EN. OECD: https://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf.

the EU Commission, because in practice, meetings with officials are not disclosed to the extent that meetings with members of Parliament and Ministers, or MEP's and Commissioners are. Even if the public can learn from a register who the lobbyists are and whom they represent, which public officials they meet and when remains unknown. A second general observation is that the lack of a lobby register does not mean that there are no 'rules of engagement' for public officials who enter into contact with lobbyists. The general rules regarding transparency, confidentiality and conflicts of interest apply. However, it would be desirable that the relevant public officials receive training on how to interact with lobbyists and that lobbyists receive special mention in the mandatory codes of conduct and procedures, which currently could not be identified for this study.

European Union

The EU (Parliament and Commission, not the Council) publishes data on lobbyists in their Transparency Register[510], that is currently governed by an interinstitutional agreement from 2014. The register contains information about lobbying entities, be it companies, representatives such as consultants or law firms, or NGO's, churches, or local government associations. The persons responsible, the number of lobbyists, and the budget must be reported. Registration is not mandatory, but 'expected'. Negotiations about a new agreement providing mandatory registration were stopped ahead of the European Parliament elections of 2019 and at the time of writing have not been finalized. The guidelines for the implementation of the current agreement do indicate that access to some meetings or events can be made subject to registering.

In 2018, the European Commission adopted a new Code of Conduct.[511] According to this Code, Commission members can only meet groups/individuals who are registered, and it must be published that the meeting took place. The same requirement applies to Directors-General. MEPs do not have this obligation, but some of them publish their meetings voluntarily.[512] Such an obligation cannot be found in the ethics codes that govern EU officials' behaviour[513], so that the meetings of EU staff are not as transparent. And a recent review of the register (Bunea, 2018) concluded from a survey that stakeholders do not perceive it to be effective in the sense that it does not reduce the information gap between lobbyists and the general public.

Netherlands

A 2015 report from Transparency International on lobbying in The Netherlands[514] calls the Dutch situation "opaque". A more recent article (Bovend'Eert, 2020) also laments the lack of transparency, and adds as a most remarkable example that in het Dutch Senate, some active members are also lobbyists for private interests. According to the TI report, citizens have "little insight on who is lobbying whom, with what means and to what end" because there is "hardly any regulation". The GRECO report

[510] http://ec.europa.eu/transparencyregister/public/homePage.do. In October 2019 it had almost 12,000 entries, from Google to the Mormon Church, to Transparency International.

[511] Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018D0221(02).

[512] See for example here: https://lobbycal.greens-efa-service.eu/all/ A few members of the Greens group publish their meetings, others do not (or do not have meetings).

[513] These are the Staff Regulations, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A01962R0031-20160101, and the Code of good administrative behaviour, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02000Q3614-20111116 (the annex).

[514] 'Lifting the lid on lobbying', 2015. https://www.transparency.nl/wp-content/uploads/2015/04/Lifting-the-Lid-on-Lobbying-Enhancing-Trust-in-Public-Decision-making-in-the-Netherlands-1.pdf

of the fifth round on The Netherlands concurs and recommends introducing rules for lobbying.[515] The Dutch Parliament does have a register of lobbyists, with less than 80 names on October 28, 2019[516]. It is not an exhaustive list of lobbyists, but rather a list of persons who have a permanent access pass to the Parliament buildings. Since the publication of the TI report in 2015, there have been certain initiatives to increase transparency and to tighten controls.[517] This has led to some changes, for example access of lobbyists to Parliament was restricted to certain areas in 2018, the Ministers' appointment schedules are now being published online (but not the subject of the discussions)[518] and former Ministers are no longer allowed to lobby for their new employer until two years after they left their ministry[519]. The Dutch Senate adopted a (soft law) code of conduct in 2019, in which an integrity register was declared unnecessary and impracticable.[520] There are no lobbying rules for public officials. And in the code of ethics for central government officials, there is no mention at all of lobbying and how to handle contacts with interest representatives – officials must apply the generic rules for conflicts of interest and undesirable external contacts.

France

In stark contrast with the Dutch approach, French lawmakers have dedicated a whole section[521] of the *Loi Sapin II* to the "Transparency of the relations between interest representatives and the public authorities". It provides that the HATVP (see chapter 2) maintains a lobby register and oversees the activities of lobbyists. The register is mandatory for any lobbyist entering in contact with cabinet members, members of parliament, regional and local politicians and executives, or high-ranking officials (excluding e.g. senior policy specialists, unit leaders, department heads). Oversight by the HATVP is strengthened by powers such as access to any documents, even if they contain professional secrets, and even verifications on the premises of lobbying organisations. Withholding information from the HATVP is punishable by a criminal fine or up to one year imprisonment, and so is a repeated breach of the code of conduct for lobbyists (Art. 18-5 of law 2013-907).

At the end of 2019, the register contained almost 2,000 lobbyists[522]. They also have to declare the activities undertaken for their work (e.g. meetings, sending documents), and the object of those activities (such as 'warning *député* X about Y' or 'pointing out the contribution of A to B'). The activities are declared once per year for the previous year. In its latest yearly report[523], the HATVP mentions that lobbyists were slow to report their activities and those with the largest delay

[515] GRECO report, fifth round, on The Netherlands (2019) page 16.

[516] See the list here: https://www.tweedekamer.nl/sites/default/files/atoms/files/lobbyistenregister_d.d._02_oktober_2019.pdf

[517] For example this memo (no. TK 34376) from two members of Parliament and its response from the Minister of the Interior: https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/17/kamerbrief-met-kabinetreactie-initiatiefnota-lobby-in-daglicht-luisteren-en-laten-zien.

[518] The searchable interface for Ministers schedules can be found here: https://www.rijksoverheid.nl/actueel/agenda

[519] See this circular: https://wetten.overheid.nl/BWBR0040075/2017-10-01. There are exceptions, and the scope is limited to the Ministry that they headed. Former Ministers can still lobby other Ministries.

[520] See Article 3 and the annexed explanation: https://wetten.overheid.nl/BWBR0042225/2019-06-11. The preceding GRECO report from 2018 (https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16808b322d, point 11, page 3) did mention that codes of conduct were more important than lobby registers, still this may not have been quite the desired effect.

[521] Titre II, amending Law no. 2013-907 on the Transparency of public life

[522] See the register here: https://www.hatvp.fr/le-repertoire/

[523] See https://www.hatvp.fr/presse/repertoire-des-representants-dinterets-bilan-de-lexercice-2018/

were 'named and shamed' (but not fined – criminal sanctions were not applicable until 2018). The overseer also reported having checked more than 100 unregistered organisations to whom mandatory registration could apply, leading to about 20 additional registrations. On the contrary, Members of Parliament or anyone in the public sector who can be lobbied are under no obligation to make public their meetings with interest groups. When this critique was brought forward in a report by Transparency International in 2019[524], more than 300 members of Parliament swiftly expressed their agreement with it in a letter to the editor of Le Monde.[525]

Romania

In Romania, the Government operates a 'single register for the transparency of interests' (*Registrul unic al Transparenței Intereselor*, RUTI)[526] where decision-makers in the public sector as well as more than 200 (May 2020) lobbying organisations are registered. However, participation is mandatory and there are very few meetings published in the online register. Adopting rules on lobbying is also an objective in the national anticorruption strategy (2016-2020)[527]. The register has no direct basis in the law but was created through a government memorandum from 2016.[528]

An association of lobbyists has also set up a list in an effort of self-regulation that exists also in other countries, but in this case is not complemented by a directory enshrined in the law. There are some 80 entities on the list. There are no anti-corruption NGO's on it. The organisation has developed an ethics code and the list has a supervisory committee.[529] Unfortunately, the list gives no information about their interaction with lawmakers, public executives or officials, and there is no dependency between being on the list and access to lobbying targets.

A report from the Romanian European Institute (Tănăsescu et al., 2015), a public institution, criticizes the lack of (legal) clarity in the status quo and proposes three options for regulation, including self-regulation, a dedicated law, or modification of mainly the existing law on decisional transparency (law 52/2003, see chapter 2). In its fourth evaluation report (2018), GRECO did not mention the RUTI but recommended the adoption of legislation for the interaction of lobbyists with members of Parliament.[530] In fact, there are legislative proposals dating back as far as 2010, that have not been voted on at the time of writing of this study.[531]

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[524] https://www.wwf.fr/sites/default/files/doc-2019-09/20190926_Rapport_Transparency_International_France-Pour_un_meilleur_encadrement_du_lobbying.pdf

[525] https://www.lemonde.fr/idees/article/2019/10/09/lobbying-pour-des-pratiques-radicalement-nouvelles-et-volontaristes-en-matiere-de-transparence_6014751_3232.html. However, in January 2020 there was little progress on the promise, according to the same newspaper: https://www.lemonde.fr/politique/article/2020/01/28/la-transparence-des-agendas-des-elus-lrm-une-promesse-non-tenue_6027507_823448.html.

[526] See: http://ruti.gov.ro/

[527] http://sna.just.ro/Introducere

[528] See: http://www.anfp.gov.ro/R/Doc/transparenta/RUTI/Memorandum-privind-instituirea-RUTI.pdf. An English description can be found here: http://ruti.gov.ro/wp-content/uploads/2016/10/English-description-of-the-Romanian-Unique-Group-Interests-Transparency-Register.pdf.

[529] http://www.registruldetransparenta.ro/, see English website of the association here: http://registruldelobby.ro/en/.

[530] https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168077e159, page 9.

[531] See the website of the Chamber of Deputies showing the legislative process and relevant documents: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=11970, http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=10808 respectively.

Publishing personal data

In chapter 4 on conflicts of interest and incompatibilities, it was already mentioned that all three countries have made it mandatory, to varying degrees however, that public officials disclose their interests, assets and secondary activities – to the public or to a designated entity. Public knowledge of this information also makes the detection of other types of corruption possible (official X was bribed with a new car), so this subject is placed under the transparency chapter. But it is linked to both. This paragraph concentrates on what personal data is published in the three countries, and by whom.

The publishing of interests and assets is of great importance for the work of monitors. Some of the information that is of crucial interest to the detection of corruption (and other types of wrongdoing, such as fraud and embezzlement) comes from the private lives of public officials. What do they own? Who owns the things (houses, cars) they use? Who are they related to? What business interests do they have? Because a proxy for the detection of corruption is inexplainable enrichment of public officials. To what extent is this information accessible to those who wish to monitor public officials, and on what grounds is it released?

The public's 'right to know' is in this case positioned opposite the right of public officials to their privacy. None of these two rights are absolute and indeed in many legislations, individuals are required to disclose personal information, for example about their wealth, for reasons of public interest. The comparison will show how the three countries weigh these two rights against each other in the context of fighting corruption and fraud.

None of the countries have chosen an intermediary solution where officials disclose their information not to the public, but to a designated authority (except financial information for some top officials in The Netherlands, see chapter 4), comparable to when someone applying for social benefits must justify their claim with financial data, but those data are not made public.

The table below shows how completely different Romania's solution is compared to the other two countries:

Table 2: Publicly disclosed personal data by public officials

	Data that must be published	By whom
Romania	- Name, first name; - Position; - Employer; - Immovable property[532] – land; - Immovable property – buildings; - Registered movable property[533]; - Other movable property worth > 3,000 EUR; - Valuables[534]; - Financial assets > 5,000 EUR[535] ;	All officials

[532] Anywhere in the world.

[533] Any movable property that must be included in a register, such as cars, motorbikes, caravans, boats, yachts, or aircraft.

[534] Jewelry, art, etc. worth more than 5,000 EUR.

	- Debts > 5,000 EUR; - Gifts, services, advantages, grants, including to spouse and children, > 500 EUR; - Income (from salary, services, or other), including spouse, children; - Associate or shareholder in a company, or member of any non-profit private organisation; - Director or board member in a company or any non-profit private organisation; - Membership of a union; - Leadership role of political party (name party, position); - Contracts signed or in execution with any public organisation or state enterprise, including spouse, parents, children; - Ultimate beneficial owner.	All citizens
France	- If they are administrators, shareholders, or ultimate beneficial owners of companies (applicable to all citizens, not all companies)	All citizens
Netherlands	- Secondary activities - If they are administrators, shareholders, or ultimate beneficial owners of companies (applicable to all citizens, not all companies)	Selected top officials[536] All citizens

In France, there are extensive public disclosure obligations, but they only apply to members of Parliament, government ministers and certain other elected dignitaries (such as mayors of larger municipalities). Information on administrators, shareholders, and ultimate beneficial owners[537] is public in all three countries, but only in Romania are officials obliged to publish this information themselves (and not the Trade Registry). Romania is also the only country that needs, and has, a special agency that publishes and oversees all these declarations and checks (some of) them – the National integrity agency (ANI, see chapter 2).[538] Sanctions are monitored and reported on by the National Agency for Public Officials (ANFP)[539]. However, sanctions for non-compliance with

[535] Bank accounts, participations in investment funds, stocks, bonds, personal loans granted, other investments that generate income

[536] The 'topmanagementgroep' (group of top managers), see: https://www.algemenebestuursdienst.nl/organisatie/documenten/publicatie/2016/12/01/regeling-aanwijzing-tmg-functies

[537] The three studied countries must transpose into local law the 4th and 5th Directive concerning Money Laundering and at the same time requiring the implementation of a national Beneficial Ownership Register. The fifth Directive must be transposed before January 10, 2020. The implementation of these so-called UBO registers is flawed worldwide, claims this recent report by Transparency International: https://www.transparency.org/whatwedo/publication/who_is_behind_the_wheel_fixing_the_global_standards_on_company_ownership.

[538] See their searchable interface here: http://declaratii.integritate.eu/ (also English).

[539] Legal basis: Ordinul 3753/2015 privind monitorizarea respectării normelor de conduită de către funcționarii publici şi a implementării procedurilor disciplinare. See reports here: http://www.anfp.gov.ro/continut/Rapoarte_de_monitorizare_20122017

disclosure obligations are not mentioned there, even though there are hundreds of cases for non-compliance brought by ANI before the administrative judge. It is possible that these obligations are viewed as a 'separate channel' that the employer's disciplinary authorities do not concentrate on.

Regardless how the existing issues with these disclosures are handled, it is clear that Romanian officials' obligations are in a different order of magnitude than their colleagues in the two other countries. Here is a clear choice of a country to let the public (press, NGO's, ordinary citizens) access personal data of public officials and their close relatives with the express goal of public scrutiny – to check for conflicts of interest, inexplicable enrichment and other signs of trouble. The published data are not machine-readable, there are loopholes, and many data are still missing, but simply observing this difference between the countries does beg the question whether this openness is a solution for detecting signs of the 'hidden crime' that is corruption? And if so, whether all countries should establish more extensive legal obligations for officials to publish their interests and assets? In the next chapter, we will attempt theoretically to have the cake and eat it, in a discussion of how officials could keep their privacy while the possibilities for monitoring are expanded. But as far as the legal issue is concerned (and not the cultural issue of valuing privacy higher or lower than public access to information), privacy is the rule and publicity is the exception. See for example Art. 7 of the EU Charter of Fundamental Rights, on privacy, and its Article 8 on the protection of personal data. For publicity to be legal, it must (to borrow a phrase from the CoE jurisdiction) pass the test of 'being necessary in a democratic society'. It follows that any publishing of officials' personal data must be duly justified. It also follows that, if lawmakers answer yes to the question whether the public should be able to check on public officials' behaviour, then they can, and should, make it possible for the public to easily access the information where it can base its checks on. Otherwise it would be a hollow function in society. The extent to which the information is published then becomes the next point of discussion, and for each individual data element a 'need to publish' should be established.

Another relevant question is whether there can be a distinction between public officials, contract workers for public institutions, and other citizens. EU privacy law protects all residents. Can the first category, or the first two, have their right to privacy reduced under less stringent conditions than the third category? The answer is probably yes, on certain conditions. In the laws of all three countries and indeed in the GDPR[540], it is possible to restrict privacy rights in the public interest. The justification in this case would be that the risk of corruption and its damage to society is greater in public officials, with relevant powers, than in 'ordinary' citizens. This justifies comparatively greater restrictions of fundamental rights. The fact that individuals can choose to become a public official or not should weigh in as well. 'Relevant powers' also constitute a key element: Public officials who have no formal or informal influence over decisions should not be targeted for asset and interest publication obligations – informal influence being difficult to establish.

Transparency of government spending: procurement, subsidies and permits

This specific type of transparency refers to data on procurement, subsidies (including allocations, loans), and permits, that is often not easy to understand by the general public. If a lobbyist talks to a government minister, it is easy to understand why the lobbyist would make that appointment. If a company receives a certain subsidy or tax break, deciphering the underlying subsidy scheme

[540] See Article 6, where the public interest is one of the grounds of lawful processing (which can include publishing) of personal data. Article 9 even allow the processing of sensitive data, such as political opinions or trade union membership, if it is necessary for "reasons of substantial public interest".

may be less intuitive and detecting wrongdoing harder. This may be even more difficult in complex forms such as public-private partnerships, where private parties can make perfectly legal (or not) profits partly based on input of public capital. Government expenditure – we also count permits, i.e. the granting of certain rights, as expenditure because they imply a value transfer from the public to the private sphere – is heavily regulated as could be expected, in all three studied countries. Transparency is not so evident in these regulations, however. To achieve transparency, in the sense that the general public can easily know how much is being spent on what, more or different (with more clarifications) active transparency measures and ex post reporting may be required than under the general legal transparency regime discussed above. In this paragraph we will identify national transparency rules for public spending. A caveat that applies throughout the study is here all the more relevant: the material is necessarily very brief, because each of these subjects could fill a separate thesis. Another one is that, even though many data are actively published, they make it possible to scrutinize only a small part of corruption risks. For example, the subsidy that a certain foundation receives is published. But, unknown to the public, members of this foundation may be public officials at the granting public authority, creating a conflict of interest. Or the subsidy may be spent on items at an exaggerated cost, while the difference is a kickback for the granting public official. Or, the subsidy may be conditioned in such a way that the granting public official, in her private capacity, profits from it.

Subsidies

The legislation discussed in this paragraph only concerns direct transfers, not fiscal stimuli. For reasons of conciseness, income redistribution allocations to physical persons are also left out, even though it is very well possible to abuse them through corruption.[541]

Regarding subsidies, there is extensive legislation in all three countries, of which a sample is presented here. The most generic legislation is found in The Netherlands, where a chapter on subsidies is included in the *Algemene wet bestuursrecht* (general law on administration, see chapter 2), with certain rules on 'internal' transparency, reporting to make oversight by the relevant authority possible, but without any mention of 'external' transparency or accountability (to the public). The same is true for several national subsidy regulations examined: internal reporting provisions, no transparency.[542] Special laws or individual subsidy-distributing authorities may require publishing certain subsidy decisions (and even requests) based on Art. 3.10 of the law, and all receivers of national subsidies (as granted by ministries) are voluntarily published under the general transparency regime.[543] At the local level, at least fifty municipalities (out of 355) publish a subsidy register, although this is not a general practice.

France has the most specific national legislation. Subsidies were left out of the law regarding the relations between the authorities and the public (*Code des relations entre le public et l'administration*, see above and chapter 2) but specific rules can be found in the older law on the

[541] For example, bribing a public official to accept your evidence of having been a hero in the revolution, and receiving a stipend for life: see this news report (Romania) https://bit.ly/34jnxB7.

[542] The following were examined: The subsidy regulation of the Ministry of Infrastructure and the Environment, https://wetten.overheid.nl/BWBR0036381/2015-07-01; the same regulation for Economic Affairs, https://wetten.overheid.nl/jci1.3:c:BWBR0024796&z=2018-01-01&g=2018-01-01; and Education, https://wetten.overheid.nl/jci1.3:c:BWBR0037603&z=2019-08-01&g=2019-08-01.

[543] See the Dutch national budget open data sets on subsidies at https://opendata.rijksbegroting.nl/#dataset_2. Latest reviewed data were of 2018.

same subject (*Loi* 2000-321)[544], more specifically its chapter III on financial transparency. Article 10 determines that government budgets and accounts, and also the budget, accounts and subsidy agreement held by the private receiver of the subsidy, can be disclosed to any requestor. A formal agreement containing subsidy conditions is mandatory above 23 000 EUR per year[545]. Authorities must publish the "essential data" in these conventions in a machine-readable digital format. The results can be seen above in Table 14: Snapshot of local detection topics. All top 4 French cities publish these data. Also, some national institutions publish data on subsidy beneficiaries.[546]

Lacking a general subsidy regime, Romanian legislation has a sectoral scope: fuel subsidies, subsidies for social care organisations, etc. This type of legislation also exists in the other two countries. The Romanian law on public finances[547] states (Art. 9) that budgets and accounts must be published for transparency if they are of a general character – excluding individual subsidy decisions.[548] Law 34/1998 regarding subsidies for social care organisations[549] does contain a specific transparency provision, namely that lists with all beneficiaries and the awarded amounts must be published in the official journal. It does not say with what frequency. From 2016 to 2019, some tens of local authorities have published their list out of thousands of local authorities that distribute these subsidies. Another sectoral law is that on subsidies for livestock breeding[550]. It does not contain a transparency provision, but Art. 111 of EU Regulation no. 1306/2013 requires publication of all beneficiaries. The lists of all beneficiaries for the past three years are published by the distributing agency.[551] For labour subsidies (such as for companies hiring disabled persons), there are subsidies based on Law 76/2002[552]. This law and its implementing rules do not contain disclosure provisions regarding beneficiaries, and none are published on the site of the labour agency[553]. This anecdotal evidence does not show that there is no transparency regarding subsidy beneficiaries, but it does suggest that such transparency is not structural but incidental.

[544] JORF nr. 0088 of April 13, 2000. See https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000215117.

[545] Established by the implementing decision: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005631044

[546] See for example this dataset from the French ministry of Culture: https://www.data.gouv.fr/fr/datasets/donnees-essentielles-des-conventions-de-subvention-5/. Some other ministries publish these data sets.

[547] Legea nr. 500 of 11 July 2002, published in M. Of. Nr. 597/2002. See http://legislatie.just.ro/Public/DetaliiDocument/37954. A portal with (some) budgets and accounts of public authorities can be found here: http://www.transparenta-bugetara.gov.ro/

[548] The distinction is between 'acte normative' and 'acte individuale' as exemplified in the case law of the Supreme Court: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=84776.

[549] Legea nr. 34 din 20 ianuarie 1998 privind acordarea unor subvenţii asociaţiilor şi fundaţiilor române cu personalitate juridică, care înfiinţează şi administrează unităţi de asistenţa social, M. Of. No. 29 of January 27, 1998.

[550] H.G. no. 1179 of 2014, see http://legislatie.just.ro/Public/DetaliiDocument/164315.

[551] See the website of the agricultural payments agency, here: http://www.apia.org.ro/ro/informatii-de-interes-public1387184760/transparenta/ajutoare-de-stat

[552] Legea nr. 76 din 16 ianuarie 2002 privind sistemul asigurărilor pentru şomaj şi stimularea ocupării forţei de muncă, M. Of. no. 103 of February 6, 2002.

[553] National Employment Agency (ANOFM), see http//:www.anofm.ro.

Permits

Permits are not payments but they do often imply a transfer of value in the form of a right to a scarce resource, sometimes a very large value, such as a building authorisation for a plot of land that multiplies its value on the market. This paragraph is limited to two types of permits: building and environmental authorisations. Both are corruption-sensitive, the first because a lot of money can be made and the second because a lot of money can be saved by obtaining a permit with a bribe – a *pot-au-vin*, as it is called in French.

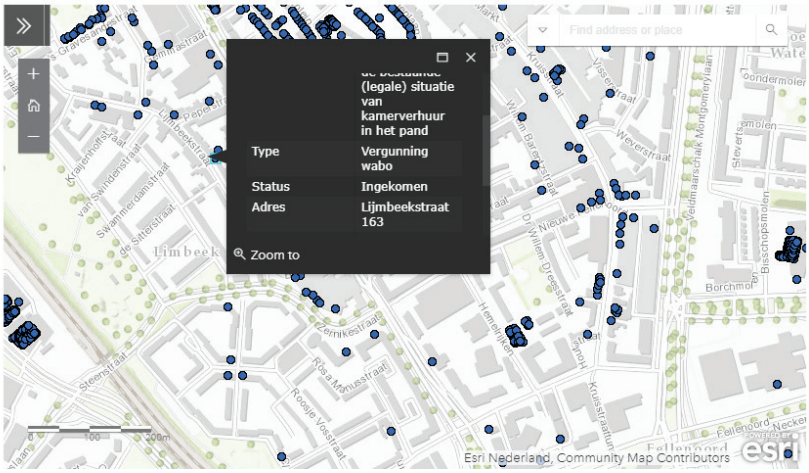

Image 1: Building permits in the city of Eindhoven. Source: www.eindhoven.nl

The transparency of building permits is a topic for local authorities. There are different approaches in the three countries that show an interest for this. An example from the city of Eindhoven, in the south of The Netherlands, shows how the presentation of the data determines its usefulness for various purposes.

The blue dots in the image represent the requested and granted permits in the area. When clicked, a dot reveals in the black table the type and status of the permit. This is ideal for residents who wish to know what happens in their area, or investigators following a certain person to know what they are spending on, but useless when looking for patterns in data. For the latter application, machine-readable tables must be presented (i.e. not scanned as a picture and with commonly used separators). In any case, it is important that the date of the request is published with the location and the date when the permit was granted, so that deviations from regular processing times can be checked as well as compliance with the area's legal conditions. Who receives a permit in two days while all the others wait two months?

Continuing with The Netherlands, this country has simplified its permits regime in 2010 so that a single permit is required for building and for environmentally impacting activities (among others)[554]. The request for such a permit and the granting decision (or the refusal) must be published via 'appropriate' media (Art. 3.8 and 3.9) while some requests for permits with an exceptional impact (such as mining) requires a public review procedure. In practice, many permits are published

[554] The legal basis is the WABO (general law on the environment). This law will be combined with others to form a new law that will probably enter into force in 2021 (the 'omgevingswet'). See the WABO here: https://wetten.overheid.nl/BWBR0024779/2018-07-28.

through the central government publications portal but it is a modest (if unknown) percentage that is made searchable in this way.[555] Local authorities are free to just use their own website or even a printed local newspaper. Some few permits can be found on the Dutch government's open data portal[556]. These various publication methods thus satisfy the transparency principle in a more or less effective way.[557]

Following the explicit provision of Law 51/1991[558], Art. 7, Romanian building permits are usually published on the website of the local authorities, at least in larger municipalities.[559] Some of them do not publish the names of applicants who are natural persons. The permits for classified buildings do not have to be published, as the only exception allowed by the law. Alternatively, permits can also be made available at the town hall. For environmental purposes, usually a notification to and declaration from the environmental authority is sufficient. For activities with a negative impact on the environment, an actual permit is required[560]. The relevant ministerial decision (Ordin nr. 1798/2007)[561] requires that the permit be posted at the premises of the authority *and* on its website, where they can indeed be found (the completeness could not be verified).[562] The request for the permit must also be published according to the same legislative act, but this can be done in various places (at the site of the works, on the website of the requestor, at the town hall) which makes it difficult to verify compliance. The Romanian open data portal shows one provincial set from 2018.[563]

French construction permits are regulated by the *Code de l'urbanisme* (Town planning code). Articles R423-6 and R424-15 determine that all requests and permits must be posted at city hall (as well as at the building site). No obligation exists for disclosure on the internet or in the media. However, aggregated lists are available since 2017 on a government website regarding real estate development,[564] and some lists of permits can be found on the French open data initiative[565]. Environmental permits are required for works that present a risk for the environment. The legal basis for the permit itself is the *Code de l'environnement*[566], Art. L181-1 to L181-31. This law dedicates another chapter to public participation in environmental decision-making: In Article L123-10

[555] Some 25 000 permits could be found on 15.12.2019 at zoek.officielebekendmakingen.nl. This covers the period since 2012. But permits for building numbered more than 30 000 in the first half of 2019 alone.

[556] See https://data.overheid.nl/.

[557] There is interesting administrative case law that requires publicity of permits from a competition law perspective, based on the idea that permits can be a scarce resource and access to them must not be unjustifiably obstructed: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2016:2927 (2017)

[558] Legea nr. 50 din 29 iulie 1991 (republicată) privind autorizarea executării lucrărilor de construcții. M. Of. 933 of 13.10.2004.

[559] Based on a review on 15.12.2019 of the websites of 21 large municipalities: Bucharest, Cluj, Timișoara, Iași, Constanța, Arad, Sibiu, Brașov, Bacău, Suceava, Buzău, Pitești, Craiova, Satu Mare, Oradea, Baia Mare, Râmnicu Vâlcea, Galați, Brăila, Ploiești, and Târgu Mureș.

[560] If an environmental permit must be obtained, a public consultation procedure is required.

[561] Ordin nr. 1.798 of November 19, 2007 pentru aprobarea Procedurii de emitere a autorizației de mediu, M. Of. 808/2007. It cites the Aarhus treaty in its preamble.

[562] See the website of the national authority, the ANPM: http://www.anpm.ro/autorizatii-de-mediu.

[563] See http://data.gov.ro/dataset?q=autoriza%C8%9Bii

[564] See https://www.statistiques.developpement-durable.gouv.fr/liste-des-permis-de-construire-des-logements

[565] See https://www.data.gouv.fr/fr/search/?q=permis+de+construire.

[566] JORF: 21.09.2000.

provides that before any investigation into the risks following a request for an environmental permit (and even if no public investigation is conducted, see Art. L123-19), the public must be informed "digitally, and through notices at the site that will be the subject of investigation". The next articles indicate that publication of relevant documents must be done online as well as on paper at the authority's office. Examples of these publications can be found on the websites of the deconcentrated representatives of the government, the *préfecture*.[567]

All in all, and even though building and environmental permits are not published for the purpose of public scrutiny of corruption risks, information on these permits can be found quite easily in all three countries. If one wishes to verify if a building was erected without a valid permit or if the authorization for an installation carrying environmental risks was done legally, the actively published information suffices in many cases. However, for the detection of trends that might indicate wrongdoing, the current publication methods fall short (again, they were not intended for this purpose).

Procurement

Buying things is an often closely monitored government activity. There are many parties interested in the legal unwinding of procurement procedures for various reasons, not least companies in the context of competition law and state aid law. Over-generous spending can lead to public opprobrium in the democratic countries that Romania, France, and The Netherlands are. For that reason, politicians and top public servants are keen on procurement too. Above a certain spending threshold there is EU legislation and below it, detailed national legislation in all three countries.

While the transparency of subsidies and permits goes virtually unrecorded in the literature, that of procurement has a more prominent profile. A recent book dedicated to exactly this topic in a European context (Georgieva, 2017) does not consider transparency an effective tool, at least not in the elaborate Bulgarian procurement transparency legislation, but instead claims that "effective control bodies [and] limiting the human element in procurement award[s] are the right path to […] curbing corruption in the procurement sector".

In this section, only procurement practice based on EU rules will be reviewed, because it allows for better comparison between the three countries; as EU members they are subject to the same EU procurement directive[568]. This instrument calls transparency a principle of procurement (Art. 18) and this principle is also a subject of section 2 in chapter III (Conduct of the procedure). Here, transparency is mainly prescribed in the form of publishing notices – of intent, of invitation to tender, and of the award. Article 53 further specifies that 'procurement documents' must be available online, for free. Article 26 provides that the open (more transparent) procedure is the standard and that for less open procedures, such as negotiated procedures, restricting conditions apply.

[567] See for example the *département* Aisne: http://www.aisne.gouv.fr/Politiques-publiques/Environnement/Installations-classees-pour-la-protection-de-l-environnement/Autorisation-environnementale/Tableau-ICPE-Annee-2018 or Somme: http://www.somme.gouv.fr/layout/set/print/Politiques-publiques/Environnement/Installations-classees-pour-la-protection-de-l-environnement/Enquetes-publiques.

[568] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Note that there are separate directives for concessions, utilities and legal remedies, which will not be discussed here.

The EU Commission tracks the performance of procurement policy by the Member States with a scoreboard.[569] Some of the criteria used for scoring are related to transparency. The table below shows each country's score (2018 data unless otherwise indicated).

Table 16: Tender transparency performance

	Romania	Netherlands	France
Procedures without calls for bids (in %, the smaller the percentage, the more transparency)	21	5	3
Publication rate: ratio of procurement on TED vs GDP (2017 data) – the higher, the better	4.6	2.5	4.3
Calls with unclear name/conditions (%)	46	20	19
Missing seller registration numbers in award notice (%)	100	50	92
Missing buyer registration numbers in calls (%)	100	12	71
Overall performance from 12 procurement indicators (including the ones not related to transparency).	Unsatisfactory	Average	Satisfactory

Data from the latest Eurobarometer report on corruption (2017)[570] show how respondents perceive corruption in public procurement, as follows (% of respondents that replied yes to the question):

Table 17: Tender corruption perception

	Romania	Netherlands	France
In (OUR COUNTRY), do you think that the giving and taking of bribes and the abuse of power for personal gain are widespread among officials awarding public tenders?	43	57	52

Apparently, less transparency in tender procedures does not coincide with a lower corruption perception in tendering. However, it would be unjustified to draw any other conclusions from this. It is dangerous to draw conclusions from perception data alone – or from rankings, for that matter. The performance data are high-level and tell us only that, overall, the transparency of procurement-related information could be improved in each of the three countries. The most harmful is probably the absence of clear conditions, which makes it impossible to check whether procured goods, works or services are performed as required. Matching odd or very specific conditions with competitors' profiles is one of the ways to discover stealthily rigged procedures (for example: a condition for

[569] See https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm. Reviewed on 18.12.2019.

[570] Special Eurobarometer 470: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/81007

building a sports stadium is that the tenderer must have experience with ice rinks, while it is clear from market information that only one candidate fulfils that condition).

The quality of the information offered, the degree to which it allows public scrutiny of buying procedures, is an important aspect when reviewing active transparency and it is revealed through this criterion on the lack of clear conditions. A government can claim that all their publication obligations on TED[571] are met, while the general public can still not check the conditions for certain projects. 46 percent of unclear conditions, 20 or 19 percent also, show that much can be done to improve this type of transparency.

6.4. Monitoring organisations and activities

The first part of this section is an overview of monitoring public institutions, inside and outside the State, to see what they do to prevent and detect corruption. The second part is dedicated to the press and NGO's, that depend on transparency practices as described above.

Public institutions

In this paragraph we will not concentrate on investigations and monitoring by national organisations that have a special mandate to combat corruption – the 'usual suspects' such as the French AFA. We will focus here on the question whether the national laws on internal monitoring explicitly include corruption prevention and detection, and if they do, whether this is reflected in policy. We expect not to find many references in legislation, since financial oversight legislation is general in nature and would insist that audits check for performance, *any* kind of irregularity, and risks, not just corruption. In contrast, policy is expected to dedicate more specifics to corruption and its prevention. Explicit mentions of corruption and/or of measures to combat it are important because they communicate a specific interest and include corruption in a formalized set of topics and objectives: they put corruption on the audit agenda.

In the introduction it was stated that transparency is a condition for monitoring, but the organisations within the State that are tasked with checking the activities of others can sometimes oblige and force other public institutions to disclose information to them that they were not willing to make known. It is debatable whether such a configuration can still be called transparency, a concept which implies a certain degree of voluntary disclosure. But we will leave that theoretical discussion aside and dedicate this section to the activities of those entities who actively pursue information and wield powers to act on that information, because it is their task – in contrast to the general public. For the purpose of this text, we distinguish two kinds, national and international monitoring bodies. At the national level, there are internal and external entities. Internally, there are controls within the process of decision-making (the first paragraph below) and controls outside of it. Literature on the effectiveness of government auditing against corruption seems to be scarce, but the existing studies do show a relation between better (professional, independent) public auditing and less corruption (Assakaf et al., 2018).

Prevention by curbing discretion

The configuration of a public institution can help prevent corruption. The literature shows a direct (not causal) correlation between organisational structure and integrity of behaviour (Nelen & Kolthoff, 2018). For example, it is possible to remove any contact between individual public

[571] Tenders Daily, the EU's procurement portal: https://ted.europa.eu/.

officials and citizens in corruption-risk situations, such as procurement, permits, subsidies and other instances where the government distributes public funds to private beneficiaries. If potential bribers do not come into contact with potential bribe-takers, and do not even know who they are, corruption opportunities decline. Chapter 9, focusing on technology, discusses this example in more detail. This paragraph discusses another example of corruption prevention by organisational configuration[572] found in the studied countries' practice: separation of powers. Similar to the separation of powers in constitutional law, where the goal is to balance the powers of state, within public institutions the powers to make decisions regarding personal advantages (such as allocations, contracts, appointments, promotions) are not left to one person's sole discretion but are balanced, to diminish the risk of their abuse. [573] The logic is simple: It is more difficult to corrupt more persons than it is to corrupt fewer persons. This practice can also be labelled separation of functions/roles, limitation of discretionary powers, or checks and balances, with perhaps minor conceptual differences.

There are several ways to achieve this limitation. According to their timing and position in the procedure, they can be ex post, ex ante, inside the institution or outside it. According to their position in the hierarchy, they can be peers or superiors. The table below contains a simplified overview of the most common measures.

Table 18: Common measures for limiting discretion

	Measure	**Ex post/ante**		**Inside/outside**		**Peers/superiors**	
1.	4 eyes principle	Ante		Inside		Peers	
2.	Committee	Ante		Inside		Peers	
3.	Randomisation	Ante		Inside		Peers	
4.	Specialist	Ante	Post	Inside	Outside	Peers	Superiors
5.	Hierarchy	Ante	Post	Inside	Outside		Superiors

A 'specialist' can be the legal, risk, or compliance department within the organisation, or accountants in- or outside the organisation, or inspectors from outside the organisation. 'Hierarchy' stands for managers, the top management of the institution, or other institutions that have a controlling task (e.g. the prefect in Romania and France, or the provincial authorities in The Netherlands who all control ex post the decisions of municipalities). In the table, all variations are shown together to show that they serve the same purpose, but we will discuss only the first two measures in this paragraph. Measures 4 and 5 are discussed in the next section, and measure three is discussed in chapter 7.

[572] The organisational aspect of control is discussed in chapter 6, together with monitoring from outside the organisation. There are, of course, more organisational elements, for example organisational culture and leadership culture. These had to be left out of scope because they are vast subjects and less related to the formal constellation that is the law.

[573] According to a well-known 'formula' in corruption literature, discretion is even a basic building block of corruption: Corruption = Monopoly + Discretion – Accountability (Klitgaard, 1988).

The four eyes-principle, or two person-principle, is recommended by GRECO[574] and found in assorted policy documents[575], even legislation[576] of the three studied countries, although commonly it is an institutional practice with no legal basis other than the instrument that assigns internal tasks and powers. The principle states that decisions made by one person must be confirmed by another person. The second person can be a peer or a superior; she is the guarantee that the first person does not make corrupt decisions. For example, an official was bribed to grant someone unemployment benefits while they do not meet the criteria. The second person checks the file and refuses her agreement, thwarting the corrupt behaviour.

Despite its common occurrence and intuitive logic, the principle is not uncontroversial. From a behavioural science perspective there is criticism that this control principle, in a professional setting, goes against empirical findings that show better integrity results on the basis of trust, autonomy, and intrinsic motivation, than based on mistrust and control (Lambsdorff, 2015). The same article cites other experimental work to show that this principle could even increase corruption and concludes that it 'does not help in reducing corruption'.

The same critique can be applied to decision making in committees, the second option from the table above. This is similar to the four eye-principle, with the difference that the multiple persons all decide together, at the same time, in a one-stage procedure (e.g. a parole board). For bribery to be successful, a voting majority of the committee must be bribed/influenced instead of one official. Lambsdorff cites research to show that "groups of people are often more selfish than individuals" and that groups of people may develop corrupt networks due to intragroup solidarity. Networks of corrupt officials may apply internal pressure for non-corrupt members to become corrupt, and for would-be whistle-blowers to keep silent. In this scenario, group decision-making could indeed strengthen ties within corrupt groups instead of acting as a preventive control. According to Lambsdorff, the principle also "diffuses responsibility by providing […] officials with excuses and justification", a serious allegation when 'removing excuses' is seen as one of the keys to corruption prevention by other authors (Graycar & Prenzler, 2013).

However, there are many examples from court cases of corrupt public officials who used their discretionary powers for their private interests. This shows that autonomy for officials is no panacea either. It is possible that four eyes or committee measures do work but only in certain circumstances. It may be that the four eye-principle is only useful to prevent crucial errors in organisations where corruption is incidental and not lodged at the top of the pyramid. In organisations where corruption has a high incidence, in the form of networks or even as a systemic phenomenon, other measures would be required such as enhanced control by entities that cannot be influenced by corrupt networks and/or corrupt leadership. Such entities would be internal but independent, external, or hierarchically superior entities.

If the four-eye principle or the committee principle is used, it may be advisable for better acceptance to organise work in such a way that these principles are strictly addressing a quality issue, to prevent errors, and communicated as such. The prevention of fraud and corruption would then be an unintentional extra benefit. This also means that not all decision-making would qualify for it, but only if it is high-risk. These decision-making procedures would have to be shaped in

[574] See for example this report, where the principle is recommended for auditing party finance: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7cc7.

[575] Such as this EC guidance on greenhouse gas verifications: https://ec.europa.eu/clima/sites/clima/files/ets/monitoring/docs/kgn_3_process_analysis_en.pdf.

[576] For example the French insurance law (*Code des assurances*), Art. L322-3-2: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006073984&dateTexte=20200331.

such a way (using workflow software) that it does not become a purely formal step (which would encourage excuses and justifications), that it is not time-consuming, that it is clear who decides what and who verifies what. For example, the classic 'pile of papers to be signed' on the superior's desk is different from viewing a computer screen that gives the essence of each decision (you are about to approve the acquisition of 100 rolls of toilet paper for 500 euro. Do you agree?) after which the user can place their digital signature.

The considerations above make it clear, at least, that the current widespread practice of verifications according to the four-eye principle should not be applied indiscriminately as a standard and cannot be relied upon as a sole preventive instrument. The detrimental effects of structuring decision-making one way or the other should be duly reviewed.

Self-checks: internal monitoring

In the first place, public sector bodies have the task to check on themselves and on the third parties they are doing 'business' with: vendors, beneficiaries of policies, and perhaps the clients of state-owned companies. Hierarchically higher placed bodies check on lower placed ones.

From interviews in all three countries can be distilled that the world of integrity/corruption prevention is separate from that of internal control. The theoretical common ground established here between corruption prevention and internal control does not appear to exist in practice. That is in itself perfectly understandable if the internal control function only works in a reactive and not in a preventive way, through sanctions and ex post measures. But if internal control entities gather and analyse data about ongoing practice in the institutions they are monitoring, it would be in the interest of all concerned to share the knowledge obtained from those data with the prevention specialists, who can often be found in the HR department, and take measures together. It is of course perfectly possible that individual control/monitoring officials do confer with their colleagues in prevention, but this could not be identified as a standard practice in any of the studied countries. A possible explanation is that corruption prevention entities have only recently begun using large quantities of data to extract trends, anomalies, and risks.

In all three countries, monitoring the work of public institutions is done in the first place by their management: The first line of defence (against irregularities), in the terminology of the 'three lines of defence model'[577]. The role of management in corruption prevention is discussed in Chapter 3 on Human Resources. It consists mainly in developing and putting in practice policies for hiring non-corrupt staff, education, and training to keep them alert, and various methods such as incompatibilities, the four eyes principle and staff rotation to minimize corruption incentives.[578]

The second line is occupied by the support roles of controllers, risk managers, quality control departments, and compliance officers. They usually report to line managers, 'embedded' in the organisation.

The third line of defence is formed by the internal audit function, in its various forms. Internal auditors usually report only to the organisation's top management. The forms can be financial audits, compliance audits (ex-ante or ex post), performance audits, or forensic audits (Shah, 2007,

[577] See the Institute of Internal Auditors, https://na.theiia.org/standards-guidance/Public%20Documents/PP%20The%20Three%20Lines%20of%20Defense%20in%20Effective%20Risk%20Management%20and%20Control.pdf. The 'three lines of defense' model is also used in the EU context: https://ec.europa.eu/budget/pic/lib/docs/2017/CD_04_ThreeLinesOfDefenseInPublicSector.pdf and IIA instruments are used in all three countries.

[578] As discussed in Chapter II, the Romanian anticorruption strategy (2016-2020) explicitly calls corruption a 'management failure'.

p. 311), to be used in different ways for the detection of corruption. For example, a performance audit can be used to find out whether the organisation has been buying goods at unjustifiably high prices, by comparing spending targets with spending practice. A legality audit (compliance) can be used to see whether procedures have been followed and to what effect. Neither type proves corruption, but they can both detect irregular actions that may be illegal and corrupt.

Internal control systems in the EU member states are described in the European Commission's public internal control compendium (2nd edition, 2014)[579]. It warns that "not all countries interpret the concept of internal control in the same way", but it appears that the three studied countries have quite similar systems at the macro level, with more central accents in France and Romania, and more locally independent control activities in the Netherlands. None of the Dutch, Romanian or French contributions to the compendium mention corruption, only (in passing) fraud control.

The **Romanian** system organizes managerial control (the first line of defence) in a specific instrument, a government decision of 2003 with an implementing decision of 2018[580]. The audit function itself is regulated by a different law, see below. The managerial control regulation specifies that corruption must be a concern for risk management and for integrity management, in line with the national anticorruption strategy for 2016-2020[581]. All public entities must implement this decision. The most important entities from the viewpoint of budget independence[582] (about 60), report to the government's General Secretariat. The latest available report[583] mentions corruption only once, when describing how more than 90% of the entities have implemented the integrity standard (leadership and personnel know and support the established integrity values). This contrasts with earlier data as discussed in section 3.3, that paint a more ambivalent picture about knowledge of integrity rules. This could indicate strong progress in a few years, but also different views on what it means to implement a standard. Also, more than 90% of these entities had conducted a risk assessment in 2018, which includes corruption risks. This picture shows concerted legislation and local implementation of formal requirements, hinting at but not focused on corruption – unfortunately without any information on actual measures 'on the ground', i.e. how the public entities implemented the standards and took measures for improvement.

The internal audit itself is organised[584] nationally as follows (Vašiček & Roje, 2019, p. 88): There is an advisory Public Internal Audit Committee (PIA) and a coordinating Central Unit for the Harmonisation of Public Internal Audit. Within public entities there are public internal audit

[579] See https://ec.europa.eu/budget/pic/lib/book/compendium/HTML/files/assets/downloads/publication.pdf

[580] Ordonanța de guvern nr. 119/2003 privind controlul intern și controlul financiar preventiv, M. Of. 799/2003, and Ordinul Secretarului General al Guvernului (SGG) nr. 600/2018 privind aprobarea codului controlului intern managerial al entităților publice, M. Of. nr. 387/2018. Also relevant is Ordinul SGG nr.201/2016 on coordination and oversight of this policy.

[581] See objectives 2.1 and 6.6 of the Strategy: https://sna.just.ro/Obiective+generale+%C8%99i+specifice%2C+ac%C8%9Biuni+principale

[582] The so-called *ordonatori principali de credite* (OPC).

[583] See https://sgg.gov.ro/new/wp-content/uploads/2019/09/Raport-SCIM-2018.pdf. The Ministry of Defence and the secret services are exempted from reporting. Interestingly but for unknown reasons, performance on about half of the standards declined in 2018 compared to 2017.

[584] Primary legislation: Law 672/2002 (http://legislatie.just.ro/Public/DetaliiDocument/40929) and Government decision no. 1086/2013 on implementing rules for the exercise of the internal public audit function (http://legislatie.just.ro/Public/DetaliiDocument/154438). These contain no mention of corruption, because they are general in scope. Corruption would fall under the topic 'control of legality'.

structures directly subordinated to the entity's management. PIAS's tasks include risk management systems assessment, control and good governance, and the follow-up on the transparency and conformity with the rules of legality, regularity, efficiency, and effectiveness. The central unit, a department of the Ministry of Finance, compiles annual reports on the internal public audit function. The report on 2018[585] mentions the number of 'irregularities', 375 from over 11,000 audits, but categorizes them as 'financial', 'legal', 'HR', etc. This is understandable because a qualification of 'fraud', 'corruption', or simply 'mismanagement' requires further (criminal) investigation, however the auditor could also categorize under 'indications of' fraud, corruption, embezzlement, incompetence, etc., and even indicate whether irregularities were referred to the police or a national anticorruption service, which would be more helpful for prevention purposes.

The Romanian national anticorruption strategy 2016-2020, mandatory for public institutions, contains an objective for internal auditors to audit each institution's measures for the prevention of corruption. The central unit produced a handbook[586] for auditing corruption prevention systems at the institutional level, which might lead to more attention for the topic in later years. The first audits were planned for 2019, and reports on these audits were not available at the time of writing. In view of the lack of internal audit departments, however, most likely these will cover only part of the public sector. There is even a criminal law obligation in Art. 23 of Law 78/2000 for auditors to alert the public prosecution and conserve any evidence of corruption if they find it. Intentionally disregarding this obligation is punishable by up to 5 years imprisonment.

In **France**, the functions of internal control (for risk management tied to the objectives of each ministry) and internal audit (to verify the internal controls) for the State are defined by law[587]. At the State level, each ministry must have an internal audit function and according to a circular on the topic it is 'desirable' that this function report directly to the relevant Minister.[588] The general legislation is however limited to a minimal framework and each ministry adopts their own rules.[589] The same law creates a harmonization committee for internal audit, similar in role to that in Romania. One of its tasks is to build, maintain and oversee a reference framework for State internal auditors.[590] This framework contains multiple references to fraud, such as taking into account the possibility of fraud when defining the audit objectives, but no reference to corruption, which is covered by 'other major risks'. The harmonization committee has an agreement with

[585] See http://discutii.mfinante.ro/static/10/Mfp/audit/Rap_activ_audit_intern_sect_public_2018.pdf. The report aggregates data from around 12,000 public entities (among which 4,000 municipalities) all of which must have an (shared) internal audit function. In 2018, 83% of them did. However, of the entities that formally did have an audit function, in 2018 more than 3,000 had not been audited for three years in a row. The percentage of *working* audit functions is thus 56%. The report further mentions a 39% shortage of personnel (p. 18). For further reading, see the SAI's audit of the internal audit function (2018): http://www.curteadeconturi.ro/Publicatii/Raport_special_Audit_Intern.pdf.

[586] See http://discutii.mfinante.ro/static/10/Mfp/audit/indrumar/indrumarauditareSNA2016-2020.doc.

[587] Décret n° 2011-775 du 28 juin 2011 relatif à l'audit interne dans l'administration, JORF 150/2011. Note that in the French administration, 'contrôle interne' usually means that superiors verify and modify their subordinates' actions (the 'first line of defense').

[588] See https://www.economie.gouv.fr/files/CirculairePM-30-06-2011_0.pdf.

[589] For example here for the policy area of Social Affairs: https://www.legifrance.gouv.fr/affichTexte.d,o?cidTexte=JORFTEXT000038318246&dateTexte=20200116.

[590] See https://www.economie.gouv.fr/files/files/directions_services/chaie/iahc_standards.pdf (English translation of the French standards).

the national anticorruption agency (AFA) on training for internal auditors[591] and it has published several audit guidelines. The one for auditing the buying function indicates corruption as one of the main risks, and the HR audit guide mentions integrity risks. The other five reviewed guides do not contain relevant mentions. The AFA has also published a guide for the prevention and detection of corruption, including the topics risk mapping, internal monitoring, and accounting procedures.[592]

At the local level, that of the *collectivités territoriales*, no legislation has been identified that imposes internal control or risk management (or even audits by external accountants, except the oversight of the national Supreme Audit Institution, SAI). Still, several mostly large municipalities have a department for internal audit and/or related tasks.[593] A best practices-guide from the Finance ministry[594] does not show any particular interest in corruption risks. From press articles[595], the picture emerges that there is a lack of structural attention but also a recent rising interest in corruption in the context of internal control. The French anticorruption agency from its side attempts to stimulate corruption detection by ways of, among others, internal control, which it both specifically includes in the prevention and detection framework and considers lacking.[596]

One of the starting points for corruption prevention policy in **The Netherlands** is a policy from 2004[597] that specifically includes internal control and audits by external accountants in a list of integrity measures: These controls should include integrity topics. The most recent picture shows that such controls are either of an incidental nature, rarely performed, or that they do take place but seldom lead to corruption results worth reporting. The national government institutions in The Netherlands are all audited by one internal auditor: the *Auditdienst Rijk* (Audit service for the central government, ADR)[598]. The service is assisted by a coordinating committee. The *Auditdienst* reports directly to the concerned Minister. Its activity plans for 2017-2019 do not mention corruption or fraud, and only the one for 2019 does include integrity as topic for controls. Its 2018 overview

[591] See https://www.agence-francaise-anticorruption.gouv.fr/fr/renforcer-maitrise-des-risques-corruption-au-sein-des-administrations-letat.

[592] See https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf.

[593] For example, Paris has one since 1979. According to a 2016 report on this unit by the French SAI, risk management explicitly includes fraud risks but not corruption. Conflicts of interest are mentioned as something that auditors must avoid but not as something to be audited. See https://www.ccomptes.fr/sites/default/files/EzPublish/IFR-2016-18-et-sa-r--ponse.pdf.

[594] See https://www.collectivites-locales.gouv.fr/files/files/finances_locales/fiscalite_locale/guide_de_renforcement_du_cicf_05_2019.pdf, from the website dedicated to local government by the DGFIP (directorate-general of public finance).

[595] See this interview with the director of an audit institution for local government, November 2019: https://www.banquedesterritoires.fr/ethique-et-transparence-le-controle-et-laudit-internes-ont-un-role-central, and this article (also November 2019) https://www.lagazettedescommunes.com/649800/laudit-interne-au-coeur-des-enjeux-de-securisation-et-de-modernisation-de-laction-publique/ that mentions collaboration with the French anticorruption agency.

[596] See AFA's activity report on 2018 (English version); https://www.agence-francaise-anticorruption.gouv.fr/files/files/RA%20Annuel%20AFA%20_ENGL-webdy.pdf, page 28.

[597] See this report to Parliament from 2005: https://zoek.officielebekendmakingen.nl/kst-30087-2.html

[598] The underlying government decision is the Besluit Auditdienst Rijk, https://wetten.overheid.nl/jci1.3:c:BWBR0041159&z=2018-07-18&g=2018-07-18.

mentions fraud and corruption only related to one ministry, that of Foreign Affairs.[599] Local government audits show the same pattern. A recent policy paper from a coordinating committee contains no mention of corruption or fraud.[600] The national audit institute does have standards for auditing of corruption risks.[601] Provinces also have a management control mandate regarding the municipalities in their territory, but no indications could be found that this is actively used for fraud or corruption control.

The Netherlands do have legislation[602] that allows checks on third parties, who are beneficiaries of subsidies or permits or contract partners in certain policy areas, in order to exclude third parties with a major risk of criminal conduct from doing 'business' with the public authorities. This legislation is inexistent in the other two countries in this explicit form.[603] It is not targeted directly at corruption, indeed corruption usually requires the collaboration of the public sector party so that party might circumvent legislation that exposes their collusion, however if public entities are discouraged in this way of treating with suspect private entities, it closes an opportunity for those entities to engage the public entity for bribes or influence trafficking.

National monitoring institutions

What national institutions monitor public entities for corruption control? Below is a brief description of three categories of actors that can and/or do monitor and/or investigate (detect), even incidentally, corruption in public entities.

When it comes to **reporting on anticorruption policy** and its implementation, only the French AFA has this activity as one of its main tasks as a dedicated organisation. In Romania, there are several actors involved in policy reporting, such as the secretariat of the anticorruption strategy at the Ministry of Justice, the Agency for Public Officials, the National Integrity Agency, and the Integrity department at the Ministry of Regional Development. In The Netherlands, a department at the Ministry of Internal Affairs fulfils this role for the central government only, with virtually no policy monitoring at the local entity level. The only national organisation that focuses on individual cases for prevention/detection is the Romanian integrity agency (ANI). These institutions are described in Chapter 2.

External auditors, such as the three countries' **supreme audit institutions** (SAI) – the *Algemene Rekenkamer* (Dutch), *Cour des Comptes* (French), and *Curtea de Conturi* (Romanian) – complete the picture of auditing institutions. These institutions are independent, in the sense that they report to Parliament, and have the role of checking the legality and effectiveness of the Government's expenses. In Romania and France, they audit also local government, but not in The Netherlands, where provinces and municipalities contract their own accountants. These institutions may decide

[599] All reports can be found on this page: https://www.rijksoverheid.nl/onderwerpen/rijksoverheid/auditbeleid/auditdiensten.

[600] See https://vng.nl/files/vng/20190225-handleiding-verbijzonderde-interne-controle.pdf.

[601] See https://www.nba.nl/globalassets/wet--en-regelgeving/nba-handreikingen/nba-practice-note-1137-corruption-procedures-for-auditors.pdf, published by the NBA, the Dutch professional organisation for accountants.

[602] The Wet bevordering integriteitsbeoordelingen door het openbaar bestuur (Bibob, Law on the enhancement of integrity checks by the public authorities), https://wetten.overheid.nl/jci1.3:c:BWBR0013798&z=2018-07-28&g=2018-07-28.

[603] In France, few local authorities practice this control, according to this report from the anticorruption agency: https://www.agence-francaise-anticorruption.gouv.fr/files/files/Rapport_danalyse_-_enquete_service_public_local.pdf, page 12. In Romania, this practice could not be identified.

their own policy focus or report on policy issues at the request of Parliament. SAIs rarely report on the implementation of corruption prevention and related policies.[604]

Inspections are the third category. Each country has sectoral inspections, such as the labour inspection or the veterinary inspection, but also general inspections, mostly in Romania and France. Each of these audit public sector entities and can report on possible conflicts of interest, suspicious spending, and other possible signs of corruption. Even if this is not their primary task, it can and should be, as with financial auditors, part of their general mandate of helping to improve the public service.[605]

In France (the one country of the three that has, as mentioned, the dedicated corruption inspection AFA), one of the most relevant inspections is the *Inspection Générale de l'administration*, with a mandate for every entity subordinate to the Minister of the Interior, whom the inspection directly reports to, and other entities (other ministries, local administration) on request.[606] Its latest activity report[607] does not mention corruption, nor do any of its published reports between November 2015 and November 2019 focus on corruption.[608] The *Inspection Générale des finances* has a similarly broad mandate and published one report on corruption in 2015-2019.[609]

Romania has verification corps (*corpuri de control)* that undertake hierarchical verification missions within the public sector. The one that reports directly to the Prime Minister and is mandated for the whole central government apparatus relates in its 2018 report several control actions within the framework of the national anticorruption strategy.[610] A (possibly exceptional) report from the similar unit at the Ministry of the Interior on 2015 reports tens of cases where facts where investigated and then forwarded to the anticorruption prosecutors.[611]

In The Netherlands there are no general internal inspections like in France and Romania, only sectoral ones. A review of activity plans of the inspections for infrastructure, social affairs, and education reveals no mention of corruption (but quite a few of fraud).[612]

[604] For example, the Dutch SAI in 2005: https://zoek.officielebekendmakingen.nl/kst-30087-2.html (a report dedicated to integrity policy), the French SAI (marginally) in 2019: https://www.ccomptes.fr/system/files/2019-03/20190204-refere-S2018-3520-lutte-delinquance-economique-financiere.pdf, the Romanian SAI in 2018: http://www.curteadeconturi.ro/Publicatii/Raportul%20public%20pe%20anul%202017.pdf (see the various recommendations related to implementation of integrity systems, e.g. p. 199).

[605] There is no room in this study to elaborate, but the work of inspections and regulators is itself vulnerable to undue influence, legal or illegal. See for example the observations on regulatory capture by Buiter (2009) http://eprints.lse.ac.uk/29048/1/Lessons_from_the_global_financial_crisis.pdf.

[606] The legal basis for its mandate is Décret n°81-241 du 12 mars 1981 portant statut de l'inspection générale de l'administration au ministère de l'intérieur, JORF 14.3.1981.

[607] See https://www.interieur.gouv.fr/content/download/116437/933624/file/RA2018_IGA_%20ligne.pdf

[608] Based on a review of the 'recent reports' section of the Inspection's website: https://www.interieur.gouv.fr/Publications/Rapports-de-l-IGA/Rapports-recents/(offset)/70#37500_children

[609] Legal basis: Décret n°73-276 du 14 mars 1973 relatif au statut particulier du corps de l'inspection générale des finances, JORF 15.3.1973. Reports can be found at: http://www.igf.finances.gouv.fr/cms/sites/igf/accueil/rapports-publics/liste-des-rapports-par-annee.default.html

[610] The *Corp de control al primului-ministru* (legal basis: Ordonanță de urgență 25/2007 [p]rivind stabilirea unor măsuri pentru reorganizarea aparatului de lucru al Guvernului, M. Of. 270/2007). 2018 report: http://control.gov.ro/web/wp-content/uploads/2019/05/Raport_activitate_CCPM_2018.pdf.

[611] See https://gov.ro/fisiere/comunicate_fisiere/Raport_activitate_CCPM_2015.pdf.

[612] Infrastructure, plan for 2020-2024 https://magazines.ilent.nl/meerjarenplan/2019/01/printvriendelijke-versie, Education, plan for 2020: https://www.onderwijsinspectie.nl/binaries/onderwijsinspectie/documenten/jaarplannen/2019/10/04/jaarwerkplan-inspectie-2020/Jaarwerkplan+2020.pdf, Social affairs, plan for 2020: https://www.inspectieszw.nl/binaries/inspectieszw/documenten/jaarplannen/2019/11/18/jaarplan-2020/Jaarplan+Inspectie+SZW+2020.pdf.

Civil society and the press

Up to this point, in this chapter the role of the 'outside monitor' was attributed to 'the general public'. But the general public does not exist, so in this section where documented action is discussed, two representatives of that public will be brought forward: the press and anticorruption NGO's. Other monitors, such as individual citizens or ad hoc groups, were too elusive for this study to inventory and could be the object of further research. And what academia has to say about corruption is already peppered throughout this study. The subject of this paragraph is how NGO's and the press monitor and report on corrupt acts and trends.

Civil society

Civil society (consisting mainly of anticorruption NGO's in this context) is cited in the UNCAC, Article 13 (See also above under 6.2.1), as follows: "Each State Party shall take appropriate measures, […] to promote the active participation of individuals and groups outside the public sector, such as civil society, non- governmental organisations and community- based organisations, in the prevention of and the fight against corruption […]." Promoting active participation can take many forms but should imply some action from the government, be it subsidies, privileges, or facilities such as access to lawmakers for consulting on plans.

Civil society monitoring is also stressed in the literature: "[…] even under the rule of law, but in the presence of significant corruption the best tools are those which do not rely on the government alone" (Mungiu-Pippidi & Dadašov, 2017). Some even speak of a 'pivotal role' for NGOs in fighting corruption, in South-Eastern Europe (Ralchev, 2004) or a 'vital role of a broad societal constituency' (Moroff & Schmidt-Pfister, 2010), while others warn that civil society engagement is not a 'magic bullet' (Grimes, 2008). Civil society organisations can concentrate on different aspects, from the building of partnerships and policy recommendations to education and the development of tools, to being a watchdog and trying to expose existent wrongdoing. Monitoring from the outside, by these NGOs and by supranational entities such as the EU or the CoE, can be the last resort when grand corruption – at the top – is systemic, and successfully controls and stifles monitoring from inside the public sector. But civil society organisations completely lack the formal power of state actors and have their vulnerabilities: they can be oversensitive to the wishes of donors, or themselves become a target of corrupt civil servants, through abusive conduct by police or tax collectors, or when public sector actors set up their own, parallel NGO's and media outlets to distort the anticorruption message.

This paragraph is based on a review of the activity reports of the relevant NGO's from 2016-2018 and their plans and strategies for the future.

One NGO is present in all three studied countries: Transparency International (TI). It is also the largest and most influential anticorruption NGO worldwide. However, the national chapters are independent and can choose their own approach. In The Netherlands, TI is the only civil society organisation of note that works against corruption. It does so by gathering and relaying news items on corruption, and by advocacy activities such as writing reports and organizing exposure on whistle-blower policy, asset recovery or lobbying. It does hardly any researching or watching individual or groups of public entities to discover cases or trends of corruption or integrity issues. From its recent yearly reports, TI The Netherlands appears as an awareness raising and advocacy NGO, not so much the 'watchdog' type. TI Romania has about the same activity profile in the sense that it also does not concentrate on exposing and reporting about individual cases of corruption, but places a larger accent on information and awareness campaigns 'on the ground', i.e. in schools,

public institutions, and in the private sector. In Romania, in contrast to the other two countries, TI was almost exclusively financed through EU subsidies in 2018, while in the other two countries this was less than 20%. In France, TI also concentrates on advocacy/policy review and awareness raising.

In Romania and France there are also other active NGOs. France has at least two other organisations concentrating on corruption: Sherpa and Anticor. Both add legal research and litigation to the mix that also contains advocacy. Through criminal, civil, and administrative litigation, for example, filing criminal charges against French companies for foreign bribery, they try to stop ongoing wrongdoing. In Romania, besides TI, there is a number of organisations whose main aim is to work against corruption. The so-called Romanian Academic Society, the Institute for Public Policy and Expert Forum profile themselves as think-tanks, producing mostly policy reports with recommendations. Other NGO's such as Declic concentrate on activism (petitions, flash mobs) or civic education of young people (Funky Citizens). There are multiple online initiatives in Romania that monitor the conduct of politicians and public institutions using transparent (online) public sector data,[613] but it is unclear whether any of them have the necessary user base and data feeding stamina for long-term viability. Apart from these applications that rely on 'big data' feeds, in none of the countries the discussed NGO seem to use FOI legislation to actually monitor government and local administration actions – the watchdog function. They do watch and participate in governments' anticorruption efforts, with discussions and through the media, but mostly the legislation itself, not its working at the executional level.

Media

This paragraph is only about professional media, not civil journalism, or non-professional activity on social media. The literature (Camaj, 2013) shows a correlation between high media freedom and low corruption. The cited study was controlled for various other variables that might influence corruption. While it is plausible that free media has a downward influence on corruption, the reverse relation seems equally plausible. According to the press freedom index that Reporters Sans Frontières, an NGO, assembles each year[614], all three countries are in the upper echelons although differences between them are considerable:

Table 19: Press freedom

RSF rank (out of 180)	RO	FR	NL
2019	47	32	4
2018	44	33	3
2017	46	39	5

RSF explains Romania's lower score on the basis of major media outlets being 'turned into political propaganda tools' with 'opaque or even corrupt' funding, with a national broadcasting council (the

[613] Such as this one: hartabanilorpublici.ro, where public procurement data are used to verify public spending. Or this one: https://sna.just.ro/vizualizare-date/ to view the implementation status of the national anticorruption strategy.

[614] See https://rsf.org/en/ranking/2019 for results from 2017 onwards.

CNA)[615] that 'not really fulfils its regulatory role'. France's rank is explained by the violence against journalists by protesters and by attacks on media outlets through frivolous litigation.

This infers that not only the amount of media coverage of corruption is relevant, but also the type of media coverage; It can be submitted that unfree media (subject to restraints by the government or other actors in the public sphere, such as businessman-politicians) may report often on corruption, but readers are worse off if that reporting is biased or distorts the facts ("the poor bribe-taking police commander was pressured by foreign elements").

What exactly the role of the media can be, also depends on the type of corruption or corruption risk that is to be revealed. Journalists do not seem to be very good at discovering bribery cases, according to an analysis of 427 cases of foreign bribery (OECD, 2014) where only 5% of this international sample of criminal investigations was triggered by the media. But bribery is hard to discover, especially the collusion type.[616] Other types of corruption can be more easily spotted, such as conflicts of interest based on officials' (publicly) available data on assets and interests.

It should be pointed out that the media also has other roles than actively investigating and monitoring. Media coverage, regardless of who discovered the issue, informs the public and can lead to pressure on public officials, that they be held accountable for corrupt acts. It can also work preventively, to show possible offenders that corruption is not tolerated.

In the context of transparency and monitoring however, the question is how much corruption coverage there is in the national press and how much of this coverage is based on information obtained on the basis of FOI legislation.

Follows a non-statistically representative article count from multiple news outlets, which gives an indication of the size of press coverage in the three countries. In Romania, there is much coverage of corruption issues, simply because there are so many court cases each year. We counted articles on national cases of bribery (public and private sector) as the main topic between 2017-2019. Multiple articles can refer to the same case, because we look at coverage, not the underlying facts. The concept of bribery[617] was used because it refers to a concrete action that is the same in all three countries, as opposed to a word like 'corruption' which has a much broader interpretation spectrum).

The Romanian website ziare.com[618], that aggregates news from other sources, has in its archive 29 articles, none of them based on documents obtained through FOI legislation, but many of them were communications from the prosecution service. Surprisingly, the Romanian expression for 'conflict of interest' reveals only two articles for the same period from this website. The press agency Mediafax, but also the state press agency Agerpres have each more than 100 articles on bribery in 2019 alone, the vast majority being based on press releases from the prosecution office.[619]

[615] See their website (English) here: http://www.cna.ro/-English-.html. Its decisions on individual cases are only published in Romanian.

[616] When bribe-taker and bribe-giver act out of common accord. This is different from the extortion-type, in which the bribe-giver is forced to bribe so they can access a needed product or service.

[617] The Dutch word *smeergeld*, the French word *pot-de-vin* and the Romanian word *mită* were used, in each country the most likely word to be used in news media language registers.

[618] http://www.ziare.com is a foreign-owned commercial operation which should make it more inclined to expose corruption than outlets controlled by persons who are convicted of or investigated for corruption themselves, such as Antena 3 (Mr. Voiculescu), Romania TV (Mr. Ghiță), or Evenimentul Zilei (Mr Andronic).

[619] http://www.mediafax.ro is controlled by Mr. Sârbu, a businessman without strong links to any of the political parties. http://agerpres.ro is the national press agency, controlled by the Romanian government.

This is despite the fact that Romania is the only of the three countries to make special provisions for the press in its FOI law (a 5 day response term for inquiries). The news website of the Dutch national broadcasting organisation shows 7 results in 2017-2019.[620] The highest level of coverage is probably attained by the specialised anticorruption news website[621], with about 80 articles on bribery in the same period (Netherlands, including former island colonies in the Caribbean). The French newspaper Le Monde has only 6 articles on bribery in France or by French persons in 2017-2019, Le Figaro has 11, and Libération only 3.[622]

While it is likely that there are more articles on corruption in general or on other subtopics (a common one in France is for example *pantouflage* or *favoritisme*), the numbers on the topic of bribery denote a reduced interest. Even more poignant is the fact that almost none of the reviewed articles are based on research by news outlets using FOI access to government information. This does not point to great effectiveness of FOI legislation to control corruption by the media – without drawing any hard conclusions. It should be mentioned, however, that in each of the three countries there are also groups of investigative journalists that do frequently use FOI access (including government open data) for their corruption investigations, like Investico in The Netherlands or Médiapart in France. A Romanian example is the RISE project, that mentions accessing official documents in almost all investigation results on their website[623].

A question that remains unanswered here and that would require a separate study, is why these numbers are such as they are and if they mean that bribery (as a proxy for corruption) is underrepresented in the news media of the three countries, as it would appear from the discovered news items. Bribery being rare in The Netherlands and France, one would expect that every case is detailed in the press. And given the societal impact of corruption, one would expect journalists to go look for it with FOI tools. It is possible that information obtained through FOI laws is insufficiently useful, or too hard to obtain, or that it takes too much time to get it, or that journalists do not have the necessary time, persistence, or expertise. It is also possible that, depending on the country, corruption is low on the public agenda or that other forms of corruption are considered more important than bribery. This topic is obviously linked to the transparency discussion above in 6.2.4, and whatever the reasons, the consequence is that no evidence was found that the existing FOI legislation in the three studied countries helps journalists to produce a critical mass of stories that can prevent and reduce corruption by being a watchdog. Neither was evidence of the contrary found, however, so that it is possible that the current volume and type of news items, concentrating mainly (based on the samples above) on police/court reports and the 'big scandals'[624] does scare potential wrongdoers or make them more cautious.

6.5. Closing remarks

The principal question for this chapter is an application of the notion of transparency to the subject matter studied in this work: *How can public and private entities access information from public institutions that can be used to detect signs of corruption, and what use do those entities make of their access?*

[620] See https://nos.nl.

[621] See the website http://anti-corruptie.nl, a commercial organisation. Coverage on this website stopped in 2020.

[622] Using the search function on the respective websites: www.lemonde.fr, www.lefigaro.fr and www.liberation.fr.

[623] https://www.riseproject.ro/investigation/ (English version).

[624] Such as the recent affairs of Van Rey and Hooijmaaijers in The Netherlands, Sarkozy and Balkany in France, or Mazăre and Dragnea in Romania.

First of all, the three studied countries have adopted freedom of information legislation 'by the book' and implemented it, even though the implementing administrations do not seem to be overly enthusiastic about spending their resources on informing the public and revealing their secrets. And even so, transparency is insufficient in itself (Kolstad & Wiig, 2009). None of the three countries was found to be significantly more or less transparent than the others, looking purely at FOI laws and their implementation. It was remarkable that, in all three countries, while generic FOI legislation was in place, none of the three countries have specific transparency rules for risk areas such as subsidies, real estate investment, permits, or passports, with the exception of public tenders. Transparency of these high-risk activities is also missing from the literature.

All three countries have legislation for active transparency, but with limited implementation. Also, active transparency of undefined information such as 'relevant policy information' or of voluntary open data registers can be a real asset but offers less guarantees for the information seeking citizen. When online publication is voluntary, the relevant public entity can always end it and advise information requestors that they view the information at the entity's premises or make a separate request for each information item.

It appears that the actual use of FOI rules does not warrant the claim of being a powerful weapon against corruption. Having theoretical access to information does not mean being able to use it in practice. The reality with open data sets and FOI laws is that usage is limited.

Reasons for this are that obtaining information may not be easy and the information itself may not lend itself to corruption prevention analysis. Some information is much more useful for corruption detection than others. Take for example permits. Individual decisions to grant a permit to a company must be studied separately, added, and compared with others, to build a trend picture. Yearly reports on the granting of permits will show totals and averages. But only a database or table with the 'raw' data will reveal if some company always receive their permits immediately while the others must wait six months, by sorting the columns 'date requested' and 'date granted'.

And for public sector information to be used by the general public, that public must first have a good understanding of how the administration works; they must know what to look for and how to interpret what they access. Applied to corruption monitoring, it seems unrealistic to assume, for example, that the general public can fit pieces such as land book and trade registry information with others such as the organisation chart of a public institution, to see who was in a conflict of interest. This is consistent with findings in the literature (Radu & Dragos, 2019, p. 446). It is therefore safe to assume that the general public, that is in this context all citizens except public officials or politicians, journalists, persons active in a specific NGO, or those in academia, will not play a significant role in the monitoring and detection of corruption, regardless of the quality and quantity of the data made available to them by public institutions.

So, can NGO's and citizens with reasonable effort extract information to detect wrongdoing (among which corruption)? The answer is 'not likely' for all three countries. Although reasons for withholding transparency may be compelling – privacy, for example – it is a conclusion that must be drawn nonetheless, and it means that external monitoring is ineffective as a corruption detection instrument.

Internal monitoring does not suffer from FOI shortcomings, of course. Internal control entities (monitoring entities from inside the public sector, with special powers) have as a great advantage that they can check whether they have received all the relevant information, by their right to enter rooms and computers and go look for the documents themselves. Private sector monitoring

entities must trust the institution that provides them with the requested information (or not) that it is accurate and complete. The same issue, of being selective with information, is also present in self-reporting. Many public institutions periodically gather and publish information in the form of activity reports, sometimes under a legal obligation to do so. But these reports are made by those in whose interest it is to keep any negative details hidden. For example in The Netherlands, otherwise regarded as the 'cleanest' of the three countries, recent scandals have shown that the temptation to tamper is a very real one.[625]

The internal audit functions, that were described above, work in all three countries in a well-established manner with regular reporting. Corruption however plays a very small role in this reporting despite a broad legal mandate to find wrongdoing including corruption, and it could receive more explicit attention – preventively under risk inventory, performance-wise under risk management and repressively under forensic auditing. Accountants will, according to their own standards, report on fraud or corruption when they find it. But nowhere in the legislation or policies of the three countries was found evidence that internal or external audit and control functions in the public sector report on these topics with any regularity. Such reports are either unnecessary, because no wrongdoing was found, remain under the radar if they do exist but are not given publicity, or cannot be found because existing facts are not reported upon.

It can be argued that some issues do not require explicit reporting or remedial actions. For the public administration to work, it can be necessary that a controlling body discovers errors by the controlled entity but does not take action or takes limited action, in the public interest. In those cases, it might be beneficial for the public trust to establish a duty of justification – if no measures are taken, then that decision should be transparent and explained ('we have done nothing, because…'). Otherwise, public organisations are let off the hook easily when they do not comply with legal obligations, because the entities that verify them do not publish the full story.

This and other improvements to FOI legislation, such as shorter turnaround terms or most importantly, implementation of the principle that everything is public unless it is secret, could improve the monitoring function by NGO's and the press. This applies to all three studied countries. Whether these NGO's and press outlets would also make use of improved conditions is a matter that depends on many other variables, such as NGO/press funding or expertise.

[625] For example in the so-called WODC case, where researchers from a Justice Ministry unit were pressured to alter their reports and then the whistle-blower who reported on this practice was put under pressure as well, or the case with child allocations where the Tax authority used illegal, biased procedures to crack down on presumed fraudsters and lied about it to Parliament.

7. Preventing corruption with software

7.1. Introduction

The previous chapters have all described what the different countries do now to prevent corruption. This chapter tries to give one of many possible answers to the question, what can be done more, or different? The recommendations at the end of this study point in several directions. One of these directions is the use of certain types of recently developed information technology for the detection, risk prediction, and trend analysis of corrupt behaviour.

In each studied country, published reports as well as interviews with public officials, scholars, and activists reveal large scale processing of digital, structured and unstructured data by algorithms, under the label of 'big data' or 'artificial intelligence' (AI), as an avenue where expectations are high and where the first concrete projects are being planned. However, no active work has been found in any of the three countries to employ artificial intelligence to detect corruption of public officials.

Below is a case study of what *was* found already in use in Romania for corruption detection, however it is based on 'old' web 2.0 technology[626], not on the latest artificial intelligence. Its relevance, besides being the only active corruption detection/prevention procedure using automation in the three studied countries, is that it makes it possible to do something that was previously impossible due to the sheer volume of the work, automated verification of compatibility with conflicts of interest legislation in public procurement procedures.

That brings us to the question why new information technology is necessary for corruption prevention in the public sector, what it solves compared to the current situation. And the answer is that it not only helps process amounts and combinations of data that humans cannot process because of their sheer volume, but also helps to keep that data accessible, searchable, and combinable in order to search for trouble. It solves issues of time and manpower. It has the potential of making preventive measures possible that make the administrative burden lighter, not heavier.

IT-driven measures can also fuel controversial anticorruption drives hiding in plain sight: Unlike other types of corruption prevention/detection such as requiring multiple signatures for documents, staff rotation, or incompatibility rules, the prevention/detection of corruption signals through 'big data' trend analysis does not burden public officials and can easily be embedded in broader efforts to improve public administration, such as cost control, effectiveness, and efficiency. In this configuration as a 'by-product' of improving administrative quality, detecting signs of corruption can more easily pass under the radar of those who are interested in weak corruption controls.

What it probably does not solve are budget issues, because the acquisition, use, and maintenance of technology comes at a price, which makes its use in anticorruption unattainable for some countries (but probably not our three studied countries). Nor does technology solve corruption itself. Corruption is man-made and man can make corruption with algorithms just as well as with hand-typed documents. It is not even effective against all types of corruption: Some misconduct cannot be prevented or detected by software, such as corrupt behaviour that has nothing to do with the official's official tasks, such as forms of influence trafficking.

[626] In this case, partially prepopulated webforms without any intelligent matching technology.

So the described procedures in this chapter are mostly about the detection of corruption proxies, not the actual prevention of corruption, unless and with its own series of caveats IT is used to replace humans in decision-making, so that corruption itself is eliminated from that particular activity – provided that corruption is not built in the automated procedure.

Another question is, what new problems the use of new technology may bring, that might harm anticorruption efforts. Here, considerations of privacy present themselves. Among other possible problems that arise from the use of AI for corruption detection are confirmation of bias, evasive behaviour while formally complying with stated criteria, and the possibility that some types of corrupt actors might be cracked down upon while others would still go undetected.

The elements above make up the outline of this chapter: After a brief section that hopefully brings some conceptual clarity, first the mentioned case study will be presented. Then some possible further – existing and theoretical – corruption prevention uses of the new technology will be discussed, followed by a discussion of the possible drawbacks of such technology and at last a few final remarks on the central question of this chapter, which is 'how can corruption prevention efforts be made more effective with automated predictive data analysis and what are the drawbacks of such an approach?' There is almost no literature on artificial intelligence and corruption prevention[627], but the 'concepts' and 'issues' sections cite some work on the related topic of fraud and other crime prevention.

7.2. The concept

Some delineation is certainly necessary, because the labels used in the introduction do not cover the topic, nor do the broader labels of 'E-government', 'Automation', or 'Information Technology'. To do that, we must first recall what the activities of corruption prevention are: Charting risks (intrinsic/situational[628]) and eliminating opportunities/erecting barriers. Plus, on the boundary between prevention and repression, the detection of ongoing misconduct. Technology, or more specifically, software, is to be used for these activities. Some software can be called artificial intelligence. If we view intelligence as the ability to solve problems by making decisions, intelligent software should be doing that, helping humans make decisions or making decisions for them – to identify corruption risks, to eliminate opportunities, and to track possibly corrupt behaviour.[629]

The way algorithms do that can be rule-based, or context-based, or both. It can be compared with deductive versus inductive reasoning. Rule-based decision-making is for example: If a cash

[627] U4, an NGO, did recently publish a helpful overview of the topic. See https://www.u4.no/publications/artificial-intelligence-a-promising-anti-corruption-tool-in-development-settings.pdf.

[628] Intrinsic risk is viewed here as everything that a person brings to the situation in which they are evaluated, in other words, everything that is not a situational risk: Upbringing, formal education, social skills, personal values, social environment, wealth, health, life events, vulnerabilities (drug/alcohol abuse, secrets that they can be blackmailed with) and anything else that might contribute to a corruption risk. Situational risk consists of job-related aspects: level of decision-making discretion, controlled budget, formal and informal influence on colleagues and third parties, potential value and confidentiality of information held, and other similar factors. It is not the purpose of this study to establish a theoretical framework (but to compare legal ones). Corruption risks in the dichotomy sketched here are analysed in the literature (Rabl, 2011), see also for situational analysis Graycar & Prenzler, 2013, and for types of intrinsic motivation Gorsira et al., 2018.

[629] Another omnipresent topic, blockchain, is not discussed because it would double the size of the material. Transparency International compiled an overview of the topic in 2018, with literature references: https://knowledgehub.transparency.org/helpdesk/bitcoin-blockchain-and-corruption-an-overview.

transaction exceeds 10,000 EUR, the bank must flag it as risky and report it to the financial intelligence unit. Software has always worked based on rules. Context-based decision assistance is newer; it has been made possible by the internet and cheap mass data storage. It relies on the analysis of previously unavailable large amounts of data ('big data') to discover patterns and correlations. A much-used example is how online shops make recommendations based on the shopping behaviour of many other users. If there were three previous customers who bought various items after buying a book, not much can be inferred. If three million customers bought that book and various other items, the software can make recommendations to customer three-million-and-one. If they all logged in using their social media account, the recommendations might become much more relevant thanks to the extra personal data to analyse. Leaving aside other details that would not fit our limited scope, this ability to draw conclusions from new data instead of just applying rules is the main feature of the technology, hence the term 'machine learning'. The most important limiting factors when relying on learning from data, are the availability, the format, and the quality of the data. For example, the analysis of court decisions using artificial intelligence will be compromised if there are not enough decisions of the desired type (e.g. there are few convictions for 'high treason'), if the decisions are not machine-readable (because the documents were first printed, then signed, then scanned as a picture), or if the elements of the document (description of the facts, arguments of the parties, analysis of the court, and verdict) were named inconsistently by the clerks.

As noted above, there are now no known artificial intelligence applications for the prevention of corruption active in the three studied countries, but there are already many applications for the detection and even prevention of other types of crime, worldwide. A few examples from police AI may help contour the phenomenon.

- In the United States, criminal investigators of the FBI use automated facial recognition software to match persons under investigation with photos from a database. The Chinese government uses the same technique for the investigation of various offenses.[630] Artificial intelligence based on a mathematical model underlies the automation part of this effort.[631]
- The Dutch police develops a location recognition software for digital images, to find out, using AI, where a certain picture could have been taken.[632] This helps tracking down offenders who post on social media.
- The police force of Marseille, France, combines different data sources to try and predict where certain crimes will happen.[633] Data scientists of the national police and *Gendarmerie* predict car theft with an AI application.[634]
- The police of Durham, Great Britain, has been testing AI to assess the risk of offenders committing another offense (Oswald et al., 2018).

[630] According to this press article: https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html.

[631] https://www.fbi.gov/news/testimony/law-enforcements-use-of-facial-recognition-technology.

[632] See https://www.politie.nl/nieuws/2019/januari/16/%E2%80%98kunstmatige-intelligentie-vergroot-onze-slagkracht.html

[633] See http://prevention.marseille.fr/s%c3%a9curit%c3%a9-et-pr%c3%a9vention/big-data-de-la-tranquillite-publique

[634] See https://www.etalab.gouv.fr/predire-les-vols-de-voitures

- In Germany, several implemented initiatives use AI to predict domestic burglaries. In the German context, the use of personal data is out of scope.[635]

All these different applications can be divided into two main groups: those targeting persons (questions such as: what will a person do? Or, who will do a certain thing?) and those with a geospatial target (where and when will a certain thing happen?). A combination between the two is possible. It should also be noted that not all AI applications are predictive in the sense that they predict future events, for example facial recognition does not do this, even though they all generate statements on the future based on past events. While AI could be used for autonomous decision-making, all of the law enforcement examples above use it as advice, an input used with other inputs for human decision-making. Automating the decision itself, exclusively based on AI processing, is illegal under EU law: subjects must be given (at least) the right "to obtain human intervention".[636] Other important categorisations are purpose (prevention, detection, criminal investigation, or other) and target users (police, judiciary, anticorruption authorities, administrative authorities such as municipalities, or even the general public).

Combating fraud is another field in the vicinity of anticorruption where AI is used.[637] Similar to corruption, public sector fraud is a hidden crime with usually no individual victims, which means that those with knowledge of it usually have an interest to keep it secret. Categorising past events is thus only possible for cases that were solved, based on convictions. Also, there are much less cases than car theft or burglary, which limits AI applications that require a large amount of training data (data on existing situations on which the software can base its projections). In forensic accounting, statistical analysis can be used to detect outlying transactions (anomalies), based on data such as: amount, currency, time/date, repetitions, % of threshold (to look for payments that were split to keep below a reporting threshold), who executed it, who was the manager, who the client, who the client contact, what does the payment represent (e.g. one department of a Ministry spends a lot more than similar ones on 'protocol' or 'consultancy' which could be a red flag indicator)[638]. Fraud detection/investigation can also analyse non-financial data, such as information in e-mail traffic with certain characteristics or oddities (e.g. in an organisation in the public health sector, persons correspond about quantities of apples). This kind of analysis may require intensive training of the AI by subject matter experts, to fine tune the relevant information. Below are a few examples of combating public sector fraud with AI. Note that they search for fraud amongst beneficiaries of funds, not amongst public officials:

- The UK government has started a national data-matching initiative to find benefits fraudsters called the National Fraud Initiative. It automatically compares data from various sources of personal data available to the government.[639]

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[635] See this working paper: https://kops.uni-konstanz.de/handle/123456789/43114.

[636] This rule applies to competent authorities that work on prevention or prosecution of corruption offenses. Directive (EU) 2016/680, Article 11. See also section 7.5.

[637] A World Bank paper (2017) on data analytics claims it can 'greatly assist fraud detection and prevention' (http://siteresources.worldbank.org/EXTCENFINREPREF/Resources/4152117-1498417623599/public_sector_internal_audit_fraud_pages.pdf). An older overview (West & Bhattacharya, 2016) already lists many applications of AI techniques to different kinds of fraud in the private sector (credit cards, insurance, financial statements).

[638] See this article on FCPA cases brought against US companies between 2014-18, with a list of account categories that were cited as problematic (i.e. prone to corruption risk): https://www.journalofaccountancy.com/issues/2019/oct/fraud-risk-bribes-in-financial-accounts-expense-categories.html.

[639] See the 2018 report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737146/National-Fraud-Initiative-Report-2018.pdf.

- The European Commission uses a tool called Arachne, in the context of the European Social Fund and the European Regional Development Fund, to calculate fraud risk scores of beneficiaries.
- The Dutch government has been using a social security fraud detection called SyRI (*Systeem Risico Indicatie*, risk indication system), that pulled data from many different sources such as social security databases, real estate registry, or the tax office. Its legal basis is from 2014[640], but there were issues with effectiveness[641] and with legality: The Dutch court found that the system violates Art. 8 of the ECHR (right to privacy) on grounds of proportionality.[642]
- The European Investment Bank uses AI to collect data from different sources and compare these to a (fixed, established by humans) set of risk factors, to focus their 'Proactive Integrity Reviews': high scores on risk are selected for reviews.[643]

So, we see in practice that there are already many applications of AI in crime detection, with certain drawbacks which will be discussed later on in this chapter. The next section shows an application of software-assisted decision making in the anticorruption field.

7.3. Case Study

7.3.1. Introduction

This section is an adaptation of an already published analysis (Bouman, 2019). There are several ways to remove or at least diminish corrupt opportunities: organisational measures, such as limiting discretionary powers, or checks and balances like obliging decisions to be made by a committee. There are also technical measures with which they can be combined. For example, automating a decisional process can limit discretionary powers by imposing a certain procedure, or by introducing random selection (e.g. selecting the members of an evaluation committee randomly from a group of experts).

In this analysis, a case from Romania will show how technical preventive measures can be put into practice, for the prevention of public procurement corruption. In 2016, the Romanian Parliament adopted a law regarding a "mechanism to prevent conflicts of interest in public procurement procedures"[644]. The system is called PREVENT. The question is: How does this system work, and to what extent does it contribute to preventing corruption of the officials involved?

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[640] With the introduction of Article 65 in a law on social benefits (Wet SUWI): https://wetten.overheid.nl/BWBR0013060/2020-01-01.

[641] This newspaper article relates that until June 2019, no cases of fraud have actually been found: https://www.volkskrant.nl/nieuws-achtergrond/syri-het-fraudesysteem-van-de-overheid-faalt-nog-niet-een-fraudegeval-opgespoord~b789bc3a/.

[642] See the decision in English here: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:1878

[643] See their Fraud Division's 2018 report: https://www.eib.org/attachments/general/reports/ig_fraud_investigations_activity_report_2018_en.pdf.

[644] Lege din 17 octombrie 2016 privind instituirea unui mecanism de prevenire a conflictului de interese în procedura de atribuire a contractelor de achiziție publică, M. Of. no. 831 of 20 October 2016. The law entered into force on June 20, 2017. A (possibly not up to date) version of this law was translated in English, here: https://www.integritate.eu/A.N.I/Legisla%C8%9Bie.aspx

7.3.2. The law

The special law governing the PREVENT system is Law no. 184/2016. The explanatory memorandum for the draft law, explaining why there is a need for PREVENT, speaks of 'systemic problems with serious effects' on the economy and the absorption of EU funds, caused by the lack of an *ex ante* verification system for conflicts of interest.[645]

Article 1 of Law no. 184/2016 establishes the material scope for the system as "the prevention of conflicts of interest in the procedure to award public procurement contracts by means of an *ex ante* verification mechanism". This means that the system is concerned exclusively with conflicts of interest (not with other forms of corruption or fraud) regarding existing procedures (not before publishing the announcement or after the contract was awarded) for public procurement (excluding other forms of public spending). The system also does not apply to framework agreements.

Article 4 of the same law determines the personal scope – the group of persons who must/can be checked under this law – by referring to Art. 1 of Law 176/2010. This article contains a limitative list of the offices whose occupants must submit asset declarations (see chapter 4). Of course, these persons must also be involved in a specific procurement. It is a large group; all public officials are included in it. Only those who do work based on a labour contract or a services contract that is not management, audit, or implementation of projects with dedicated funding, are excluded. It is unclear why the last group is excluded, but the chosen legal technique of referring to a limited list in another law has the advantage of consistency and it is possible that the excluded category of contractors is presumed to lack any influence on the procurement process. Some of the persons in the latter group, however, are re-included explicitly by Article 5 of Law 184/2016. This article provides that data regarding *inter alia* consultants, members of the assessment committee, and experts must be included on the integrity form. A note on that form specifies that consultants can be private (legal) persons.

Tenderers, candidates, consultants, or experts[646] or their representatives if they are legal persons, do not fall within one of these categories. Their data must still be reported in the form as prescribed by the Annex to Law 184/2016. They can also be subject to measures that prevent or put an end to conflicts of interest, in the sense that they can be excluded from the procedure. However, they are outside of the scope of the law as stated in Article 4. It seems that this scope must be interpreted as stating that, for example, conflicts of interest between consultants and tenderers are out of scope, while conflicts of interest between consultants or tenderers and any of the categories mentioned in Art. 4, are in scope. This excludes private sector conflicts of interest.

Article 4 establishes another limitation: the system uses only the input from an online self-reporting form with limited information, as described in the procedure below. The rest of the law mainly details the procedure and the form to be used. These are described in the next section.

7.3.3. The procedure

The exclusive goal of PREVENT is to perform semi-automated *ex ante* checks of possible conflicts of interest in public procurement. Use of the system[647] is mandatory for all public procurement procedures published on SICAP, the Romanian procurement platform, where one or more of the

[645] The document is called 'expunere de motive' and can be found at: http://www.cdep.ro/proiecte/2015/600/20/6/em806.pdf

[646] The law calls consultants and experts 'procurement service providers'. They can help write documentation or evaluate bids.

[647] A video showing the key features can be found here: https://www.youtube.com/watch?v=13QCfdWZfk8

decision-makers, influencers or members of an evaluation committee are public officials (see the Applicable law section for more details). Each contracting authority must designate an official to complete a special form. This official updates the form when necessary during the procurement procedure, for example by (semi-automatically) adding data about whom the contract was awarded to, or if a member of the evaluation committee is replaced by a designated replacement member.

This online form, delivered as a module of the national electronic procurement system (SICAP), is the basis of the PREVENT instrument. The contracting authority uses it to fill in data about the tenderers (or candidates, depending on the type of procedure) and about persons from the contracting authority who can influence the public procurement procedure itself, such as decision-makers (so-called '*factori decizionali'),* members of the assessment committee, experts supporting them, or the official who signs the contract. The official Q&A about the system[648] even speaks of 'anyone involved in the procurement procedure'. This is not entirely correct, see comments on the personal scope under 'Applicable law'.

The completed form is then processed by the system and combined with data acquired from other sources: the trade registry and the civil register. If the system detects a possible conflict of interests, an automated notification, called an 'integrity warning', goes to the integrity inspectors at ANI. They access the same system through their own interface. When they receive a notification, the integrity inspectors review the data and in case they suspect a conflict of interest, they send an integrity warning to the contracting authority. In the course of a single procurement procedure, multiple warnings can be issued.

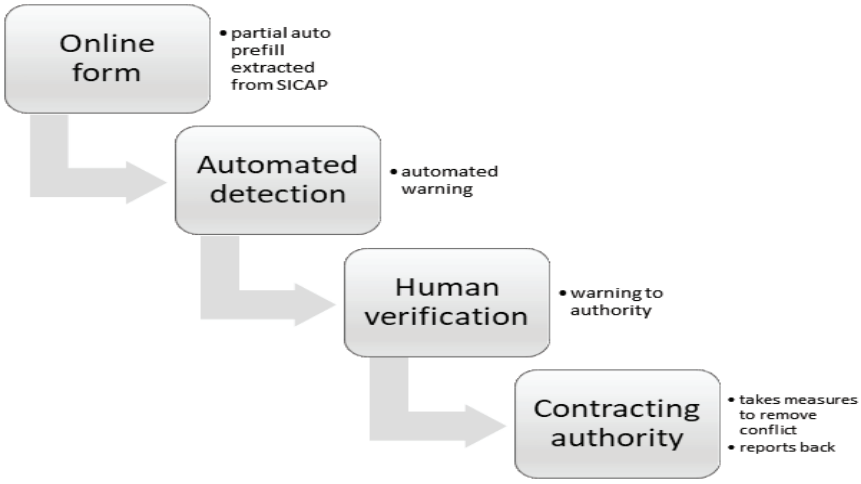


Figure 3: Simple schematic rendering of the procedure (by the author)

The management of the contracting authority must then take all the necessary measures to remove the conflict of interests within 3 days from receiving the warning. This also reflects the imperative of Law 89/2016 on public procurement, Article 62 (see above). ANAP checks whether the necessary measures were implemented (Art. 8 of Law 184/2016). Necessary measures may include removing even the appearance of a conflict of interests, since this is required by law (see the legal definition above). Some of the conflicts of interest that the system detects may have existed without criminal

[648] It can be viewed at: https://www.integritate.eu/PREVENT.aspx. Some of the information is in English.

intent or even without knowledge of the official involved. They must still be removed but being less of a threat to society they may not require any criminal or even disciplinary sanctions.

The system thus prevents conflicts of interest from happening by sending out the mentioned integrity warnings in case there is a match, indicating that one or more of the persons involved in the procedure on the side of the contracting authority, has public as well as private interests in it. The assumption is that the parties involved can remedy, in good faith, the potential conflict of interest if they are made aware of it. The match is made by applying the rules to the data sets obtained (through the form) for each procurement procedure. Using the civil register and the trade register, the system checks whether an influencer, member of an evaluation committee or expert is related to, works with, or has financial interests (stock) or other interests (such as being a member of the same non-profit) in a tenderer, candidate, or consultant. This is obviously a subset of all the possible conflicts of interest an influencing official may find herself in.

Now follows an example of how the procedure can work: An official working for the contracting authority is tasked with reviewing and signing reports for stages in the procedure. She has a brother (2nd degree relative) who is an investor and owns one of the tenderers. The data about the tenderer is entered in the online form. The system checks with the trade register who owns each tenderer and the name of the brother comes up. The system checks for the relatives of the brother in the civil register and the sister comes up. The sister's conflict of interest triggers an integrity warning to ANI. ANI's inspectors check it and decide to send a warning to the contracting authority. The contracting authority's director has the official in question removed from the procedure and the conflict has been solved.

The discretionary powers of the integrity inspectors and the contracting authority to respectively report and repair the conflict are open for some interpretation. The automated detection generates an alert and integrity inspectors must act upon it, i.e. inform the contracting authority, if they "detect elements of a potential conflict of interest"[649]. This means that just an element of a possibility of a conflict triggers the obligation to send the integrity warning. It may be safe to assume that only objective errors of the automated alert (such as registration errors in the trade register) relieve them of it. Then it is the turn of the contracting authority's leadership, who according to Article 8 of Law 184/2016 has the obligation to "take all necessary measures to prevent the conflict of interest". The conflict must be eliminated but management has discretion to establish which measures are necessary. Since the definition of conflicts of interest according to Law 98/2016 includes the appearance of these conflicts, this appearance must also be removed. This limits the discretionary powers of the contracting authority's management because limited measures may leave the appearance intact. It should be mentioned here once again that conflicts of interest constitute a "systemic problem" in Romania, according to its own government,[650] so that the eye of the beholder is very sensitive to these appearances. Of course, the personal interest must be objectively established, also the objective possibility for the involved person to influence the proceedings, but not whether their impartiality or independence really is compromised. In this context, the contracting authority can do little else than effectively removing the interested person from her position of influence. Article 62 of Law 98/2016 gives this option as the only example of a measure besides removing the conflicting tenderer/candidate.

[649] Article 7 of Law 184/2016

[650] See the cited explanatory memorandum for Law 184/2016, above.

Escalation procedure

Following a warning, if the contracting authority does not take the necessary measures or if those measures are not reported back to ANI, another procedure is started automatically, after the award of the contract: the 'evaluation procedure regarding conflicts of interest'. It should also be noted that, according to Art. 7, this procedure, or any irregularities in it, do not replace or impede disciplinary or criminal investigations or civil suits.

This 'evaluation procedure regarding conflicts of interest' is the procedure described in Art. 20-26 of Law 176/2010, Romania's main integrity law. This is an administrative procedure, carried out by ANI after the awarding of the contract (*ex post*). The explanatory memorandum for Law 184/2016 does not mention why this procedure should start only after the award. The procedure is a general one, that also applies in cases where a suspected conflict of interests results from an asset declaration review (also by ANI). Since this procedure can be lengthy, with for example a term of six months for ANI to appeal to the administrative judge to annul any decisions made while in conflict of interests, it is understandable to start it only after the awarding of the contract. If this procedure must be finished before the end of the procurement procedure, then the procurement would effectively be suspended for the duration of the ANI investigation. This is not in the public interest. The choice may seem contrary to the PREVENT philosophy, however. Why detect something early when issues of noncompliance can be solved only when it is too late? Firstly, the early warning system is just that. It warns but does not eliminate conflicts of interest. The warning gives the contracting authority the possibility to do an amiable 'quick fix' but failing that, the courts and/or disciplinary authorities must be engaged and then the procedure goes into another phase altogether. The reasoning may be that, if a quick solution ex ante is not possible, then it is in the overruling public interest to let the procurement take its course and aim for sanctions afterwards. Article 23 of Law 176/2010 also provides a safety catch for cases when contracting authorities are unwilling (for any reason) to cooperate: If a conflict of interests is established afterwards, then all administrative or legal acts issued in violation of the conflicts of interest rules, that are related to the specific procurement, are void.

The procedure does not suspend the award or execution of contracts. It goes as follows: Involved persons are contacted, invited to give their view of the facts, and an 'evaluation report' is drawn up if the response is unable to allay the suspicions. ANI has no time limit for writing the report[651], but when it is ready it must be sent to the involved person within 5 days. This report contains conclusions about whether the involved person was in a conflict of interests. It is sent to that person and, if relevant, to the prosecution service and/or the institution responsible for disciplinary sanctions (the employer's disciplinary committee). The report can be contested before the administrative court within 15 days from receipt. ANI can ask the court to establish the nullity of all legal acts signed while in conflict of interests. Signing legal acts while there is a conflict of interests is a disciplinary offence if not a criminal one (depending on intent).

Processed data

The electronic form contains a series of (automatically populated) data regarding the procedure itself, such as what is being procured, the start date of the procedure, the type of procedure, and the date that the contract was awarded. Law 184/2016 prescribes exactly what data the form should gather about the persons involved:

[651] Of course, when the person involved cannot be held responsible anymore for the underlying facts due to the statute of limitations, writing a report is devoid of sense.

Role	Data
Influencer	- first and last name, - sex, - nationality, - national registration number (called CNP), - home address, - obligation to declare assets and interests, if yes, position in the organisation (job title). - Labour relations with one or more of the tenderers (yes/no) o If yes, which one(s) - Member of an association/foundation? o If yes, which one(s) - Signs off procedure report? (yes/no) - Signs off awarded contract? (yes/no) - Active/inactive (once entered, a person cannot be removed from the system, but they can be 'inactivated' if they no longer participate in the procedure).
Consultant (legal person)	- VAT number - Address
Consultant (physical person)	- first and last name, - sex, - nationality, - national registration number (called CNP), - home address
Members of evaluation committee	- first and last name, - sex, - nationality, - national registration number (called CNP), - home address - obligation to declare assets and interests, if yes, position in the organisation (job title) - status in committee (president, president without voting rights, member, replacement member) - Labour relations with one or more of the tenderers (yes/no) o If yes, which one(s) - Member of an association/foundation? o If yes, which one(s) - Participates in opening the bids? (yes/no) - Signs off procedure report? - Signs off awarded contract? (yes/no) - Active/inactive

Role	Data
Expert (for the contracting authority)	- Employer - first and last name, - sex, - nationality, - national registration number (called CNP), - status in evaluation committee (with/without voting rights)
Tenderer/candidate	- Status (sole tenderer, leader of an association, associate, subcontractor, third party support) - Name (of the entity) - VAT no. - Address - Representing a tenderer/act on their own behalf - Winning bid yes/no - Contract awarded yes/no

Access to the system

Articles 5, 7 and 10 of Law 184/2016 determine who has access to the system, namely: contracting authority: the management and designated persons who keep the form up to date; ANI: integrity inspectors; judiciary (prosecution service and courts); and public entities with a mission to audit or supervise the spending of EU or national funds.

The last two categories only have regular access if they have concluded a collaboration protocol with ANI and if there is a legal basis. Their access is restricted to the 'necessary' information to fulfil their legal mandate. Auditors and supervisors are, for example, OLAF, the national procurement authority (ANAP, *Agenția Națională pentru Achiziții Publice*) or the Court of Auditors. Tenderers have no access to the system; their own data are prefilled from the submitted offers, so they would need no access to complete any data. It is more logical that data about public officials should be completed by a designated public official. Besides, having many persons (tenderers can be many) input data can put a strain on access management and increases the risk of human error when inputting data.

What does PREVENT prevent?

The PREVENT integrity form is built under responsibility of the Agency for a Digital Agenda,[652] which also maintains the national procurement portal. The system itself and its input connections were built by a private party. On the input side, the system relies on the correctness and completeness of the data. If certain interests are left out, either because the contracting authority is unaware of them or omits them on purpose, they cannot be cross-checked against the participants in the procedure. For example, the contracting authority can add or omit influencers according to its

[652] AADR, Agenția pentru Agenda Digitală a României. Website: http://aadr.ro. The Agency's legal basis is Hotarirea 1132/2013 privind organizarea şi funcționarea Agenției pentru Agenda Digitală a României, precum şi de modificare a Hotărârii Guvernului nr. 548/2013 privind organizarea şi funcționarea Ministerului pentru Societatea Informațională, M.Of. 32 of 2014.01.15.

interpretation of the term 'influence' from the legal definition. Also, any errors in the trade registry or the civil register may be imported without correction since this is done automatically.

Some of the interests are in public registers and thus easily verifiable, making the risk of detection higher in case of *mala fide* omissions. Other interests are hidden, for example, if a director of the contracting authority buys shares in the winning tenderer and sells them at a profit before the next asset declaration is due, the PREVENT-system cannot detect this interest.

Based on the input data, the system can perform the following checks:

Public procurement role	Checked relations	With whom
a. Influencer b. Member of evaluation committee c. Expert	- close relative - labour relations - shared membership of associations - shared financial interests (e.g. both have shares in a tenderer) - shared ownership of assets	- shareholder (physical person), - director, or - administrator of one or more of the tenderers; - procurement consultant

The range of personal interests which can constitute a conflict is much broader than in the above table. Firstly, some interests are impossible to detect with an *ex ante* check. If a director of the contracting authority wishes to acquire a controlling stake in a company and makes that company's bid lose, this conflict of interest only comes to light after he has acquired the devalued shares. Secondly, any family relations that are not in the civil register will remain hidden. Cousins and nephews, for example, cannot be traced in this way[653]. In Romania and France, but also in many other countries, there is the tradition of godparents who may be deeply involved in family life despite the absence of consanguinity. Thirdly, the personal interest can be that of a friend, neighbour, informal business partner, money lender, colleague, fellow party member, or other social categories. Those ties may be strong but escape detection through formal means. Detection of these relations would involve access to the (online) social behaviour of the persons involved (through Facebook, LinkedIn, Google, and other behaviour tracking social media platforms) with the effects on privacy that it would entail. Fourthly, only relations between tenderers on the one hand and authorities on the other hand are checked, not internal relations within those groups. If there is an informal corrupt network within the organisation of the contracting authority, the relations between the colleagues inside this network can be strong but remain undetected, while labour relations with one of the tenderers, however unrelated to the procurement procedure they may be, can lead to exclusion measures because of the need to eliminate even the appearance of a conflict of interests. Finally, the system only looks at conflicts of interest, while there are many other types of corrupt behaviour.

[653] ANI comments here that: "[t]heoretically, the system can identify relations between persons up to the 4th degree but, in practice, this is very hard to do, due to the fact that the Civil Registry database of Romania is not 100% accurate".

7.3.4. Compliance with EU law and other international obligations?654

This paragraph contains a brief comparison between the characteristics of PREVENT and requirements of national law and EU and other international legal obligations.

EU Law

Article 24 of Directive 2014/24/EU provides that Member States must "ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators". It is submitted that the word 'ensure' implies that it must be possible to force contracting authorities to take those appropriate measures. PREVENT works on a case-by-case basis: it processes large amounts of data and flags cases where certain criteria are met. It is preventive in the sense that it detects issues before a contract is awarded, but not in the sense that it actually prevents those issues from arising, although given the myriad possible social relations that professionals can enter into it would be hard to envisage a system that can detect them all. Furthermore, PREVENT itself does not oblige contracting authorities to take general measures (in the field of hiring/promoting, education & information, removing discretionary powers, or introducing random assignments for example). Art. 62 of Law 98/2016 provides that contracting authorities must take 'every necessary measure' to identify conflicts of interest. This shows that besides PREVENT there must be other measures to prevent conflicts of interest. Contracting authorities should do more than just fill out the PREVENT form online. But this obligation is not provided by Law 184/2016, which does not give ANI any enforcement powers; they can only go to the administrative judge if a contracting authority fails to comply.[655] It is submitted that if the system can detect issues, but measures can only be enforced through the administrative courts, with all the ensuing loss of time, effort and public money, its impact is reduced. Such recourse may be considered sufficient as a remedy, satisfying the effectiveness criteria of the Directive, but in the context of prevention any legal recourse is *ex post* – too late. So, if the contracting authority is unable or unwilling to eliminate the conflict of interests, the preventive system is powerless. There are ways to give it power. For example, it would be possible to reverse the burden of proof and automatically eliminate any conflicting officials from the proceedings unless they prove that they do not, in fact, have any relevant personal interests or are unable to influence the procurement. Such strong preventive measures may however exceed the limits of appropriateness that the Directive provides in this Article 24. An alternative would be to give ANI a form of power over the decisions of the contracting authority, for example sending integrity warnings with measures and suspend the procurement procedure until they are implemented. In its current form, the system is more of a detection system than a prevention system. The prevention itself, i.e. elimination of conflicts of interest before they can be resolved against the public interest, takes place outside of the system and the system or ANI cannot influence it decisively.

Ratione materiae, a comparison of the definition of conflicts of interest from Law 98/2016 with the elements checked by PREVENT reveals that it can detect only part of the possible conflicting

654 The fifth evaluation round of the Council of Europe's 'Group of States against corruption' (GRECO) will also look into conflicts of interest. In May 2020, the report for Romania was not yet published.

655 In a reaction to the draft article, ANI stated that it "has the obligation to start an *ex post* evaluation procedure regarding the possible conflict of interests that appeared in that specific public procurement procedure and only regarding the person within the contracting authority that had or has the obligation to submit asset and interests disclosures / statements, after the contract has been awarded".

situations. Even the situations that can be checked (labour relations, membership of charities, financial interests) depend on the quality of the input data. It is easy to leave elements out, and also easy to find excuses such as "I forgot to mention that" or "I requested my secretary do it and they overlooked it", in a context where intent must be proven for criminal sanctions. That said, Law 184/2016 does not claim that absolutely all possible conflicts of interest will be found. There is also a backup possibility of *ex ante* control by ANAP (although they might not prioritize it, to avoid the waste of redundant checks).

UNCAC

Article 9 of the UNCAC obliges the States party to the Convention to establish 'systems of procurement' that are 'effective…in preventing corruption' (of which conflicts of interest are an aspect). Section 1(e) obliges the parties to "regulate matters regarding personnel responsible for procurement, such as declarations of interest". PREVENT exceeds this requirement in respect of conflicts of interest. However, the article also states that the measures must be based on "transparency, competition and objective criteria". Transparency would arguably require the ANI warnings to clearly state the basis for their determination and the source of the data. The competition requirement means that competition should not be restricted unnecessarily. In eliminating all cases with even the appearance of a conflict of interest, the Romanian measures might be disproportionately drastic, particularly if the elimination of the conflict is done by removing a tenderer. But a measure could also be disproportionate when it causes an official to be removed from the procurement procedure if that removal creates organisational difficulties for the contracting authority. There are thousands of (very) small municipalities in Romania where the Secretary – the highest-ranking local official – is the only manager with procurement experience and must sign all contracts. Removing this official from a procedure may cause significant problems for the organisation.

OECD

The recommendations published by the OECD on conflicts of interest[656] describe an ideal policy that is based on risk assessment and differentiates between acceptable and non-acceptable conflicts of interest. The second element is *de facto* part of the PREVENT system because it checks only for certain types of conflicting interests, i.e. the relations that it can know about based on its input (such as who is an associate of which company). But this does not mean that the relations (of being alumni of the same student fraternity, for example) that the system disregards are less risky or acceptable. No risk assessment forms the basis of what PREVENT checks or not, but the availability of data in official registers. Also, if the authorities were to follow the recommendation of differentiating between acceptable and non-acceptable conflicts of interest, they would conflict with the national law that stipulates the elimination of all conflicts.

7.3.5. What are the outcomes so far?

PREVENT started in June 2017. In July 2018, ANI published a press release[657] with the following figures regarding the first year of operations: 15,954 procedures were checked by the automated

[656] Details are available at: http://www.oecd.org/governance/ethics/2957360.pdf. Romania is not an OECD member but has expressed interest in joining the organisation.

[657] https://www.integritate.eu/Comunicate.aspx?Action=1&NewsId=2782&currentPage=2&M=NewsV2&PID=20 (in Romanian). Some figures in this press release are lower than in the previous one. This may be due to the correction of preliminary data, but the exact reason remains unclear.

system; 2,161 authorities were checked; 12,684 companies were checked; 223,444 persons were checked; and 55 integrity warnings were sent to the contracting authorities. 50 cases were followed up with proper measures. In 2 cases, a formal 'evaluation procedure regarding conflicts of interest' was started. 3 cases are pending, awaiting measures. 36 notifications were sent to ANAP regarding other irregularities.

There is little point in making rules unless they are applied. In this light, the fact that hundreds of thousands of persons could be checked with very limited intervention means that there is progress. However, an *ex-ante* check of contracting authorities' files for irregularities takes 2-3 hours per file[658]. This is one of the reasons why ANAP stopped checking all files and now checks only a selection. In this regard, PREVENT adds at least a partial conflict of interests check, without spending the extra man hours.

The system sends a notification to ANI in case of a suspect match. ANI's inspectors decide whether to send a warning to the contracting authority prompting measures to be taken or not. Looking at the number of 55 integrity warnings issued over the course of 12 months and after checking almost 16,000 procedures with many times that number of contracts, this figure appears to be low (0.003 percent). Considering the systemic nature of corruption in Romania, this could indicate that PREVENT does not quite catch all the conflicting fish in the sea. And those fish might escape the net because their private interests do not turn up in the data-matching that ANI can do at this time. This is not the only explanation: the use of the system may also work as a deterrent, so that previous conflicts of interest have stopped with the introduction of PREVENT.

This means that the powers of ANI/ANAP regarding accessing data can be an issue and they should be explored further. Funding is another issue. The Agency's budget has dropped significantly since 2016 and the explanatory memorandum for the law did not provide any personnel budget for PREVENT, except some 25,000 EUR per year for services around the system (maintenance and related services). Even though automation of business processes may lead to faster throughput of higher volumes, it does not usually lead to lower costs.

7.3.6. Lessons and next steps

One of the classic problems of corruption detection is that you cannot check everyone all the time and checks take a lot of time, resource, and money. ANAP stopped checking all projects because it was too time consuming. Systems like PREVENT can help address this issue and lower the administrative burden, but their development comes with a cost and also causes new issues, such as corruption risks by manipulating the system itself, information security issues and the privacy issues that they entail.

With a relatively simple system and minimum administrative burden, the Romanian authorities have found a way to detect some of the most common conflicts of interest in public procurement. The conflicts detected can be removed easily and before any harm is done.

To what extent does PREVENT contribute to corruption prevention? Theoretically it removes the risk of conflicts of family, financial, labour, and social cause interest (membership of foundations or associations), at least the most blatant ones. The results after the first year of implementation do however leave the worry that it detects less cases than it should, as shown in the previous section. Statistics about how many procedures and persons were checked should not create a false sense

[658] According to the Strategy regarding public procurement 2015-2020.

of security. While it is unambiguously an improvement on the previous situation, PREVENT does not cover all cases of conflicts of interest.

How could the system be improved? First, the scope could be broadened to include more data, to cover more potential conflicts of interest. Second, a risk assessment could be used to exclude the least risky procedures (and leave them to surprise checks by ANAP). Third, the powers of ANI could be extended to include fines and other administrative measures such as removal of a person from participation in a procurement procedure if the contracting authority refuses to do so. Fourth, complementary preventive mechanisms, such as stimulating whistle-blowers, can be further developed (legislation[659] is already in place in Romania, the practice requires further study). Fifth, measures could be introduced that make it physically less possible to enter into a conflict of interests, for example by introducing randomisation of assignments to review committees. Sixth, procurement data could be used to build trends and look for deviating occurrences that indicate other forms of procurement corruption than conflicts of interest. Conflicts of interest lead to the award of a contract to the favoured instead of the best tenderer, which does not necessarily imply an extra direct cost, but other types of corruption such as bribery make the price of a contract go up. These price hikes appear in statistics and forensic accountants use statistical detection techniques[660] and predetermined 'red flags'[661] to make them visible.

Beyond procurement, these measures could be made part of a comprehensive detection system that looks at all the risk areas in government spending, including grants and subsidies, but also risk-prone policy areas such as permits, concessions, and zoning plans. When it comes to automated means of corruption prevention, we are only at the beginning.

7.4. Technology-aided options for strengthening prevention

The case above shows that automatic processing of public data from different sources can close some options for corrupt behaviour. It also indicates legal limits of such an approach, which will be further discussed in the next section. In this section we will briefly explore some technology options for the described purposes of corruption prevention: removing opportunities/raising barriers, enhancing oversight, charting risks, increase awareness, and detection. Measured by impact, removing opportunities for corrupt conduct is the strongest, because some forms of corrupt behaviour are made physically impossible. Detection can be viewed as post hoc, but it is included here because, apart from the fact that it can reveal *ongoing* corruption, the fact that it exists can also be a barrier for future corrupt actions.

[659] Law 571/2004 protects public sector workers who report misconduct. See chapter 5.

[660] For example, in Kossovsky, A. E. (2014). Benford's Law: Theory, The General Law of Relative Quantities, And Forensic Fraud Detection Applications. New Jersey: World Scientific, p. 26.

[661] See the literature on procurement corruption indicators, such as how many tenderers participate, or the time between advertising and bid opening. The World Bank has an overview published at: http://documents.worldbank.org/curated/en/790591468321562564/Red-flags-of-corruption-in-world-bank-projects-an-analysis-of-infrastructure-contracts. These indicators should be used with care, however. See Ferwerda, J., Deleanu, I., & Unger, B. (2017). Corruption in Public Procurement: Finding the Right Indicators. *European Journal on Criminal Policy and Research*, *23*(2), 245–267. https://doi.org/10.1007/s10610-016-9312-3.

Removing opportunities

Removing opportunities for corrupt behaviour is or can be the effect of many measures implemented under the label of E-government (that has also other goals besides corruption prevention, such as efficiency and ease of use), by removing all contact between decision-makers and those to whom the decisions apply. It is not new. More than twenty years ago for example, the authorities of Seoul (South Korea) already implemented a web-based system for permits, registrations, approvals and even contracts that removed much of the personal interaction between citizens and public officials (Cho & Choi, 2004). These systems have now been implemented in various forms and degrees (think of tax returns) in many countries in the world, including the three studied countries.

Automation helps in situations where briber and bribe-taker do not know each other but agree on a one-off bribe at the occasion of the application. The bribe can be given for activities such as:

- A special treatment: urgent processing, putting the application 'on top of the pile';
- An illegal treatment: granting the permit even though it does not meet the conditions;
- Outright falsification: The official helps the briber falsify a permit (by giving them access to a stamp or a certain form);
- Influence trafficking: The bribe is accepted for wielding influence over another official (by using the bribe or part of it for that third official);
- 'Protection' money: to ward off inspections and controls that will discover errors and impose fines at the building site.

An online system does not remove all the opportunities above. Imagine for example the situation where someone wishes to build a house and rush the building permit process. He knows an official at the municipal office for construction permits – or finds an intermediary who does – and pays him a sum to have his application processed with priority. He then files the application online according to the rules. This behaviour can only be circumvented by eliminating all human intervention (automated processing of applications), anonymizing contacts, or randomizing them so that no one knows who is processing which application – although even this barrier can be circumvented by manipulating the rules of the automated processor or to pay the person who is able to influence the automated randomisation process, to rush applications with certain markings.

Full automation is also difficult to do, because a system for the processing of applications will have to accommodate for exceptional situations (e.g. when the rules are silent).[662] Automated processing cannot allow for exceptions to the rules, and any human intervention opens up an opportunity for (extortive) bribery, influence trafficking, or conflicts of interest. This human risk can then of course be mitigated by implementing safety measures, such as the four-eyes principle that limits personal discretion.

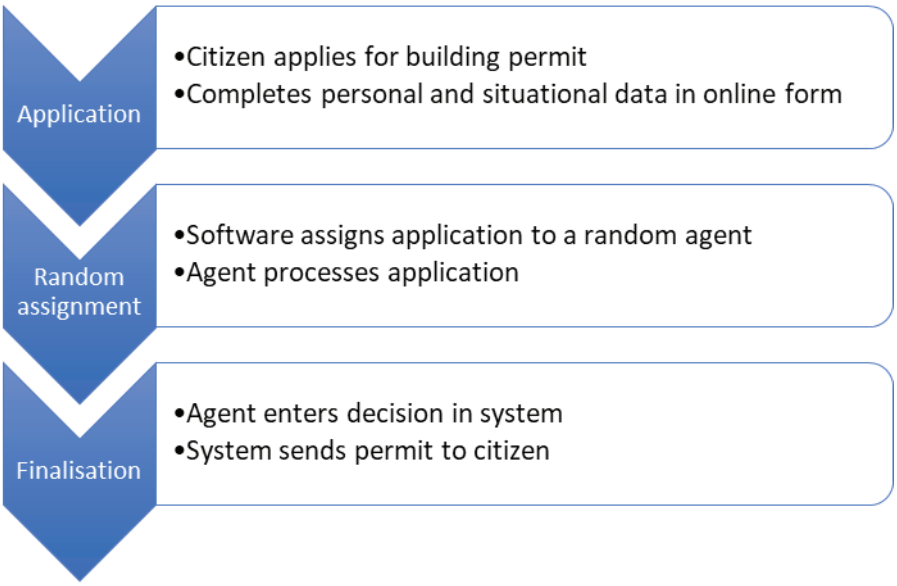
Anonymisation, where the personal data of the citizen are hidden from the public institution, or pseudo-anonymisation, where their personal data are hidden from some public officials but can be retrieved by certain other public officials, may be unfeasible (if the processing of the request depends on the identity of the requestor, such as passport renewals) or undesirable (for example, if the public institution wishes to check whether the person requesting a gun permit has prior convictions for violence). It would be, however, possible in many cases to split the verification of

[662] This is not the only practical issue: For example, there can be unstructured input that is not uniform (such as the drawings of an architect, in a building permit application), or, implementing rules do not allow for digital signatures.

personal data from the verification of other conditions (does the request comply with the zoning regulation, has the fee been paid) and/or randomise the assignment of both parts of the process. The citizen then has much more difficult access to a relevant person he might be able to bribe, and a potential bribe-taker has more difficult access to citizens he wants to extort bribes from.

Online systems also make it easy to have requests from municipality X processed in municipality Y, or indeed any other municipality, that could be across the country or, if randomised, anywhere. Randomisation equally helps against influence peddling, because the corrupt official does not know whom they should influence. It may even make other precautions unnecessary, for example in the case study above, if all procurement procedures would be handled by persons who do not know whose application they are processing, intentional abuse of a conflict of interests cannot happen. Online systems that can be easily consulted by enforcement officials are also useful to verify against official data whether a citizen did not simply falsify their permit (with the help of a corrupt official).

Figure 4: Simplified online application processing



The example in this paragraph shows how difficult it is to make the system bribe-proof. On the other hand, bribing opportunities that were plenty in the absence of an online automated and randomised system, have disappeared. The more the system is automated, the less persons can influence it and the more obvious would it be who the bribe-taker is if an irregularity is discovered. This matters for prevention: it is much more difficult to monitor every permit-issuing official in every municipality than two or three IT specialists and their management.

Removing opportunities can also apply to other corruption issues besides bribery. Think for example of an application that recognizes a conflict of interest and blocks officials from participating in procurement where they have any private interest.

Finally, E-government systems can and are usually implemented for public service or efficiency reasons, something which even corrupt top officials may find hard to withstand if the public calls

for it. Corruption prevention gains can be simply a by-product and such systems could be advocated under the label of efficiency or modernisation.

Detection

Detection of ongoing corrupt acts could be done similarly to what is being used for other crimes, by detecting unexplained wealth. Corrupt acts have benefits: enrichment, privileges, a relative gets a good job, a political party receives funding. These visible elements can be used as proxies for corruption (bribery, conflicts of interest, influence trafficking), to deduct the corrupt behaviour from. And data patterns can be used for corruption detection proxies also, such as in the previously mentioned example of the permits for one company that are processed on the same day while all others take a week, or all public contracts from a certain municipality go to one group of companies. However, while they can be – theoretically – declared unlawful as such or declared expressly in the law as an indication for corruption, unexplained advantages 'for themselves or for others' are not proof of corrupt acts. Because there is no causality or even correlation: these advantages can also be the outcome of correct behaviour.

Not only are proxies not proof, they are not even indications of a specific crime. The examples above may indicate corruption, fraud, embezzlement, theft, or other crimes. But they are anomalies that may be explained by criminal behaviour and as such, police and prosecutors (or even disciplinary authorities within public institutions)[663], but also journalists, may try to use them in certain circumstances as the starting point of an investigation, *in rem* or *in personam* depending on the data. So, proxies should be used with caution. Public prosecutors know this. Scholars know it, too. But the general public may not be equally aware.

There are also more direct ways: bribes can be detected by security cameras, undercover agents, or (anonymous) reporting, for example[664]. But we will concentrate on automated processing of large volumes of data to find connections or trends that might indicate corruption. An organisation from The Netherlands shows how this works in practice. It is called ICOV (*Infobox crimineel en onverklaarbaar vermogen*, criminal and unexplainable assets).[665] Founded in 2013, ICOV is a collaboration between many public sector parties, such as the public prosecution service, the national FIU, the tax authority, the social affairs inspection, the police and others. This broad collection of parties also gives an indication of what types of data are exchanged based on the collaboration protocol.[666] With the data provided, ICOV makes analysis 'products' and reports them back to the requesting partner organisation. One of its purposes, according to the protocol, is 'to chart criminal and unexplained assets, to reveal money laundering and fraud schemes and […] supporting […] tasks of the participating organisations'. According to a 2016 working paper commissioned by the Dutch government's science council[667], ICOV uses fiscal data, land registry,

[663] In situations where a certain crime investigation is preceded by a disciplinary one, in which it is concluded that the case must be referred to the public prosecutor. It is also possible that a case of corruption is not a criminal offense, such as with conflicts of interest in The Netherlands.

[664] Examples of initiatives for bribe detection with the help of the general public: http://www.ipaidabribe.com/#gsc.tab=0 (India) or http://www.piatadespaga.ro (Romania).

[665] See its website here: https://icov.nl/ with a section in English.

[666] The first protocol came into force in 2013. See https://zoek.officielebekendmakingen.nl/stcrt-2019-11302.html for the updated version from 2018.

[667] 'Big data voor fraudebestrijding', Wetenschappelijke raad voor het regeringsbeleid, April 2016, https://www.wrr.nl/publicaties/working-papers/2016/04/28/big-data-voor-fraudebestrijding.

trade registry, and vehicle registry data, and police information on suspicious transactions and previous offenses. However, due to confidentiality and privacy legislation, not all partners can use data from all other partners; especially police information is inaccessible to other parties. There are three types of reports: 1) Assets and revenues of a person or group of persons (detection of unexplainable assets); 2) Networks – ownership, participation, commercial and employment relations; 3) Topical – the combination of a number of factors around a certain topic/research question, e.g. whether public officials in corruption risk positions own significantly more real estate than those in less risky positions but with comparable revenue. The organisation also works on research projects that are not specifically aimed at (groups of) subjects. The paper cites an example of a study of motorcycle gangs with statistical outcomes at the group level (apparently, they are significantly more often unemployed in combination with engaging in suspicious transactions and having tax debts – and one-fifth does not have a motorcycle license). ICOV is used for combating fraud, not (yet) for corruption detection. But it could be used for such purposes; the data are there and so is the technology.

Detection can be used for other preventive purposes as well. A similar system to that described in the case study in section 9.3 could be used for the ex-ante detection of conflicts of interest in hiring and promotion procedures, as discussed below.

If the law prohibits public officials with a personal interest in hiring or promoting certain persons, who may be relatives, friends, godparents, business relations, landlords, persons from the same village, neighbours, persons whom their brother owes money, or others, a large and diverse group, those officials must refrain from influencing the hiring or promoting process, through formal or informal channels. To prevent this influencing, software can be used, in the first place to identify who has an interest in hiring or promoting a certain candidate, and second to alert competent persons that a conflict of interests exists. Third, in a highly automated environment, an official who finds him- or herself in a conflict of interests can even be excluded by the system to participate in decision making – at least through formal channels – by denying them the possibility to perform certain actions (e.g. pressing the button 'approved' or placing an electronic signature) when the rules do not authorize them for those actions. To do all this, the system must have sufficient information about those already working in the organisation, and those who audit, monitor, or oversee that organisation, and about the candidates for appointment – or employment – and promotion. The system also needs definitions of what constitutes abuse of a conflict of interests.

Sources of information must also be documented in a structured way, otherwise the gathering and processing of data can be prohibitively costly or simply take too much time. The population registry has databases and so does the trade registry. Godfathers may be found in church records. But how to find out about informal relations, such as friendships that can influence a person greatly, when they are not registered anywhere? It is possible to request that candidates for positions grant access to their social media accounts, to see who their Facebook friends, WhatsApp contacts or LinkedIn connections are. An AI tool can extract the data and may be able to analyse whether the connected persons do present a private interest or not. But this is a breach of privacy-sensitive data of which the proportionality may be questioned. Besides, it will be easy for candidates to 'clean up' their social media accounts before a check and reconnect after. These are data collection issues; there is also the influencing issue. Formal influencing can be channelled and put in digital procedures. But there is also informal influencing, for example when a department manager whose fiancée's brother has applied for a position with a neighbouring department, goes to put in a good word for him with his peer. In fact, exercising undue influence to obtain private interest advantages does not even have to imply doing anything, for example when the candidate for a position is the nephew

of the director of the institution. Just knowing of this relation might make the HR manager, who's own review is coming up, read the nephew's CV in a more positive light. To combat this effectively, not only would an automated system have to know all the formal and informal relations between the relevant persons, but also be authorized to block actions with the appearance of a conflict of interests – the director's nephew would then be rejected exclusively because of his blood relation. This type of problems is not technical, nor is it legal. It is a matter of public policy whether a 'clean organisation' where 'not even suspicions of nepotism' are allowed, means that those with personal ties to appointed officials cannot be hired.

As an alternative to prevent undue influencing in cases where a private interest exists, the whole process could be made blind. A nationally centralized selective exam and/or procedure, online, for all candidates, followed by random placement in organisations, could theoretically eliminate any form of bias. In that case however, the focus shifts to that centralized system (which does not necessarily use AI as described here). Can it be tampered with to skew results? Can some candidates be secretly informed beforehand of the questions or criteria? But that goes beyond the scope of this section.

We see that detection can go far. With current technology, a scenario is possible where candidates for public sector positions sign away their data privacy to an AI that will then look into their bank accounts, the bank accounts of anyone they've ever received e-mails or text messages from or with whom they are friends on Facebook. The AI will investigate all those person's securities, cars, houses, company ownership. It will look into travel itineraries past and future[668], it will analyse friendships, blood relations, godfathers, concubines. It will follow them around through CCTV footage. The AI will combine all this information and look for suspicious behaviour. When it finds something, it alerts the competent authorities. Hiding wealth obtained from corruption will still be possible, but much more difficult. Of course, privacy is an issue and it will be discussed in the next section.

Risk charting

Similar to detection but focused on *possible* corruption is risk charting using AI. An interesting application of this is the series of risk indicators developed for public procurement in Hungary (Fazekas et al., 2016). In this approach, open government data on procurement is used to build risk indicators for corrupt procurement through a combination with a set of risk factors established with experts. For example: After a public tender has been published, its estimated price sometimes rises sharply in the final contract to cover the cost of corruption, the bribes paid to have the contract awarded to the 'right' company. An analysis of the voluminous dataset with 'big data' techniques[669] shows, in this example, that contracts regarded as high risk based on other factors (such as number of bidders, duration of the procedure) had indeed higher prices. A corruption risk index for procurement was compiled from a large number of these factors, such as:

- was the procedure open or closed
- just one bidder or more
- lengthy or short
- was the tender modified after publication
- exclusion of all but one bidder
- procedure annulled and then relaunched

[668] For example, through airline ticket or hotel reservations.

[669] No self-learning algorithms were used, but techniques such as text mining (automated identification and collection of relevant elements in free text data) and crawling (automated internet search).

- was the execution phase extended
- did the contract value increase during execution

The author warns that the resulting index should not be seen as proof for corruption, but as an indication of an irregularity that could also have other reasons, such as incompetence.

If there are sufficient data available, such an approach can also be used for other government value transfers, such as subsidies, grants, permits, or concessions. In a theoretical exercise for example, driver's licences could be analysed for corruption risks. Since the person overseeing the exam (in Romania, a police officer, in The Netherlands and France, a civil specialist) and the doctor who declares the candidate physically fit to drive[670] have extensive discretionary powers, and since obtaining a driver's licence can be difficult and have financial consequences, the examination can present a corruption risk: the examining person may accept or extort a bribe, or may let a candidate pass in situations of conflicts of interest. The hypothesis could be that, through paying a bribe, a candidate who is not ready to drive obtains a driver's licence so that the risk of accidents or safety-related fines after having received the licence will be higher. Alternatively, or complementary, an analysis could be made of unexplained revenues/assets for the examining persons. In any case, the first step is gathering data. Generally, personal data can only be obtained if there is sufficient cause, but aggregate data on obtained driver's licences, fines, and accidents can already contain relevant information without revealing the identity of individuals. Government data could be stored in databases, as is often the case at the tax authority even in less developed countries, but can also take the form of text documents stored on file servers, accessed through metadata in a document management application. In the worst case, the file server contains scanned forms that were filled out by hand. In almost all cases, preparing data for automated processing and combining data from different sources is in itself an elaborate process, in which choices and assumptions are made about which cases to leave out and which ones to interpret in a certain way,[671] separately from certain considerations that must be made regarding the data set as a whole: For example, in the Hungarian study conducted by Fazekas above, procurement below a monetary threshold was excluded because it did not exist in the national database. The author assumed therefore that the examined data pertained to grand corruption.

After accessing the relevant data, they are thus copied and processed into comparable formats, after which the analysis can start. In our thought experiment, data on accidents and fines are correlated with the number of times the candidate had to try before obtaining the licence. The results can be compared between cities. Other variables may be brought in to strengthen the corruption case, for example the value of the examining officers' real estate could be used to see if there is a connection between getting a licence on the first try, accidents, and wealthy examining officers. Of course, high numbers of accidents could also be caused by lack of experience by drivers who passed the first time, but the examining officer's wealth should not be related in that case.

Having established a relation between obtaining a driver's licence the first try (in a certain period of time and a certain area) and accidents/fines for young licence holders, AI tools[672] can help find

[670] In The Netherlands, candidates usually just fill in a declaration that they are fit.

[671] For example, in the theoretical case with driver's licenses, if the data field for 'previous examinations' is empty, does that mean that the candidate passed on the first try? Or does it mean that they may have tried before but in another jurisdiction?

[672] Such as a clustering algorithm, that groups data according to criteria it discovers: an example of 'unsupervised' machine learning.

other relations in the data that may or may not be relevant, such as 'a passing grade on the first try is granted more often by examining officers who moved recently to the area than other officers'. This could be called a 'fishing expedition', or 'mission creep', the extension of an initial mandate to look for indications without underlying suspicion. The (privacy and criminal law)[673] legality of such an exercise depends greatly on whether data are or can be related to natural persons.

The results, if they reveal relevant correlations, mark the starting point for more research that could lead to criminal investigations, preventive measures, or outcomes unrelated to corruption such as efforts to improve examining persons' evaluation competencies. The more data the better: If the result is that

- Those who pass the exam the first time
  - Cause more accidents
  - Receive more fines
  - Are more likely to have been convicted for bribery, AND
- Those who examined their performance are wealthy, WHILE
- Those who need two or three tries to pass
  - Cause less accidents
  - Receive less fines
  - Are less likely to have been convicted for bribery, AND
- Those who examined them are not wealthy

Then the established correlation would certainly indicate a corruption risk, warranting preventive measures such as always sending two persons to evaluate the examination drive.

Another risk charting example, from the Brazilian government's Observatory of public spending, shows how far corruption risk profiling can go when applied to individual public officials.[674] They built an application (for internal use) where querying a the data on a certain civil servant results in a "probability that the civil servant is corrupt". To arrive at this risk profile, the Observatory trained an algorithm with training data from corruption convictions of civil servants, leading to criteria such as:

- Was the person hired after a competitive exam or not?
- Does the person have prior convictions?
- Do they own a company? Stock?
- What is their position in the hierarchy?
- Are they a political party member?

The Observatory claims to include hundreds of other variables to arrive at a risk profile that a certain person is corrupt.

Profiling for enforcement purposes has been used for many years, the difference here is that AI applications and not 'classical' statistics were used to process the data. Another difference is that risk profiles are usually not applied at the individual level, but rather the risks of a certain area, a certain group of persons, or a certain activity. The Brazilian approach would carry legal risks in the

[673] See 7.5. Fishing expeditions could violate the purpose limitation principle in privacy law and the criminal law principle that there must be sufficient grounds to investigate a person.

[674] The source is a video presentation, to be found here: https://www.youtube.com/watch?v=2prrNVaD-Nc&feature=youtu.be. Further correspondence early 2020 between the author and the presenting official, Mr. Marzago, revealed that more detailed information cannot be obtained, so that corrupt agents are prevented from gaming the system. The Observatory (Observatório da despesa publica) is a department of the Comptroller General's office (website: https://www.gov.br/cgu/pt-br).

studied countries. It can be questioned whether branding an individual civil servant with 'corruption risk' is legal, necessary, and the least privacy-invasive alternative. It can be questioned whether past behaviour is indeed the best predictor for future behaviour, and if it is, what that means for the criminal law principle that someone is innocent until proven guilty and that a crime is erased from the slate after the punishment, as if it had never happened.

Another question is what can be done with the results. In the Brazilian example, no actions had been taken based on the results from the application. When someone is identified as being high risk, they cannot be subjected to disciplinary action if they have not actually done anything. They can be monitored more closely, but even if that monitoring in itself would be legal, any measures that limit human rights would be questionable. Transparency would probably help raise acceptance of the approach, such as sending high risk civil servants a message stating that they were identified as such and offering assistance in case the person should be offered a bribe. But transparency could also give away the criteria used for the risk profile, inviting the actual corrupt officials to game the system by changing some of their characteristics, drop out of the high-risk group, and continue or start with corrupt behaviour.

Awareness raising

A final application of technology for corruption prevention discussed here is tailored awareness raising and education. There are general applications that use technology to raise awareness on corruption cases, such as the case visualization tool that Transparency International France had made.[675] Such tools are aimed at the general public. With sufficient user data, information and messages can be presented also at group or even individual level to those in risk positions. One can think of applications such as:

- The buying manager for a large municipality is about to approve the purchase of 30 laptops when a message pops up on his screen, saying that his cousin is co-owner of the vendor.
- The director of the municipal real estate development department receives a message with guidelines for accepting gifts as he is about to enter a meeting with developers.
- The controller of the Ministry of Sports just bought a new home. He receives a message that he should update his asset declaration in the online portal.
- Managers, doctors, and nurses of a state hospital go through follow-up antibribery training twice a year. Support staff once every two years.
- Contractors receive the same message on purchase orders, contracts, and other documentation that 'bribery or fraud nullifies the contract and leads to criminal charges'.

Technology for the education/awareness raising aspect of prevention may not only be more useful, because better targeted, than just having a policy or doing the same training for everyone each year, but for the same reason it can also lower the administrative burden – those who do not need training, are spared and those who do need it, receive more. Training delivered online can also help lower the burden of integrity officials, for whom this is often a secondary activity. Technological training solutions have higher development costs, but their marginal cost is lower and with many iterations in large public sector organisations can be cheaper. The higher development cost can, however, also push the organisation into adopting standard solutions, for example where every public official does the same training online, regardless of the specific needs related to their job,

[675] A dataset can be found here: https://public.opendatasoft.com/explore/dataset/affaires-de-corruption-en-france/table/?disjunctive.tags&sort=-date_des_faits. The visualization is here: https://www.visualiserlacorruption.fr/home.

or middle management devoting insufficient resources to corruption prevention because they think the issue 'has been taken care of' by centralized training. Keeping in mind that training and awareness are not optimal in any of the three countries (see section 3.3), better use of technology for these purposes should be considered.

7.5. Issues with using AI for corruption prevention

This section discusses some practical and legal issues with the technology applications in this chapter, to give an indication of the barriers that software-enhanced corruption prevention may have to overcome and to achieve a balanced outlook on their deployment. Some have already been mentioned above. Technical issues are not discussed here.

Practical issues

1. Data availability

Predictive analytics for detection or risk charting requires large amounts of data for the algorithms to be trained and make deductions from. Even straightforward, 'classical' statistics requires large data samples to be reliable. If an agriculture ministry wishes to know why one regional office spends so much more on subsidies while it is not in an agricultural area, and suspects that it might be corruption, it needs the data that can exclude other possibilities (the subsidies might have been spent on innovative urban greenhouses) and establish some connections such as unexplainable enrichment or conflict of interest patterns. The ministry must collect data about the suspicious activity: subsidy request forms, underlying documentation, decisions, execution reports, not only from the suspicious office but from others as well, for comparison. They have access to this information but it comes in the form of documents, from which it must be extracted through data-mining (the software must be taught what information is relevant through multiple iterations of human verification, then extracted and loaded into a database). Then, it must gather information about the officials who perform the activities. These data belong to the data subjects, so that data gathering must comply with GDPR and other privacy laws. And the Ministry does not have the power to sequester data from banks, the tax service, social media, or other private communication. It can, however, request public data from the trade registry and the land registry. Those data are stored in databases but may not have the right format. They must be extracted, reformatted, and stored. This data must be combined with the subsidy data – at least one data category must apply to both types, most likely the name of the official who processed the subsidy request. Then to exclude some other logical explanations, housing price and size data must be acquired to see if the local office salaries could not have afforded the real estate the officials live in, the local agriculture sector must be analysed to see if land prices or other factors did not cause higher subsidies, and so on. For researchers with the appropriate access rights, there is a plethora of possible data sources, from the registry of private yachts to the latest M&A data, and a long list of public sector actors may be involved.[676] And finally, relevant data must also be kept up to date and accurate. This example just shows that not only is state of the art prevention a technology issue, it is first an issue of defining the objective, the data requirements, then finding the data, and obtaining access to them. And, access can also be withdrawn. Access to data can be withdrawn by data subjects (barring overriding legal grounds for processing) but if the analysis uses existing data sets provided

[676] See this OECD report on the detection of foreign bribery mentioning, among others, accountants, FIUs, foreign authorities, tax authorities, NGO's, and whistle-blowers: https://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery-ENG.pdf.

by third parties, private or public, that access can be withdrawn, sometimes simply by stopping the uploading of updates to a dataset.

2. Fitness for purpose

When setting up preventive measures with technology, caution is required: Data that is at first sight neutral may be incomplete or biased towards a certain outcome. Sometimes the reason is simply because available data is not what it appears to be. If in a file management system, one official marks a category of documents as 'authorisations', the second one as 'permissions' and the third one as 'licenses' then you must know this or end up with a small part of the actual relevant data. Or, the speedy throughput of a certain subsidy department may be due to efficiency instead of 'cooked' requests.

A more fundamental issue is whether available data really can inform us about (possible) future events, simply because existing data represent the past, and the future is uncertain. The young and bright and highly ethical official who happens to live in a bad neighbourhood and has delinquent relatives, or another who embezzled funds when they were young but since then chose the honest way, may be wrongfully targeted as high corruption risk by profiling algorithms. Detected patterns may be false leads, and correlations can lead to logical fallacies, which happens all too often; there is a reason why the criminal law requires proof of causality and why police investigations are done by specialists.

Another risk of trusting deviant patterns (roads in region X cost triple compared to other regions) for the detection of corruption is that, especially once these patterns become common knowledge, corrupt actors know precisely what to do to stay under the radar and no one will look for them again. A recent paper from an anticorruption NGO[677] highlights how the Ukrainian government developed a new electronic procurement system including explicit criteria for which projects needed closer inspection from the audit service, only to discover that fraudsters simply adapted their procedures to formally comply with those criteria.

The limits of technology become evident when one considers that most corrupt acts do not imply paper trails, or are in themselves illegal, or necessarily lead to visible enrichment. Corruption offenses are easy to hide. Even totalitarian surveillance states, with advanced technology, manpower, and top leadership commitment such as China struggle with corruption of public officials.[678] This is why other measures, such as education to stimulate a 'clean' mindset and support for whistle-blowers, remain crucial. Apart from these limits, technology-aided corruption prevention tends to be more useful for the prevention and detection of petty corruption than of grand corruption. Grand corruption – loosely defined as acts of corruption with large private gains by managing public officials – is probably less frequent, simply because there are far fewer top public officials than other public officials, which leads to less useable data. Besides, petty corruption, such as one-off small bribes for relatively simple public services, can be more effectively eliminated (by e-government, described above) or deterred (by raising salaries) than grand corruption, which makes more use of long term informal networks and takes place outside of formal procedures.

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[677] U4, based in Norway. See its report on AI and anticorruption from 2019: https://www.u4.no/publications/artificial-intelligence-a-promising-anti-corruption-tool-in-development-settings.pdf. The report also mentions a Transparency International initiative to develop an alternative system, "not bound by pre-defined indicators or formulas". See the project here: https://digitalsocial.eu/project/3224/dozorro.

[678] As portrayed in the media, see: https://www.scmp.com/comment/opinion/article/3047198/china-still-anti-corruption-road-nowhere-despite-xi-jinpings and in the literature (Ni & Su (Su Su), 2019).

Yet another issue is that not all technology-aided approaches are suitable for all prevention objectives. In the example above from Brazil, it is one thing to chart individual corruption risks based on shared characteristics with convicted peers but taking measures against an official based on that information is quite something else (and rightly so). Sometimes the data are aggregated at a level that does not permit identification of individual institutions, departments, or individuals, for example when government budget and spending data (on green subsidies, say) are reported at the regional level. And the reverse is also true. Data on limited sets of individuals cannot be extrapolated to make statements about larger populations; network inventories such as delivered by the Dutch ICOV say nothing about other networks.

3. Authorisations

One practical aspect that should not be overlooked is that of human resources and the roles they have in AI processes, specifically who performs the analysis, to whom is it addressed and who has access to it. Is there a central corruption prevention organisation that handles AI analyses? Or (also) the prosecution office? Individual institutions, regarding their own staff? Private sector organisations? Theoretically, any public sector manager who can command the necessary funds, can initiate measures to remove corrupt opportunities, or order detection or risk charting work. In practice however, performing such analyses is costly because it requires specific and rare expertise (from system and database administration to data scientists who develop algorithms). And it would be useless to order analyses if you have no access to its results, for reasons of privacy or secrecy. A cost-effective organisation of the process would then be to have analyses performed centrally, by those with the necessary expertise and the security clearance, such as a judiciary police unit. Leaving the work and data management with such a unit would also make it more difficult for senior officials who are themselves corrupt to misuse AI analyses (to deflect or 'disprove' suspicions).

Legal issues

There are two main legal issues with the technologies described above: privacy (reuse, data subject rights) and unfair treatment (profiling, discrimination).

1. Privacy

There is a need for data sharing because criminals are elusive, and also because government institutions that do not know what other government institutions know are exposed to public criticism, along the lines of: "If the mayor of city X knew that this person was a drug dealer/child pornographer/serial arsonist, why was the police chief of city Y not informed?" But personal data are protected by privacy law.

To avoid the issue of exposing confidential personal data, comparing things with things instead of looking at personal data can be attempted. This way, privacy is not breached unless there is already a suspicion. For example: you can load the incomes of public officials and their spouses in a database, encrypt the key relating incomes to names and compare the incomes to house prices from the land registry, also anonymized, and only when a glaring mismatch is found (automatically), a competent person can use the key to uncover who is the person that owns a house that they could never afford on their official income and inheritance. This can be automated with minimum disclosure of personal data and no paperwork effort for the persons involved.

But anonymity – in the example pseudo-anonymity because it can be reverted – only goes so far. At the point where criminal or disciplinary offenses are discovered, prevention will turn into

repression and personal data are necessary to individualize the corrupt official(s). Then it must be demonstrated that the personal data were treated according to the law from start to finish. The question is thus, what the legal limits are regarding the collection and processing of data related to public officials for the goals of corruption detection and risk assessment. All three studied countries being member states of the EU, the European privacy legislation is leading, while the ECHR also applies.

When reading the law, it should be considered that the data subjects are not ordinary citizens but public officials, who may be less protected than the general public. While there is no doubt that public officials have a right to privacy, simply because they are also EU citizens, they may not be enjoying the full constitutional protection of citizens against abuse of State power because of their subordinate relation to the State in order to be loyal parts of its apparatus. And there are other arguments brought forward to justify encroachment on privacy. According to the UNCAC technical guide, transparent monitoring can be considered even in the absence of indications of wrongful behaviour:

"It may also be advisable to explore ways to monitor lifestyles of certain key officials. This would admittedly be a rather delicate matter and would need to be approached with due regard to, and in compliance with, applicable laws for the protection of privacy. Such monitoring may include looking for tell-tale signs in living accommodations, use of vehicles or standards of vacations which may not be consistent with known salary levels. Individuals' bank accounts may also need to be monitored, provided that such monitoring is approved by employees in their contracts."[679]

In certain cases, national laws also breach privacy principles for certain purposes. An example is the Dutch law that allows data sharing (i.e. reuse for other, not originally stated purposes in the sense of the GDPR) for fraud prevention, among other purposes. This is section 5.2-5.7 of the 'Besluit SUWI' (Government implementing decision on the organisation of allocations distribution)[680], where different public institutions, such as the tax authority, municipalities, the allocations distributor UWV, the Inspection social and labour affairs and others can all exchange information 'for monitoring and enforcement' between each other, but also disclose information to third private parties (e.g. insurance companies). The SyRi system, based on the same executive act, that the Dutch government employed to detect benefits fraud automatically, is an example of new technology that was used in violation of Art. 8 ECHR, according to the Dutch judge.[681] Another example of this phenomenon, but with 'old' technology, is the 'national security' phone taps that the Romanian anticorruption prosecutors received from the internal security agency and based their cases on. This practice was declared unconstitutional because of oversight and transparency issues that conflicted with the code of criminal procedure.[682] A similar data exchange example is the French legislation authorising the exchange of personal data to combat health insurance fraud.[683] Another French example is from case law, where the Cour de Cassation ruled that employers may

[679] See https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf, page 15.

[680] See: https://wetten.overheid.nl/jci1.3:c:BWBR0013267&z=2020-01-01&g=2020-01-01.

[681] See: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:865)

[682] There are multiple decisions on the same issue. The latest: http://legislatie.just.ro/Public/DetaliiDocument/211779. See this news coverage regarding a previous decision: https://www.rri.ro/en_gb/the_week_in_review-2544689. See also a previous conviction on the same grounds by the ECHR: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1995439-2103500%22]}.

[683] See Décret no. 2015-389 of April 3, 2015, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000030457991&dateTexte=20200325

access private files of employees, if the respective employee is present.[684] Note that these examples refer to 'ordinary' citizens, not public officials.

We shall consider a fictitious case, again based on the far-reaching example from Brazil that was discussed above. The tax authority in one of the studied countries notices that corporate tax revenue from mid-sized companies is down significantly, without any explaining macroeconomic factors. They discover that tax assessments are often corrected downwards after a request and subsequent visit from the tax inspector to the company offices. Suspecting that bribery could be involved, the tax authority's internal affairs unit decides to build corruption risk profiles of all individual inspectors, to see if high risk correlates with granted assessment corrections after visits. Based on expert interviews and corruption convictions (through data mining and automated analysis), a set of criteria is made to establish the risk that an official may be corrupt. The criteria include past convictions or disciplinary measures of any kind, past convictions of direct colleagues, unexplained assets, area of residence, relatives or social contacts who are known criminals, unusually fast promotions, unusually high or low workload, and deviant use of exceptional procedures. The data are gathered from police records, personnel files, population registers, tax records, bank records, real estate records, and the social media profiles that the researchers had access to because they had been allowed to connect by the data subjects under scrutiny.

The "[automated and/or file-structured] processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences" is subject to an EU *lex specialis*, Directive (EU) 2016/80[685]. Not being a regulation, it was transposed into national law with a deadline of May 6, 2018.[686] Public institutions that do prevention work but have no specific mandate for crime prevention or criminal investigation of corruption are excluded from the scope of this Directive, which would probably exclude all relevant authorities except the police and the public prosecution, except perhaps Romania's integrity agency (ANI). France's AFA is a policy organisation that does not conduct investigations, at least not in the public sector. The Directive states its principles in Art. 4 and elaborates these in subsequent articles. The most salient ones are that processing must be

- Necessary for the performance of a task carried out by a competent authority (Art. 8);
- For 'specified, explicit and legitimate' purposes only;
- Using no more data than necessary;
- Kept no longer than necessary if individuals can be identified;
- Necessary and proportionate if for another purpose than the data were collected for;
- Open to human intervention, in the case of automated decision-making, including profiling;
- Demonstrably compliant with the stated principles.

Assuming that the fictional case above is in the hands of an authority competent to prevent and prosecute corruption crimes, there is a number of tests that the data gathering must prove to pass in order to be legal (evidence in court):

1. There must be explicit legal grounds for processing;

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[684] Cour de cassation, July 4, 2012 (https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000026160977). Later confirmed by the ECHR in Libert v. France.

[685] OJ L 119, May 4, 2016.

[686] In Romania by Law 363/2018, in France by Law 2018-493, and in The Netherlands by the Besluit implementatie richtlijn gegevensbescherming opsporing en vervolging and the Law of October 17, 2018 (Stb. 2018, 428).

2. Only data strictly necessary for the purpose (to see if high corruption-risk officers give more tax breaks) may be used. This is difficult to prove for individual data types, because for big data processing the rule is 'the more the better', but in a gradual way. No individual data types are determining the quality of the results;
3. In the example, the data do identify individuals, so they must be destroyed when no longer necessary. Since the data may become evidence in a criminal case, they must probably be kept until a deadline set by the rules regarding criminal evidence, at least until a final and irrevocable court decision. But data that later turn out to be irrelevant must be destroyed earlier, and the destruction must be documented;
4. Since the processing is aimed at profiling, human intervention must be possible. A competent person must be able to change the outcome of the processing before there are legal consequences;
5. The fulfilment of all conditions above must be proven, even when the personal data are no used in a criminal trial. In case of restrictions to data subject's rights (e.g. Art. 15 of the Directive) they must be necessary and proportional.

Using similar principles, the General Data Protection Regulation (GDPR)[687] is relatively flexible on breaches of data subjects' rights by public authorities. Its Article 23 allows restrictions of data subjects rights – such as the right to be informed of any processing or data breach – for a broad array of policy purposes, such as criminal investigations or crime prevention, or (for cases where types of corruption are not incriminated) 'important objectives of general public interest' among which the integrity of the corps of public officials could probably be counted. The condition (same article) is that there be a specific 'legislative measure' with specific provisions on types of data, purpose of processing, scope of restrictions. If the purpose of the restriction (in our case, corruption prevention) could be prejudiced by informing the data subjects about the restrictions, informing them may be omitted. This does not absolve the public authority of publishing specific legislation with specific provisions, however, for any restrictions to have a basis in law. Attentive officials will thus learn about the generic data collection with rights restriction from the official gazette. There is special attention for automated processing and profiling, against which the data subject must be able to object unless this right is explicitly restricted by law (Art. 21 read in conjecture with Art. 23). Completely automated individual decision-making is only allowed if the respective authorising law contains 'suitable measures' to protect the subject's rights, freedoms and interests (Art. 22), unless these measures are themselves restricted by Art. 23, in which case the general conditions for restriction of rights apply, as follows:

The introductory phrase of Article 23 also states that any restriction should respect "the essence of the fundamental rights and freedoms" and must be "a necessary and proportionate measure in a democratic society". This formula leads to the EU Charter of Fundamental Rights (Article 7) and the ECHR (Article 8) because gathering personal data and using them for monitoring and risk assessment can interfere with the respect for the official's private life. The Court has extensive guidance on its Article 8 case law[688] but the criteria in the presented cases can be reduced to the proportionality principle: authorities can gather personal data, but not without balancing the

[687] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of May 4, 2016, p.1.

There is also an e-Privacy Directive (2002/58/EC, to be replaced by an e-Privacy Regulation), but that legal instrument does not apply to the scope and the actors of processing discussed here.

[688] See https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

benefits against the intrusion, not for any length of time, not without safeguards against misuse, and not without unnecessary obstacles to accessing the data by the subject.

In our imaginary case, an important missing element is 'specific provisions': without a legal basis, no public authority may collect personal data and for restrictions of the rights of data subjects, it must be precisely indicated what the authority can do and for what purpose. This also applies to reuse for another purpose (see Article 6, point 4, GDPR). It would be less relevant whether the data would be collected from work situations (such as the use of exceptional procedures in our example) or from completely private situations (what house an official lives in): work-related personal data are equally protected. Then, the proportionality criterion would limit the amount and categories of data collected. For example, registering the names of a public official's Facebook friends in a database does not only interfere with the privacy of the official, but also with that of the friends. Recording Facebook posts or messages would be an even greater interference. But if an algorithm would retrieve and store only the names that match a database of convicted criminals, the interference would be less. But would it still be proportional if the personal data of thousands of officials were processed for the identification of one or two rotten apples? The judge in the Dutch example thought not (see note 678 above), because the disputed system was targeted at benefits fraudsters and had not actually caught one. Corruption may be considered more disturbing to society, which would influence the scales.

Another example of how complex the proportionality discussion can be is the possible effect of recording relations. Assuming that social media accounts can be legally accessed for corruption prevention purposes, which is already a significant step up from using public records such as the population register, the circle of persons under scrutiny will be enormously enlarged. But will that be more effective to prevent conflicts of interest or influence trafficking? When all Facebook friends and phone contacts are known, would those practices really be prevented? No, because the list of possible contacts is endless. For example, the HR manager in a conflict of interest does not hire their cousin, who is being watched because they have each other's phone number, but that cousin's spouse who incidentally does not appear in the list of contacts. Following this reasoning, the argument that and how identifying contacts reduces the risk of corruption by making it harder and riskier to be corrupt, must be carefully constructed or be thrown out during judicial review.

Time-limits for retrieving and storing data is another proportionality aspect. In the fictional case above, there are no limits established. But the general principle is that personal data can be stored until their usefulness runs out (Article 5 GDPR) so that it must be established how far back in the past the data are still relevant (do unexplained assets of ten years ago give information about possible corruption that is now ongoing?). Furthermore, specific provisions in the criminal law must be complied with, as noted on the Durham example above (Oswald et al., 2018): "There must be considerable doubt however over the legality of the use of certain pieces of older, known information about a person's past. […A] rehabilitated person shall be treated 'for all purposes in law' as a person who has not committed the particular offence.' Using such data as basis for sanctions may be illegal.

Reflecting more generally: Many people these days, and also public officials, disclose their personal data voluntarily to all kinds of data controllers, from online shops to social media companies. And going to work for the government is a choice. The first step, applying for a position, already implies sharing all the personal data in the CV. Sharing personal data with the employer is a natural and frequent occurrence. The main condition is, however, that the data subjects know what they are exposing themselves to. It would thus be of great importance to explain to every appointed or hired

public sector worker that their personal data may be used for corruption prevention monitoring.[689] The more infringing use of secret surveillance would then require a more serious situation of criminal investigation based on concrete indications.

6. Unfair treatment

Under this label we discuss two issues of automated analysis and profiling: opacity and discrimination.

Opacity was one of the reasons the Dutch SyRI-system was ruled illegal and the data protection regulations discussed above contain measures against it: data subjects must be informed, data subjects must have access, options for redress, and the possibility to obtain human intervention in completely automated decision-making processes. This reflects the reality that artificial intelligence can learn, through trial & error and rearranging categories and similarities, to modify and combine algorithms in a way that was not originally input by the human engineers. It becomes a black box, with an input and an output, and no one can know why the AI came to a certain conclusion unless all the calculations are done again (with other software, it would take humans much too long). This is a problem because the court must know why a certain person was labelled guilty (by the prosecutor, or by their employer), otherwise it cannot dispense justice. Even accessory use of this type of evidence along with other 'classical' evidence where the trail of logic is evident, may not be legal. If we make a parallel with other types of evidence where the judge cannot ascertain for herself the value of the presented data (for example, a biochemical analysis of the remains of a victim), it might be possible to bolster AI analyses with sufficient procedural safeguards so that the court can still be satisfied about its validity, even if it does not understand exactly how the software came to its conclusions. Such safeguards could be a guarantee of impartiality, for example, if the analysis were not performed by the prosecutor's office itself but by a national general facility that works on request but is not subordinate to the prosecution. It should also be noted, as the defence argued in the Dutch case, that disclosing the model on which the risk assessment was based would allow potential criminals to 'game the system': continue with their illegal activities while taking care not to be detected with criteria from the model. A completely open government-style assessment would thus undermine its very activity: the original indicators for wrongdoing would have to be respected by potential wrongdoers, which would be a gain. But that gain could be offset by the impossibility of using the same model twice.

Discrimination can be intentional, built into the categorization criteria by humans, and unintentional. AI systems have no perception of human values but may combine characteristics of (groups of) persons in ways that puts them at a structural disadvantage compared to other groups. If an AI made the decisions, public officials with an immigration background from corrupt countries could be prevented from making promotion or even from entering the public service. Recent literature (Todolí-Signes, 2019) cites multiple discrimination issues with the use of AI for HR decisions:

1. Even when certain characteristics are explicitly excluded, it can infer possible discriminatory information (such as ethnic background) from other information (such as area of residence).
2. Because AI uses existing information in society, it may perpetuate existing bias. If currently 90% of the convicted corruption offenders are men, the AI could structurally discriminate against men for high-risk positions.

[689] This also becomes clear by Copland vs The UK (ECHR, 2007): http://hudoc.echr.coe.int/eng?i=001-79996 where intercepting phone traffic was deemed illegal because the person was not informed and there was no specific legislative provision.

3. Algorithms prefer to take decisions based on more information rather than less, to lower the risk of wrong decisions. This is laudable but contains a bias against groups or individuals about whom there is less information available (such as speakers of a minority language). If candidates for a civil service job are assessed using online data, persons in Romania from minority populations such as Hungarian-speakers would be at a disadvantage because their online profile in Hungarian can be compared with a lot less other profiles than Romanian-language candidates.

It should not be forgotten that the use of algorithms can be also beneficial: apart from the clear benefits of big data processing in little time while building correlations that human analysts would take years, the software itself is also not hindered by any bias or prejudgment, or any kind of feelings really. It will not overlook wrongdoing out of empathy, try to cover up results, or bring down that particularly hateful person. Whatever bias may come out of it, was already present in the input data and the choices, conscious or subconscious, of those who fed it the data.

One does not compensate for another, however. Superfast bulk processing does not make discrimination go away. And the most important remedy is the same as for opacity: transparency, access to data, and the obligation for the data controller to show which measures they took to mitigate the risks for human rights such as the right to equal treatment, to privacy, and to a fair trial. The data controller (the employer, the competent authority) must implement these 'suitable measures to safeguard' (Art. 22, GDPR) conscientiously or be exposed to administrative fines, appeals and civil suits from data subjects who had their rights violated and suffered legal consequences, while a suspect in a criminal trial might be acquitted for violating Article 6 ECHR.

7.6. Closing remarks

The similar legislative coverage in the three countries on most of the 'traditional' corruption prevention topics in this study indicates that laws and policies cannot explain the differences in corruption incidence. More laws and policies are thus not the answer, but could artificial intelligence be it? New technologies offer hitherto impossible depth and breadth of preventive analysis and detection. The argument according to which such a panopticon was impossible to achieve as well as reprehensible, has lost half of its premise. This is why we must think about if and how these new technologies could be put to use.

Some types of automated analyses do not use personal data to establish trends and correlations. They have few of the issues that personal data-processing analyses have, although they can be just as bias-prone. One of the most important issues is privacy, because most of the times personal data are used extensively. A discussion on privacy versus more openness regarding the doings of public officials, could go along the lines of: In an age where people give their most intimate information to Google, Apple and Facebook (and probably some foreign governments), why would you object, on the occasion of joining the civil service of your own free choice, to giving your personal information to a designated public authority in your own country, that uses transparent procedures and is democratically controlled, with judicial review as your option for redress? It may be possible to reveal personal information to investigators only when a suspicious pattern is confirmed. And of course the retort would be that, while in principle most people have no objection to share their personal data with a trustworthy party, in practice they are not so sure whether the government, with its special powers of coercion, will use them fairly. You can say a lot about Facebook, but they

cannot fine you and cannot put you in prison for thought-crime. Data subjects need the safeguards that ensure respect of their fundamental rights.

After having discussed in this chapter the novel phenomenon of automation in corruption prevention, with some cases, examples, options, and issues, it would therefore be interesting to see if a list of minimal conditions can be established, and what some practical implications of these conditions would be. We appeal to an article cited above (Oswald et al., 2018) for the framework that they used for the deployment of algorithms in police work, in a slightly modified and shortened version, as follows. The use of AI for corruption prevention (regardless whether personal data are involved, as outcomes or as inputs) requires:

- Dependency: Systems should not be autonomous, but a human should always take the decisions (i.e. draw ultimate conclusions from the analysis and establish the consequences) or be able to change 'decisions' taken by the AI;
- Legality: There must be specific legal provisions for the use of the AI, including at least the purpose and the data categories that can be used. There must also be provisions to challenge the outcomes with the administrative authorities and/or in a fair trial (to rectify source data or challenge the correctness of the processing/the conclusions);
- Responsibility: A public official must be responsible for data entry and (another or the same) for granting data access/data security;
- Transparency: It must be possible to discover and explain (by a person with specialist expertise) how the AI has come to its results, through the weighted categories that were input or that the AI developed;

If these conditions are met, and the analysis in question could violate the right to privacy, then two more conditions apply:

- Necessity: There is no other way to reach the objective;
- Proportionality: The violations of privacy must be offset by gains in the public interest.

These conditions are also an answer to the question in the introduction to this chapter, how the new technology could be put to good use to prevent corruption. Next, 'technical' conditions could help keeping costs and processing time down, for example the obligation for all EU law enforcement/anticorruption authorities to use one data standard that is open and simple, such as the open contracting standard in public procurement[690], and to use a common baseline security standard.

In any case, the first step is to adopt specific legal provisions that provide the legal basis for the use of AI analyses in anticorruption, similar to that for combating fraud. The transparency principle would also require that monitored data categories would be indicated in officials' contracts/appointments. Broad legislation – for all crimes – might violate the purpose principle. The responsibilities could be organized as follows: 'Institutions A, B, and C, are allowed to share data categories X, Y, and Z, to be analysed with the use of software for the purpose of risk analysis, detection and prediction of criminal and disciplinary corruption offenses. Each institution is responsible for the correctness of the data they hold. The processing institution is responsible for the security of the data it processes.' An alternative would be that the law allows institutions to share data with a central institution, that processes them and is responsible for access and security.

To circumvent the stricter conditions for the processing of personal data, analyses could be divided in two parts: First an analysis based on actions ('Did the building permits in City X in year

[690] See: https://www.open-contracting.org/data-standard.

Y legal conditions? Were they rushed? Which requesting legal persons received them very quick and do those permits correlate for building code violations?'). After the results of the first phase would indicate wrongdoing, then they could be correlated with the officials who processed the permit requests and at the same time check for alternative explanations, e.g. if an official rushes everyone's applications hands out permits that violate the building code, then it would be rather incompetence, while if they do it for only a some requestors, this could indicate bribery). A human specialist would then take the results and assess whether they warrant further investigation. But the conditions for the second phase are strict. The greatest difficulty with automated analyses is not the fact that the right to privacy is being restricted, because non-automated analyses do the same thing. Making the workings of algorithms transparent and convincing to a judge might be the greatest challenge. Amazon can get away with saying 'we don't know why our software recommended you this item for purchase' but a prosecutor in court does not have that luxury.

8. Conclusions and recommendations

This final part of the study recapitulates the main findings from the different chapters. Together, these topics try to answer the main question, what the most important differences and similarities are between the laws to prevent corruption of civil servants in the three studied countries, and between the ways that these laws are put into practice. A general conclusion and some recommendations for law- and policymakers form the last section.

8.1. Conclusions by chapter

Legislative coverage

The second chapter of this study inventoried in what main laws the topic of corruption prevention is treated. The first thing to note is that none of the countries have a special corruption prevention law: the subtopics that make up corruption prevention are scattered throughout national legislation, although the French law is the most compact. There may be good reasons for that, or it may be a matter of coincidence. In any case, that what prevents corruption also prevents other societal woes – fraud, abuse – so this absence of a dedicated law is probably no sign of a legislative oversight. However, it may denote this topic's struggle on the political agenda. Prevention is not heroic; it does not deliver results such as seizing criminal assets for which special laws were made in many countries. When prevention works perfectly, as a result nothing happens.

Each of the three countries provides prescribed and forbidden conduct in the criminal code (next paragraph) and in a law that governs the rights and obligations of public officials. These laws have also been recently updated, among other aspects to reflect the changing position of public officials in society: the Romanian Administrative Code entered into force in 2019, The new Dutch law regarding public officials in 2020, and the French main law regarding public officials was significantly modified in 2017 and in 2020. These laws, referenced throughout the study, each contain the principles by which public officials must act. The Dutch law does not go further than the principle level but does contain more concrete obligations for the employer than the other two laws. The French and Romanian laws contain a similar set of obligations to steer the conduct of officials.

Another main weapon against, or rather, condition to combat corruption is transparency, or freedom of information. This is in many countries the subject of a dedicated law, also in the three countries studied here. Romania and The Netherlands have older laws on this topic. In The Netherlands, a new law is struggling to get adopted for fears that bold new openness may prove too costly. The French law is more recent and includes more provisions regarding the 'digital age'.

A third chief topic of corruption prevention is monitoring and control. There are many forms and actors involved in this activity: internal monitoring, by management, by auditors, and outside monitoring, by civil society and external actors. It is not surprising that there are also multiple laws involved in the three countries.

Besides these main topics, there are several special laws on subtopics of prevention, such as laws regarding whistle-blower protection, or laws regarding specialised anticorruption institutions. And of course, each country has also adopted a host of implementing regulations to prevent corruption.

The main conclusion from the legislative overview is that the main national legislation in all three countries is quite complete. Only a few topics recommended by international instruments (such as the UNCAC) are missing. Another conclusion is that the main laws in the three countries are quite similar.

Prevention institutions

One of the recommendations of the UNCAC is to set up a dedicated corruption prevention organisation, with two main tasks: coordinating prevention policy and informing the public. Only France has such an organisation, the AFA, and only since 2017. Romania's ANI verifies assets and interests of public officials (the HATVP does this in France), but it does not coordinate policy and public information is not one of its principal activities. The Netherlands have no organisation comparable to AFA or ANI and corruption prevention policy is organised at the level of individual institutions.

Sanctions

In France and Romania, public officials who abuse their position for private gain can be sanctioned through administrative, disciplinary law even if their conduct is not criminally sanctioned. The Dutch situation has recently become more complicated. The special status for most public officials has been abandoned on January 1st, 2020. The Civil Code provides the possibility for dismissal in case of integrity breaches. Collective and institutional labour agreements can provide options for other sanctioning and internal dispute resolution. Central government institutions are all subject to a collective labour agreement that does provide different sanctions, but the same instrument for local government institutions does not provide this, leaving 'disciplinary' sanctioning to individual institutions that may or may not provide them. If employers, through lack of instruments, only have the choice between no sanction and dismissal in case of an integrity breach, there is a risk that public officials will be sanctioned too harshly or that no action is taken against them when a lighter sanction would have been warranted. The same situation applies to enforcement: In France and Romania, powers and structures have been attributed by law to ensure that sanctions can indeed be imposed in cases of wrongdoing. In The Netherlands, this arrangement takes place at the institutional level, without centralized oversight or data aggregation. By not having a national baseline in the law for disciplinary sanctions and their enforcement, the Dutch framework of non-criminal sanctions is relatively weakened. Other than this Dutch rearrangement of responsibilities, disciplinary sanctions are highly similar: reprimands, promotion holds, pay cuts, and dismissal.

The three countries' criminal laws are largely similar regarding corruption offenses, as described in Chapter 2, but there are also some notable differences, shown in the table below. The article numbers refer to the national criminal codes, except where indicated.

Table 20: Corruption offenses in Romania, France, and The Netherlands

	Romania	**France**	**Netherlands**
Active bribery	Art. 290	Art. 433-1	Art. 177-178
Passive bribery	Art. 289	Art. 432-11	Art. 363-364
Influence trafficking	Art. 291-292	Art. 432-11	-
Abuse of office	Art. 297	Art. 432-1	-
Extortion	Art. 301	Art. 432-10	Art. 365, 366
Favouritism	Art. 301, Art. 10 of Law 78/2000	Art 432-14	-
Interest-taking	Art. 11 of Law 78/2000	Art. 432-12	Art. 376

The comparison comes with a warning that similar labels do not mean similar facts: Due to slight differences in the descriptions, it cannot be concluded that the same facts are incriminated even if the offenses are labelled the same. With this in mind, it can still be concluded that the Dutch criminal law is silent where the two other countries have specific provisions, on traffic of influence, abuse of office, and extortion. This could have been compensated by a general abuse of office offense that incriminates 'abuse of public office for personal gain', but such an offense is also lacking. The criminal law coverage of corruption is thus similar in all three countries, but less extensive in The Netherlands.

Screening, education

Chapter 3 treats these subjects in the sphere of human resources management. It appears that only in exceptional cases candidates are barred from access to the civil service for reasons of corruption prevention. Except for a few high-risk positions, where screening may be more thorough, public officials are screened in a limited, formal way by reviewing (part of) the candidate's criminal record. Re-screening after entering the public service is rare, and so is the use of psychological testing or other review mechanisms to verify the candidate's penchant for probity. In light of the importance of personal moral convictions for an official's conduct, it should be investigated whether more extensive screening leads to less integrity incidents.

Awareness and education are the most important corruption prevention instruments, not based on extensive legislative provisions but judging from the prominent place they occupy in the policies of the three studied countries. Despite this, the awareness and education efforts in practice reach only a small part of the public service in France and Romania. The Dutch situation may be rosier because integrity discussions are built into the HR cycle. However, in The Netherlands there is no central monitoring or coordination so that data are lacking. It would be advisable for all three countries to train all public officials periodically, at least once a year, in a documented way so that practice can be measured. It may be necessary to train high-risk officials more often and/or more extensively.

Conflicts of interest

Compared with the recommendations from international instruments detailed in chapter 4, Romania is doing too much, The Netherlands too little, and France just about enough. Romania imposes restrictions for public officials to occupy positions in unions and political parties and obliges all public officials to publish declarations of assets and interests. The Netherlands has few formal restrictions for secondary activities and obliges only a handful of officials to report a limited set of data to their employer. In France, selected categories of senior officials publish asset and interest data and just like in Romania, commercial activities are formally restricted.

Romania and France also have organisations that verify the data, although the capacity of Romania's agency is completely insufficient for the task (France's would be, too, if they had not limited their own scope to sample verifications). In The Netherlands, voluntary reporting of conflicts of interest by employees is discussed with them by management. No other reporting or verification takes place, except for some tens of persons at the absolute top of the public sector. When closely analysing practice cases, some restrictions in each of the countries do not stand up to scrutiny.

Whistle-blowers and integrity counseling

Because whistle-blowers can reveal wrongdoing that would otherwise never have reached the competent authorities, they are of great interest with regard to corruption, although the incidence of whistle-blowing is low and probably will remain so, even if all current standards of protection are put in place. International instruments prescribe protection of whistle-blowers against retaliation, facilities to assist them and the possibility of (anonymously) reporting to the authorities, the public or the press. A recent EU Directive aims to set a standard for the protection of persons who report on EU-related policy areas. Implementation of this Directive is mandatory for the three studied countries and some national rules must be changed by the end of 2021, for example in Dutch law a legal option must be provided to report publicly. However, protection for whistle-blowers is already in place in the three countries, having dedicated rules to cover this topic, with considerable procedural differences and slight differences in protection levels.

A number of factors stimulate or impede whistle-blowing. A first factor is loyalty. Romanian law encourages loyalty to the institution more than the other two national laws. As if to compensate, Romanian law is also the only of the three to make it mandatory for public officials to report any criminal conduct that they learned of. Another factor is protection of the whistle-blower's identity. This is most comprehensively protected in France, with some loopholes in The Netherlands and Romania. A third factor is protection from liability and retaliation, which is only partial in the three countries, with the strongest protection in France, but may be better covered by the new EU Directive, depending on the transposition. A fourth factor is the possibility of financial incentives for whistle-blowers. This is not an existing practice in any of the three countries, but it could be worth a try.

Integrity counselling can be a support for whistle-blowers, but it seems that in practice these persons, who are generally available in each public institution, are not consulted often. Nor do they have much availability, this role is almost always assumed next to other responsibilities. They are also often untrained, not formally independent from management in The Netherlands or France, and have only in Romania an active role including awareness training.

Transparency and monitoring

Transparency and monitoring occupy a less prominent place in international instruments than other topics, but EU and national legislation cover the topic with special laws on transparency, that have highly similar provisions. However, chapter 6 shows that the access to public sector information is well guaranteed on paper but suffers in practice from institutions that are reluctant to act out the principle that everything not secret is public. The result is that phrasing FOI requests can be difficult, there are relatively few requests, refusals and complaints are significant and judiciary review takes months, making requests on time-sensitive issues useless. Additionally, aggregated public information about transparency practice in the three studied countries is scarce, which is hardly transparent.

Within the framework of transparency, three subtopics were discussed. On the related topic of lobbying registers, France clearly invests more efforts than the other two countries. The Dutch seem to be doubting its importance, there are hardly any rules. The Romanian government did launch an initiative but has so far not developed it properly.

The next related transparency topic of publishing civil servants' personal data shows an enormous difference between Romania and the other two countries. In Romania, all civil servants are required

to publish extensive asset and interest declarations on the internet, to be scrutinised by the public. In the other two countries, hardly any civil servants publish personal data.

Public officials are, in our three studied countries, relatively well-paid, well trained professionals with possibly a certain pride in their status. It is not hard to imagine that they are just the category of professionals who work best when given responsibility, to uphold the public interest unsupervised. Then again from a risk analysis viewpoint, one should trust but verify, after Reagan's borrowed quip. The first is seen to be the Dutch attitude regarding corruption prevention throughout the study. The French and Romanians adhere to the verification by hierarchies, and in the Romanian situation also by the general public, while the Dutch prefer to place responsibility at the lowest possible level and give preference to privacy.

Regarding the transparency of subsidies, permits, and procurement data, these data can be found in many cases online or requested individually through FOI legislation, which helps public scrutiny in individual cases. But online publication is far from complete and not always in open formats, hampering the automated analysis of patterns and trends.

Under the topic of monitoring, the study reviewed rules and practice of monitoring inside and outside the public sector. Monitoring and auditing structures inside and outside public sector institutions report on corruption incidentally. Romania has a significantly higher incidence of corruption press coverage than the other two countries but in all three countries, press reporting is lower than expected based on the number of corruption cases. According to reports, the Romanian press is in the hands of personal interests, and the French press suffers from attacks, but the press in The Netherlands is strong. Most anticorruption NGO's present in each country do not assume a watchdog role to research individual cases but can of course play a role in enhancing prevention policy.

In consequence, the main question phrased for this chapter, which was how information is being made accessible for external monitoring and how this access is being used, can be answered with the word 'suboptimally'.

Preventing corruption with software

After reviewing some options in this novel field of corruption prevention in the last chapter, the conclusion is that there is significant opportunity to enhance corruption prevention and detection with software automation. However, a specific set of criteria in legislation is required that enables the authorities to gather data and conduct automated analyses while not disproportionally infringing the rights of citizens.

At the time of writing, in May 2020, nothing can be said with certainty about how government monitoring with big data, and its acceptance, will develop after the pandemic caused by the novel coronavirus has passed. However, as the Orwellian saying goes, power is never seized with the intention to relinquish it. The Economist's lead article of 26 March 2020 reflects that: "The most worrying is the dissemination of intrusive surveillance. Invasive data collection and processing will spread because it offers a real edge in managing the disease. But they also require the state to have routine access to citizens' medical and electronic records. The temptation will be to use surveillance after the pandemic, much as anti-terror legislation was extended after 9/11. This might start with tracing tb cases or drug dealers. Nobody knows where it would end, especially if, having dealt with covid-19, surveillance-mad China is seen as a model." Replace disease with corruption, and there you have the dilemma. A legal framework is a necessity.

8.2. General conclusion

Corruption prevention, like all prevention, is an effort with invisible success and all too visible failure. It can never be done right, but it is better than doing nothing, so it must be done. And there are several ways to go about it, as this study has shown.

In the first place, the legal topics required by international instruments are mostly covered in our studied countries, and often in a similar way. All three countries have adopted legal provisions on incrimination, integrity, transparency, and the other discussed topics. We have seen throughout the text that in general, these rules are in place for more than 15 years, in compliance with international instruments. In the three studied countries, the law can be considered mature.

There are some notable exceptions:

1. The Netherlands has no national organisation or strategy against corruption;
2. The Netherlands does not incriminate influence trafficking or interest-taking;
3. None of the three countries have legislation on anticorruption training;
4. The Netherlands lacks lobbying rules;
5. The personal scope of whistle-blower protection in Romania and The Netherlands is smaller than the UNCAC prescribes;
6. None of the countries offer monetary whistle-blower relief, in spite of CoE recommendations;
7. The reporting of assets and interests, especially in The Netherlands, do not meet all the requirements from the UNCAC technical guide or the OECD recommendations;

Compared with the many rules and recommendations that international instruments contain to prevent corruption, the exceptions above are significant in quality but not in quantity. Another conclusion is that The Netherlands, broadly regarded as the least corrupt of the trio, has the most holes in the constellation of preventive rules recommended in the international canon.

The legal framework must also be implemented, with the help of organisations and procedures, budgets and planning, reporting and oversight. The most salient points in this study on the implementation of prevention in each country are the following:

1. France has recently adopted new laws and established an organisation, the AFA, that is starting to revitalize corruption prevention efforts that existed already on paper – oversight, education, and awareness. There is a more active and central role now also for the HATVP (authority ensuring the transparency of selected officials' assets and related tasks). Practice in individual institutions is lagging, but efforts are intensifying, however it may be too early for measurable results. Conflicts of interest are moderately regulated, with a few burdensome aspects. Reporting misconduct is procedurally complex and presents some pitfalls. Freedom of information is in practice not strongly supported by the public administration. Lobbying comes under more scrutiny. Monitoring within the public sector has no corruption focus.
2. The Romanian practice contains the most obligations for public officials, with a dedicated but too small integrity monitoring institution. Awareness and training are insufficient, probably due to underfunding. Conflicts of interest are heavily but formally regulated, its thorough implementation causing an administrative burden. Whistle-blowers have many freedoms, but unclear protection. Integrity counselors have a broad role and central support. The lobbying register is underused. Internal monitoring is not focused on corruption, despite a relevant objective in the anticorruption strategy.

3. The Netherlands have no dedicated organisation to coordinate the efforts, and there is little to no national oversight on local institution's policies (Ministries coordinate with each other). Awareness and education efforts appear to be well embedded in institutional practice, but with great differences between organisations. Conflicts of interest are largely left to individual officials to solve. Whistle-blowing is still insufficiently stimulated, despite dedicated legislation and organisation. Integrity counselors are present but passive. It is difficult to use freedom of information to prevent corruption. Public sector monitoring structures are present but report on corruption only incidentally.

The rules and their implementation show that it would be a miracle for The Netherlands, France, and Romania to be where they are if corruption prevention only consists of laws and procedures. Romania has the most impacting of these, followed by France and trailed by The Netherlands at some distance. But corruption perception and criminal incidence are exactly in the reverse order. This does not mean that laws are irrelevant; without them, incidence and perception would probably be far worse.

The explanation for the findings above could lie outside of the legal realm, after all it is no surprise that the law has its limits. What could it be, does The Netherlands dedicate extraordinary funding to corruption prevention of public officials? There is no evidence of that. Does it focus much more on awareness and education? Perhaps some more, but not decisively so. This suggests that other factors, such as possibly personal convictions and group/organizational culture, or management issues, could determine the difference and that they merit more attention of law- and policymakers in the three countries. It certainly means that no public sector manager can defend themselves with the argument that they have rules and procedures in place, because those are insufficient to tackle the issue. It also means that more legislation and/or more procedures will most likely not bring substantial changes in the current situation.

It is possible that an enhanced implementation of existing rules, and/or more dedicated staff or budgets may further counter the risk of corruption in the public service. It is also possible that, because of the covert nature or other characteristics of the issue, current instruments of prevention fall short even if boosted with budgets or staff.

The last few years, new technical monitoring and analysis options have become available for prevention purposes with the advent of artificial intelligence. These do not offer total prevention, but they do offer the possibility of enhanced prevention. They also make more use of public officials' personal data, although in many cases those data do not have to be revealed unless there is a clear suspicion of wrongdoing. In any case, measures that restrict the fundamental right to privacy require justification. Further use of them may also require a more fundamental discussion on trust versus verification, now that the second option has become a very real one thanks to technology.

8.3. Recommendations

The recommendations below are distilled from the study. The first set refers to all countries, the second to the individual countries. They are not necessarily the most heavily discussed topics from the text, but are selected as the most salient points for improvement.

For all three studied countries

1. Chapter 3 shows how in all three countries, screening of candidates for entry or promotion is limited and mostly formal. To help prevent persons with wrong intentions from entering the public service, it is recommended to **explicitly include corruption risk mitigation in the recruitment process and career of public officials**. This can be done through extended and more frequent screening for corruption risks, such as intrinsic values or vulnerabilities caused by their social environment, and measures such as including ongoing court cases in the review besides the criminal record.
2. In the same chapter is described how, especially in France and Romania, public officials are trained incidentally not structurally, and that in The Netherlands it is unknown who is being trained. This is why this study recommends to **enhance awareness and education efforts.** With relatively low costs, these can be greatly intensified to fill the current gaps in all three countries. Institutional efforts should be backed up by national legislation that contains sanctions for management if they fail to comply. This is to make sure that it does not become a token effort or that excuses are found not to implement.
3. The fate of whistle-blowers deserves improvement, not a confused scope of protection. Chapter 5 describes how the new EU directive can set a baseline for protection on the following condition: **When transposing the EU whistle-blower directive, enlarge the scope to encompass all relevant national situations.**
4. Another measure to help whistle-blowers is to **start experimenting with monetary relief**, such as compensation arrangement for lost income that does not require a final court decision.
5. As described in Chapter 6, all three countries have adopted extensive freedom of information (transparency) legislation, however its implementation is not ideal for the general public to monitor for public sector corruption. Hence the recommendation to use technology for **changing the current FOI practice, to reflect the idea that non-secret public sector information should be public** – and as next step, that it (at least if in the form of documents or structured information) should be published online automatically unless marked 'not for publication' with a justification.
6. The same chapter shows how auditing and control structures are in place in all three countries. However, they pay no structural attention to corruption. Therefore, it is recommended to place **structural emphasis on auditing corruption prevention** efforts within the framework of public sector monitoring activities.
7. Chapter seven, the last topical chapter, concerns the use of new technology for corruption prevention. There are many possibilities for monitoring and detection, but also risks to the human right of privacy. The recommendation is therefore to introduce **automated systems, that monitor all civil service acts but also the personal assets and interests of selected officials based on risk**, systems that rely as much as possible on pulling data from public sources instead of burdening officials with declarations, that include the social circle of public officials, but only reveal personal data to investigators when a concrete suspicion has been established, according to an officially and transparently established procedure.

For The Netherlands

1. There is no Dutch organisation whose main objective it is to prevent corruption. Acknowledging the actions undertaken by dedicated authorities in the other two countries and the recommendation of the UN anticorruption convention, it is recommended to

expand the Whistle-blower Authority into an Integrity Authority that coordinates local and national integrity policy and strengthens awareness and education practice, besides assisting whistle-blowers. Subsequently, it is recommended to remove the requirement that investigations of whistle-blower allegations be impartial, but to let the Authority represent admissible whistle-blowers against the accused entity.

2. Throughout the study, it has been observed that The Netherlands, although by all standards the least corrupt of the three, lacks actionable policy information and appears to turn a blind eye to some issues (lobbying, for example). To preclude an exclusively incident-based government response, it is recommended to **devise a national corruption prevention policy**, adopted and budgeted by the government and coordinated by the Integrity Authority. As part or outcome of this policy, this study recommends to establish **mandatory rules for revolving doors**-practices and **lobbying** in the civil service.
3. Unlike the other two countries and the relevant international instruments, The Netherlands does not incriminate influence trafficking or the most harmful forms of interest-taking. The recommendation therefore is to **impose criminal sanctions for influence trafficking and (certain) conflicts of interest.**

For France

1. As described in Chapter 2, France has recently developed new policy against corruption in the public sector, driven by the new anticorruption agency (AFA). This policy should be further developed, perhaps in a similar way to Romania's national policy. The recommendation is to make the national policy plan more **clearly mandatory** for all relevant public sector actors and include **deliverables and timetables** that the government can be held accountable for.
2. From the data in Chapter 3 on training and education, which can be viewed as a baseline for any anticorruption effort, can be deduced that, to create structural awareness of corruption issues in the public sector and to help public servants deal with issues that may present themselves, **all public servants should be trained** at least once a year on anticorruption. **All integrity advisors** should be trained regarding their particular role.
3. On the topic of lobbying transparency, France's lobbying regulation efforts already considerably outdo the other two countries. However, to present a more complete image to the public of who is influencing who, it should be **mandatory for civil servants to report meetings with lobbyists in the public register**.
4. With the new laws France has adopted since 2013 that work against corruption, new organisations have come, some have changed roles and others have formal roles that lack practical implementation. Therefor it is recommended to **make the division of roles clearer between AFA** (anticorruption agency)**, HATVP** (transparency authority)**, and DGAFP** (coordinating directorate for civil servants).

For Romania

1. Romania has profited from a centrally placed integrity agency for over a decade. However, lack of funding seems to prevent it to completely fulfil its role according to the law. It is therefore recommended to **increase funding for the National Integrity Authority so that it can automate its monitoring or hire sufficient staff**.
2. The second recommendation is also related to budget. The effort to prevent corruption, and with it the rule of law cannot be more than a paper tiger unless implementing organisations are sufficiently funded. It is recommended to **raise the budget of the ANFP** (the public

servants' authority) **to train all public officials in corruption prevention at least once a year**, instead of having to depend on incidental project funding.

3. Romania's fraud and corruption-sensitive selection process for public officials has the potential to become much better proofed against such abuse. To do this, it is recommended to **increase fraud prevention for eliminatory entrance exams, through centralization, randomization, and automation**.
4. Civil servants' and the public's understanding of corruption can suffer from legal confusion. Chapter 4 described how in Romania, multiple definitions of conflicts of interests are operational at the same time, depending on the situation. This creates a lack of transparency and a lack of predictability that is contrary to legal principles. The recommendation is thus to **adopt a single, open definition for conflicts of interest**.

This concludes the study. May the efforts to prevent corruption be fruitful.

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Interviewed persons

Country	Organisation	Name	Position	Date of interview
Romania	Institut Politici Publice (IPP, NGO)	Adrian Moraru	Director	February 18, 2019
Romania	Ministerul Economiei	Bălăcescu Camelia	Consilier	December 18, 2017.
Netherlands	Gemeente Groningen	Bouma, Froukje	Integrity coördinator	July 10, 2018
Romania	Primaria sectorului 3	Cepareanu, Marta	Control intern, sef serviciu	December 17, 2018
Netherlands	Ministerie van Volksgezondheid, Welzijn en Sport	Deurloo, Marijke	Integrity coordinator	July 24, 2018
Romania	Primăria Călărași	Dobre, Nelu	Consilier de etică	December 22, 2017
France	Centre de gestion Rhône/ Lyon	Elise Untermaier-Kerléo	Déontologue	October 23, 2019
Romania	ANFP	Georgevici, Diana	Director monitorizare implementare legislatie	January 22, 2019
Netherlands	Huis voor Klokkenluiders	Hoekstra, Alain	Head of department	July 4, 2018
Netherlands	Gemeente Amsterdam	Hofstee, Bart	Integrity specialist	June 21, 2018
Netherlands	Saxxion Hogeschool (retired)	Hulten, Michiel van	Professor	September 18, 2018
Romania	Ministerul Fondurilor Europene/Dezvoltare/	Ignat, Dana	Director adjunct, directie Etica	December 14, 2017.
Romania	TI Romania	Irina Lonean	Project manager	October 15, 2019
Netherlands	Gemeente Zuidwest-Friesland	Kerkhoven, Hans Ennour, Jamila	HR specialist Legal specialist	June 18, 2018
France	Transparency International	Kevin Genier Elsa Foucraut	PM local government Head of public advocacy	March 15, 2019

Country	Organisation	Name	Position	Date of interview
Netherlands	Ministerie van Financiën	Koomen, Joost	Security coordinator	June 18, 2018
France	Sherpa	Laura Rousseau	Head of Illicit Financial Flows program	March 14, 2019
Romania	Expert Forum (NGO)	Laura Stefan	Expert anticoruptie	January 30, 2019
Netherlands	Ministerie van Binnenlandse Zaken	Maat, Johri	Central coordinator integrity policy	August 7, 2018
Netherlands	Gemeente Utrecht	Meijer, Pauline	Project manager	June 22, 2018
France	Ville de Marseille	Mme Faglin	Déontologue	Responded to written questions.
Romania	ANI	Popa, Silviu Ioan	Secretar general	September 11, 2018
France	Agence Française Anticorruption	Sandrine Jarry	chef de département du conseil aux acteurs publics	March 13, 2019
Romania	Ministerul Justiției	Stoian, Victor	Consilier	November 1, 2017
Romania	Ministerul de Interne	Topoloiu Valentin	Consilier anticorupție	January 1, 2018
Netherlands	TI Netherlands	Vlaanderen, Paul	President	July 19, 2018
Netherlands	Ministerie van Binnenlandse Zaken	Werf, Marja van der	Coordinating policy advisor	June 11, 2018
Netherlands	Ministerie Infrastructuur en Milieu	Woerd, Evert-Jan van der	Sr. Policy advisor	July 20, 2018
Netherlands	Gemeente Leeuwarden	Zittema, Irma	Sr. Legal advisor	July 19, 2018

List of tables

Annex 1: Codes of conduct public officials

Below is a list of the codes of conduct, or codes of ethics, of the most important cities in the three countries. This annex relates to section 3.3.2 of this study.

1. Netherlands

Amsterdam	https://www.amsterdam.nl/bestuur-organisatie/organisaties/organisaties/integriteit/ click on 'gedragscode voor ambtenaren…'
Utrecht	https://www.utrecht.nl/bestuur-en-organisatie/publicaties/openbaar-gemaakte-informatie-na-wob-verzoeken/wob-verzoek/2017-158-wob-besluit-integriteitsbeleid-en-gedragscode-ambtenaren/ (2018) Click on link 'bijlage'. Document containing procedure for whistle-blowers can be found here: https://www.werkenbijutrecht.nl/Content/RGU%20versie%20okt2%202018.pdf
Rotterdam	https://www.rotterdam.nl/loket/documentenkcc/gedragscode.pdf (2016)
Den Haag	https://decentrale.regelgeving.overheid.nl/cvdr/XHTMLoutput/Actueel/'s-Gravenhage/CVDR484480.html (2018)
Eindhoven	https://vng.nl/sites/default/files/20150226-gedragscode-eindhoven.pdf (2011; on the site of the municipality no document could be found).

2. Romania

Bucharest	http://www.primariasector1.ro/download/regulamente/Codul_de_Conduita_al_personalului_institutiei.pdf (2012, code of Sector 1 of the city. At the moment of access in April 2020, the citywide code from 2014 had been pulled offline).
Timișoara	https://www.primariatm.ro/index.php?meniuId=1&viewCat=381&viewItem=382 (only for social services dept, date unknown)
Constanța	http://www.primaria-constanta.ro/docs/default-source/documente-pwpmc/codul-etic-si-de-integritate/codul-etic-si-integritate.pdf?sfvrsn=4 (2019)
Iași	http://www.primaria-iasi.ro/imagini-iasi/fisiere-iasi/1568107667-Codul%20etic%20si%20de%20integritate%202018%20editabil.pdf (2018)
Brașov	https://www.brasovcity.ro/file-zone/regulamente/primarie/Codul%20de%20conduita%20al%20angajatilor.pdf (date unknown)
Cluj	https://files.primariaclujnapoca.ro/2019/09/09/CODUL-ETIC-AL-PRIMARIEI-MUNICIPIULUI-CLUJ-NAPOCA.pdf (2013)

3. France

Paris	http://museevieromantique.paris.fr/sites/default/files/edition/charte-de-deontologie-de-la-ville-de-paris-2019.pdf (2019)
Greater Bordeaux	http://www.bordeaux-metropole.fr/content/download/1169/10195/version/10/file/charte-deontologique-achats.pdf (2012, only public procurement)

Greater Lille	Not found online, received on request (2012)
Strasbourg	https://www.strasbourg.eu/documents/976405/1085589/0/1225c5e9-7fee-02e8-3c9c-f456cb7e2151 (2015)
Lyon	https://www.lyon.fr/sites/lyonfr/files/content/migrated/163/96/Charte-d%C3%A9ontologie-DCP.pdf (2013, only public procurement)
Toulouse	Not found online, received on request (2018)

Annex 2: Typology of corruption prevention rules

This annex contains a categorising exercise for comparing national legal systems or aspects of them not just with each other, but also against a *tertium comparationis* drawn from theory, that will show deviations. These deviations by themselves do not permit any conclusions, but they are an invitation for deeper digging. The typologies can themselves be classified in three categories: typologies that focus on the rules themselves, those that focus on the actors involved, and typologies that concentrate on the activities of public administration. Legal typologies make up the first category for the comparison of the three national systems. The legal character of rules may be a differentiator, as follows:

1. According to the measure of obligation:
   - Directly binding rules
   - Indirectly binding rules
2. According to hierarchy:
   - International instruments
   - Constitutions
   - Binding national principles of law
   - Laws adopted by Parliament (organic/non-organic)
   - Rules adopted by Government
   - Rules adopted by (Prime) Ministers
   - Rules adopted by other officials (directors of public bodies etc.)
   - Rules adopted by local (regional) councils
   - Rules adopted by local (regional) executive
3. According to scope (regarding addressees, geography):
   - Rules that bind individuals
   - Rules that bind public entities
   - Rules that bind only states
   - Rules that apply to every public entity
   - Rules that apply to a part of public entities
   - Rules with an individual addressee
   - Rules that address groups of people
   - Rules that address the population in general
   - International rules
   - National rules
   - Subnational rules
4. According to sanction regime:
   - Rules with no sanction
   - Rules with a criminal sanction
   - Rules with a disciplinary sanction
   - Rules with a civil sanction
5. According to internal structure and subject matter:
   - Rules that work with enumerations (non-exhaustive)
   - Rules that work with enumerations (exhaustive)
   - Rules that work with definitions

- o Permissive, restrictive, prescriptive
- o Procedural, substantive
- o Rules for the preparation of rules
- o Rules for the implementation of rules
- o Rules for the evaluation of rules

Of course, not all elements can be applied to all sets of rules. The *Idealtyp* is just a toolbox. An example may show how this framework can be applied to sets of rules. If for example in France, the practice of pantouflage is considered harmful to society, a sanction may apply to those who abuse their position in this way. In The Netherlands, if lawmakers consider the same practice as perfectly acceptable, then the discussion from strictly legal perspective is over. If however the Dutch government agrees that pantouflage is a harmful practice but only gives recommendations instead of sanctionable rules, then there is an issue from a comparative perspective. Another example: The principle of loyalty towards the State may enter into conflict with obligations to report wrongdoings. The nature of this conflict may depend on whether this principle is explicitly sanctioned in legislation that governs the behaviour of officials, such as the *Ambtenarenwet* in The Netherlands.

Another classification could be made according to how rules try to influence behaviour, their mode of action. There are rules regarding:

1) Monitoring behaviour and looking for indicators of corrupt activities
2) Making groups of persons aware of corruption
3) Stimulating correct behaviour, by rewarding it or making it easier
4) Making corrupt behaviour less attractive, influencing risk, incentive, efforts, and rewards

The first two types of rules are about information. Information is the input, the tool, and the output of public administration. The first one permits authorized persons to look for deviant behaviour that could be a proxy for corruption, such as a city buyer who always orders IT consumables from the same company, at twice the usual market price. This type of rules can be labelled 'transparency rules' that force public entities to publish data or respond to requests for such data, from which monitoring entities (inside or outside the public sector) can try to extract relevant correlations. All three studied countries have transparency legislation, with varying obligations to actively publish certain information (such as incompatibilities, or tendering information) and to respond to requests for information from third parties – with some limitations, such as that the information provided on request may not harm privacy or security interests. The second type of rules forces public entities to publish and distribute information about the harm corruption does to society. Examples of this are media campaigns, but also integrity trainings aimed at making subjects consider alternative choices and their consequences. This type of rules may be especially relevant in societies where socioeconomic groups of people think differently about what corruption is and what is (un) acceptable behaviour. It could be analysed whether this type of rules can be sanctionable, or if addressees may deduct certain rights from them. There is a difference between a government policy that prescribes the organisation of information campaigns, and a policy that makes such campaigns, their evaluation, and follow-up action an obligation for public entities.

The third and the fourth type are about altering the consequences of corrupt and non-corrupt behaviour. The third type could be called positive and the fourth, negative. Stimulating rule-compliant behaviour includes rules helping whistle-blowers or victims and witnesses of corruption by offering them anonymity, protection, or reduced sentences. It is debatable whether codes of conduct fall in this category or if their role is rather to inform officials about accepted and

unaccepted conduct. If a code of conduct does not entail the risk of sanctions for transgressors, then it is a policy instrument that cannot be regarded as a legal rule as defined by this study. If it does entail such possibilities, then it rather falls into the fourth category. Stimulating non-corrupt behaviour can take the form of offering rewards, or lowering the risk for persons of exposure to corrupt groups. An example of the latter is job rotation, diminishing the exposure of civil servants to existing corruptive networks. The fourth type of rules consist in the first place of criminal and other types of sanctions, including criminal asset recovery. This type includes rules aimed at making corrupt behaviour more difficult or even physically impossible. Checks and balances increase the effort needed for corrupted results, because they require for multiple officials to be corrupted. Rules that limit discretionary powers have the same aim. Automated 'red flags' in IT systems can make it virtually impossible for an official to use that system and be corrupt, without altering the system itself or going around it.

Zooming in on this fourth category, rules can also be categorized depending on their purposes. Graycar and Prenzler dedicate a chapter of their book Understanding and preventing corruption to an approach called situational crime prevention, based on earlier work by Clarke. In this approach, applied to corruption there are 25 'techniques' categorized under the following 5 'purposes' (Graycar & Prenzler, 2013, Chapter 5):

1) Reduce the rewards
2) Increase the risk
3) Increase the effort
4) Reduce provocations
5) Remove excuses

This is a typology of techniques rather than rules, but the categorization can equally be applied to rules. Rules that lower the rewards of corruption are for example sets of rules regarding asset recovery. If a corrupt person not only loses the spoils registered in his name but also those of third persons, a criminal conviction for corrupt practices will have a greater impact than just the prison time and/or fine itself. The described method is called 'situational' because the techniques (or rules) are adapted to the outcomes of an analysis of the risks to society. An example of the second category, creating higher risks involved with corrupt behaviour, could be enhanced surveillance. This should be situational because it is both expensive and probably illegal to follow all civil servants, regardless of their risk profile. For the other categories presented, it may be difficult to find rules that target them explicitly. For the fifth one, 'remove excuses' one could think of an adequate remuneration policy for civil servants.

ACTORS

Looking at the parties involved in administrative law, we can distinguish three groups of actors that control the acts of public administration:

1) Control by the public (transparency)
2) Control by other officials that are not superiors (checks & balances)
3) Control by superiors (reporting/auditing)

In administrative law, there are actors within public administration, there are entities of public administration and there is the administration as a whole. This group of actors make rules and are also subject to them. The other category of subjects, often referred to as 'citizens' do not make rules but can protest and contest them in various ways. This protesting and contesting can be viewed as a form of control: public scrutiny. The tools for this are the media, the courts, advocacy of special

interests and so on. If we look at the different groups enforcing rules, public scrutiny, the first category of the three below, uses a different set of instruments and has different prerequisites than the other two categories. Without access to information, actively published by the administration or obtained through requests, there can be no control by the public. It is a weak form of control, in the sense that the controllers have limited means of forcing the controlled to disclose the information that makes the control possible.

Public scrutiny can be done a priori or a posteriori, depending on when 'the public' gains access to the relevant information. The second category, control by peers, which does not exclude hierarchy but refers to control within the same workflow of policy making or policy executing, is per definition a priori. It includes practices of 'four eyes', where decisions have to be countersigned by different officials within a public entity, and requiring the approval of another entity. It can also include a separation of functions, for example one public entity approves tender documentation, a second one organizes the tender, and a third one oversees the execution of public contracts.

The third category includes part of the concept of accountability, as far as it refers to accountability to hierarchical superiors (offices, entities). Their task is to oversee the work of the officials placed under them by requesting and examining self-reporting and by reviewing external audits. 'Hierarchical superiors' also refers to specialised organisations armed with investigative and/or sanctioning powers, such as the Auditor General (*Algemene Rekenkamer, Cour de Comptes, Curtea de Conturi*).

Choosing yet a different viewpoint, one can examine the different groups the rules are aimed at. This viewpoint is related to the idea that preventive rules do not necessarily have to be aimed at the officials or entities whose conduct must be influenced. Preventing bribe-givers from acting makes the efforts of bribe-takers much greater, to give just one example. The list is non-exhaustive.

- Anticorruption enforcers within the public sector
- Civil servants in high-risk positions
- Civil servants in general
- The general public
- Private companies
- Civil society
- Victims/perpetrators/social context of victims/perpetrators
- School children, parents etc.

An attempt to structure this list is the 'pillars of integrity' concept coined by Transparency International.[691] It distinguishes the relevant actors in society, one of them being the 'public sector'. The concept is holistic and for the purpose of this study lacks precision. But it provides a checklist for societal actors that play a role in corruption prevention and prevents a too narrow focus on rules aimed at the administration exclusively.

ACTIVITIES

Public administration engages in many activities, some of them such as administering justice falling outside the scope of this study. Below is a simplified list of the most important ones. All of them are susceptible to corruption, with variations in risk.

[691] Transparency International uses this framework to evaluate so-called National Integrity Systems (NIS). They provide its methodology in the paper: "National Integrity System background rationale and methodology" from 2011. It can be accessed here: https://www.transparency.org/files/content/nis/NIS_Background_Methodology_EN.pdf.

- Rulemaking
- Buying goods, services, and works
- Appointing and promoting people
- Distributing funds
- Granting permits
- Evaluating and sanctioning

This list can be used to evaluate the measures taken by entities to prevent corruption for completeness and cohesiveness. Examples of preventive rules are limiting discretionary powers, random allocation of subsidy requests for review, or sanction regimes based on objective (strict) liability.

A slightly different focus is the organisational aspect of government activity. Each of the activities above contain the aspects listed below. Rules aimed at preventing corruption can thus be categorized according to the internal aspect(s) of organisations that they influence:

1) Technical measures, that influence IT systems (check for unexpected behaviour - buying equipment twice the price of last year, or twice the price of another city in the area).
2) Organisational measures, that influence procedures
3) Budgetary measures, that influence financial controls
4) HR measures, that influence personnel management in the broadest sense

The first category includes so-called 'big data' initiatives, using algorithms to examine large amounts of (unstructured) data for patterns. An example of this category is the automated preventive system used in Romania.[692] The trick with this type of measures is that it tries to circumvent a classic issue of corruption prevention measures: the administrative burden on the persons and entities implementing the measure. Of course, even if there were no effort at all involved with running such an IT measure, its proportionality would still have to be assessed against principles of privacy and information security. The other categories reflect 'traditional' measures such as periodic background checks for high-risk positions, requirements of authorization by higher management in case of exceptional decisions, or financial audit procedures.

[692] Law 184/2016 provides the legal basis for this system, aimed at automatic detection of conflicts of interest in public tender procedures. See also chapter 7.

Annex 3: Legislation consulted for the study

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
1.	CoE	Civil law convention	Civil law corruption remedies	1.11.2003	30.5.2020
2.	CoE	Criminal Law Convention on Corruption and Additional Protocol	Regional framework	1.7.2002	30.5.2020
3.	CoE	GRECO statutes	GRECO methodology	5.5.1998	30.5.2020
4.	CoE	Resolution (97) 24 on the twenty guiding principles for the fight against corruption	Anticorruption principles	6.11.1997	30.5.2020
5.	EU	Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25.6.1997, p. 2-11)	Public servants	28.9.2005	30.5.2020
6.	EU	Directive (EU) 2017/1371 of the European Parliament and of the council of 5 July 2017 (JO L 198, 28.7.2017, p. 29-41).	Replaces the Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto	Transposition: 6.9.2019	30.5.2020
7.	EU	Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65-242)	Public procurement	17.4.2014	13.6.2018
8.	EU	Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39-50)	Asset recovery	Transposition: 4.10.2018	30.5.2020

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
9.	EU	Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.05.2001)	Transparency, access to documents	3.12.2001	18.09.2019
10.	FR	Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques (Law of 29 January 1993 on prevention of corruption and transparency in business and public proceedings, JORF 25/1993)	Transparency, largely repealed by Law 2016-1691.	31.1.1993	31.3.2017
11.	FR	Loi n° 2000-595 du 30 juin 2000 modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption (Law no. 2000-595 of 30 June 2000, JORF 151/2000)	Modifies code pénal and code procedure pénale	1.7.2000	28.3.2017
12.	FR	Arrêté du 9 mai 2017 relatif à la fonction de référent déontologue au sein des ministères chargés des affaires sociales et portant création, attributions et fonctionnement du comité de déontologie des ministères sociaux (Decision regarding integrity counselors in the Ministries of Social Affairs and establishment, powers and procedures of the integrity committee JORF 109/2017)	Integrity counselling	11.5.2017	30.5.2020
13.	FR	Circulaire du 19 juillet 2018 relative à la procédure de signalement des alertes émises par les agents publics dans le cadre des articles 6 à 15 de la loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, et aux garanties et protections qui leur sont accordées dans la fonction publique (Circular regarding whistle-blowers)	Whistle-blowers	20.7.2018	10.6.2019
14.	FR	Code de justice administrative (Code of administrative justice, JORF 107/2000)	Administrative procedure	1.1.2001	30.3.2017
15.	FR	Code des relations entre le public et l'administration (Code on relations between the public and the administration, JORF 248/2015)	Transparency	1.1.2016	10.09.2019

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
16.	FR	Code penal (Criminal code, JORF 169/1992)	Incrimination of corruption	1.3.1994	15.5.2020
17.	FR	Décision n°2013-676 DC (JORF 238/2013)	Declaration of the French Conseil d'État declaring some aspects of Law 2013-907 unconstitutional	9.10.2013	28.3.2017
18.	FR	Décret n° 2020-69 du 30 janvier 2020 relatif aux contrôles déontologiques dans la fonction publique (Decision on integrity checks, JORF 26/2020)	Conflicts of interest	1.2.2020	14.5.2020
19.	FR	Décret n° 2011-775 du 28 juin 2011 relatif à l'audit interne dans l'administration (Decision on internal audits, JORF 150/2011).	Internal control	1.7.2011	16.01.2020
20.	FR	Décret n° 2013-1204 du 23 décembre 2013 relatif à l'organisation et au fonctionnement de la Haute Autorité pour la transparence de la vie publique (Decision on HATVP procedures, JORF 298/2013)	Transparency (asset/interest declarations)	25.12.2013	28.3.2017
21.	FR	Décret n° 2013-908 du 10 octobre 2013 relatif aux modalités de désignation des membres des jurys et des comités de sélection pour le recrutement et la promotion des fonctionnaires relevant de la fonction publique de l'Etat, de la fonction publique territoriale et de la fonction publique hospitalière (Decision on eliminatory exams in public administration, local administration and hospitals, JORF 238/2013)	Composition of jury's for eliminatory exams (concours)	1.1.2015	26.3.2018
22.	FR	Décret n° 2014-747 du 1er juillet 2014 relatif à la gestion des instruments financiers détenus par les membres du Gouvernement et par les présidents et membres des autorités administratives indépendantes et des autorités publiques indépendantes intervenant dans le domaine économique (Decision on financial assets held by members of the Cabinet and public sector leaders, ORF 151/2014)	Financial assets	3.7.2014	17.12.2018

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
23.	FR	Décret n° 2015-1165 du 21 septembre 2015 relatif à la direction interministérielle de la transformation publique et à la direction interministérielle du numérique et du système d'information et de communication de l'Etat (Decision regarding the Interministerial Digital Directorate, JORF 2019/2015)	Transparency, reuse of public information	23.9.2015	10.09.2019
24.	FR	Décret n° 2016-1967 du 28 décembre 2016 relatif à l'obligation de transmission d'une déclaration d'intérêts prévue à l'article 25 ter de la loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires (Decision regarding declaring interests, JORF 303/2016)	Conflicts of interest	31.12.2016	12.05.2020
25.	FR	Décret n° 2016-1968 du 28 décembre 2016 relatif à l'obligation de transmission d'une déclaration de situation patrimoniale prévue à l'article 25 quinquies de la loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires (Decision regarding declaring interests, JORF 303/2016)	Conflicts of interest	31.12.2016	15.12.2018
26.	FR	Décret n° 2017-105 du 27 janvier 2017 relatif à l'exercice d'activités privées par des agents publics et certains agents contractuels de droit privé ayant cessé leurs fonctions, aux cumuls d'activités et à la commission de déontologie de la fonction publique (Decision regarding secondary activities of public officials and the integrity committee, JORF 25/2017)	Secondary activities/ conflicts of interest	30.1.2017	21.1.2019
27.	FR	Décret n° 2017-329 du 14 mars 2017 relatif à l'Agence française anticorruption (Decision on the French anticorruption agency, JORF 63/2017)	Organisation of anticorruption	16.3.2017	27.4.2020
28.	FR	Décret n° 2017-519 du 10 avril 2017 relatif au référent déontologue dans la fonction publique (Decision on integrity advisors, JORF 87/2017)	Integrity advisors	13.4.2017	23.7.2019
29.	FR	Décret n° 2017-547 du 13 avril 2017 relatif à la gestion des instruments financiers détenus par les fonctionnaires ou les agents occupant certains emplois civils (Decision on holding financial assets by civil servants, JORF 90/2017).	Financial interests	1.5.2017	16.12.2018

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
30.	FR	Décret n° 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'Etat (Decision on whistle-blowing procedures in the public and private sector, JORF 93/2017)	Whistle-blowers	1.1.2018	6.7.2019
31.	FR	Décret n° 2017-867 du 9 mai 2017 relatif au répertoire numérique des représentants d'intérêts (Decision on the online lobbying register, JORF 109/2017)	Lobbying	11.5.2017	17.8.2018
32.	FR	Décret n° 2018-1075 du 3 décembre 2018 portant partie réglementaire du code de la commande publique (Decision on the Public procurement code, JORF 281/2018)	Public procurement	1.4.2019	23.12.2018
33.	FR	Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administration (rights of citizens when treating with public administration, JORF 88/2000)	Transparency of government expenditure	14.4.2000	14.12.2019
34.	FR	Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité (Law on adaptation of criminal procedure due to changes in criminal behaviour, JORF 59/2004)	Changes code of criminal procedure, asset recovery.	11.3.2004	8.10.2017
35.	FR	Loi n° 2007-148 du 2 février 2007 de modernisation de la fonction publique (Law on modernisation of the public sector, JORF 31/2007)	Integrity	7.2.2007	30.5.2020
36.	FR	Loi n° 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption (Law on the fight against corruption, JORF 264/2007)	Modifies the criminal code	15.11.2007	22.4.2019
37.	FR	Loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale (Law on facilitating seizing criminal assets, JORF 158/2010)	Changes other laws on asset recovery	11.7.2010	8.10.2017
38.	FR	Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (Law on a digital republic, JORF 235/2016)	Transparency	9.10.2016	5.10.2019
39.	FR	Loi n° 2016-483 du 20 avril 2016 relative à la déontologie et aux droits et obligations des fonctionnaires (Law on integrity and rights and obligations or public officials, JORF 94/2016)	Changes Loi Le Pors	various	26.7.2019

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
40.	FR	Loi n° 2017-1339 du 15 septembre 2017 pour la confiance dans la vie politique (Law on trust in politics, JORF 217/2017)	Professional ethics, conflicts of interest	17.9.2017	27.4.2020
41.	FR	Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique (Law on transformation of the public sector, JORF 182/2019)	Integrity	Multiple	12.5.2020
42.	FR	Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal (Law on improving the relations between public administration and the public, JORF 18.7.1978)	Access to administrative documents	19.7.1978	18.09.2019
43.	FR	Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires (Law on rights and obligations of officials, JORF 14.7.1983)	Integrity, disciplinary law	15.7.1983	3.3.2018
44.	FR	Loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat (Law on the status of central government officials, JORF 12.1.1984)	Recruitment	13.1.1984	24.7.2018
45.	FR	Loi n° 84-53 du 26 janvier 1984 portant dispositions statutaires relatives à la fonction publique territoriale (Law on the status of local government officials, JORF 27.1.1984)	Recruitment	28.1.1984	1.1.2019
46.	FR	Loi n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique (Law on transparency of public life, JORF 238/2013)	Transparency (asset/interest declarations)	13.10.2013	30.5.2020
47.	FR	Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Loi Sapin II, Law on transparency, the fight against corrruption and modernisation of the economy, JORF 287-2016)	Transparency	11.12.2016	1.5.2020
48.	FR	Loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits (Law on the Ombudsman, JORF 75/2011)	Ombudsman	31.3.2011	31.3.2017

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
49.	FR	Loi organique n° 2016-1690 du 9 décembre 2016 relative à la compétence du Défenseur des droits pour l'orientation et la protection des lanceurs d'alerte (Law on the authority of the Ombudsman to assist and protect whistle-blowers, JORF 10.12.2016)	Role of the ombudsman in protection of whistle-blowers	11.12.2016	23.7.2019
50.	FR	Loi organique n° 2013-906 du 11 octobre 2013 relative à la transparence de la vie publique (Law on transparency of public life, JORF 238/2013)	Transparency elected officials/ elections	13.10.2013	30.5.2020
51.	FR	Ordonnance n° 2014-948 du 20 août 2014 relative à la gouvernance et aux opérations sur le capital des sociétés à participation publique (Regulation on governance and capital transactions of state-owned companies, JORF 194/2014)	Checks & balances	24.8.2014	31.3.2017
52.	FR	Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics (Regulation on public procurement, JORF 24.7.2015)	Public procurement, transparency	1.4.2016	31.3.2017
53.	FR	Ordonnance n° 2018-1074 du 26 novembre 2018 portant partie législative du code de la commande publique (Regulation on the Code of public procurement, JORF 281/2018)	Public procurement (its annex is the *Code de la commande publique)*	1.4.2019	23.12.2018
54.	NL	Aanwijzing afpakken (Confiscation policy, Stcrt. 2016/68526)	Asset recovery	1.1.2017	10.5.2020
55.	NL	Algemeen Rijksambtenarenreglement (ARAR, General regulation central government officials)	Public servants	Abrogated 1.1.2020	5.4.2020
56.	NL	Algemene wet bestuursrecht (General law on public administration, Stb. 1992, 315).	Conflict of interest, Integrity	1.1.1994	30.5.2020
57.	NL	Ambtenarenwet 2017 (Law regarding public officials, Stb. 1929, 530)	Public servants	15.3.1930	30.5.2020
58.	NL	Beleidsregels VOG-NP-RP 2018 (Policy on declarations of good conduct)	Background checks for candidates	1.1.2018	5.4.2020
59.	NL	Besluit melden vermoeden van misstand bij Rijk en Politie (Decision reporting misconduct, Stb. 2009, 572)	Whistle-blowers	Repealed 1.1.2017	17.03.17

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
60.	NL	Besluit SUWI (Decision information exchange, Stb. 2001, 688)	Information exchange for fraud detection/ enforcement	1.1.2002	23.03.2020
61.	NL	Besluit justitiële en strafvorderlijke gegevens (Decision criminal prosecution data, Stb. 2004, 130)	Criminal records	1.4.2004	30.5.2020
62.	NL	Besluit werving en selectie (Decision on recruitment, Stcrt. 1985, 204)	Reliability testing before hiring Integrity	Abrogated 1.1.2020	3.5.2020
63.	NL	Circulaire nevenwerkzaamheden rijksambtenaren (Decision on secondary activities of central government officials, Stcrt 1995, 19)	Secondary activities	Abrogated 1.1.2020	12.12.2018
64.	NL	Gedragscode integriteit rijk 2020 (Code of conduct central government, Stcrt. 2019, 71141)	Code of conduct for persons working for the central government	12.12.2019	13.5.2020
65.	NL	Gemeentewet (Law on municipalities, Stb. 1992, 96)	Integrity	1.1.1994	3.10.2016
66.	NL	Organisatieregeling dienstonderdelen OM 2012 (Internal regulation public prosecution, Stcrt. 2012, 16568)	BOOM	14.8.2012	8.10.2017
67.	NL	Regeling aanwijzing TMG-functies (Regulation on officials in top management positions, Stcrt. 2016, 61103)	Positions with interest reporting obligations	1.1.2020	28.5.2020
68.	NL	Insiderregeling Financiën 2017 (Regulation inside knowledge Finance Ministry, Stcrt. 2016, 55117)	Reporting obligations	Abrogated 1.1.2020	14.1.2019
69.	NL	Uitvoeringsbesluit Ambtenarenwet 2017, (Implementation decision law regarding public officials, Stb. 2019, 346)	Background checks, oath of office	1.1.2020	13.5.2020
70.	NL	Wet bibob (Law on promoting integrity checks public sector, Stb. 2002, 347)	Background checks vendors/ beneficiaries	18.10.2002	17.03.17
71.	NL	Wet hergebruik van overheidsinformatie (Law on reuse of public information, Stb. 2015, 271)	Transparency/ reuse of public information	18.7.2015	19.09.2019
72.	NL	Wet Huis voor Klokkenluiders (Law on the Whistle-blower Authority, Stb. 2016, 148)	Whistle-blower Authority	1.7.2016	18.03.17

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
73.	NL	Wet openbaarheid van bestuur (Law on transparent administration, WOB, Stb. 1991, 703)	Transparency	1.5.1992	10.5.2020
74.	NL	Wetboek van Strafrecht (Criminal code, Stb. 1886, 6)	Incrimination of corruption	1.9.1886	15.3.2020
75.	OECD	Convention on combating bribery of foreign public officials	Public servants	15.2.1999	1.5.2020
76.	RO	Codul de procedură fiscală, Legea 207/2015 (Code of fiscal procedure, M. Of. 547/2015)	Autonomous definition conflicts of interest	26.7.2015	13.5.2020
77.	RO	Codul Penal (Criminal code, M. Of. 510/2009)	Incrimination of corruption	27.7.2009	7.5.2020
78.	RO	H.G. no. 1179/2014 privind instituirea unei scheme de ajutor de stat în sectorul creșterii animalelor (Decision on state aid for livestock breeders, M. Of. 967/2014)	Transparency of subsidies	1.1.2015	14.12.2019
79.	RO	HG 583/2016 privind aprobarea Strategiei naționale anticorupție pe perioada 2016-2020, a seturilor de indicatori de performanță, a riscurilor asociate obiectivelor și măsurilor din strategie și a surselor de verificare, a inventarului măsurilor de transparență instituțională și de prevenire a corupției, a indicatorilor de evaluare, precum și a standardelor de publicare a informațiilor de interes public (Decision on the national anticorruption strategy, M. Of. 644/2016)	Approved the SNA for 2016-2020.	23.8.2016	30.5.2020
80.	RO	Hotărâre nr. 506 din 24 aprilie 2003 privind stabilirea modelului Registrului declarațiilor de interese (Decision on the register of interest declarations, M. Of. 293/2003)	Declarations of interests	25.4.2003	30.5.2020
81.	RO	Hotarirea 1344/2007 privind normele de organizare şi funcţionare a comisiilor de disciplină (Decision on disciplinary committees, M. Of. 768/2007)	Disciplinary committees	13.11.2007	5.5.2020
82.	RO	Legea 176/2010 privind integritatea în exercitarea funcțiilor şi demnităților publice (Law on integrity in public office, M. Of. 621/2010)	Integrity	5.9.2010	1.4.2020

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83.	RO	Legea 340/2004 privind prefectul și instituția prefectului (Law on prefects, M. Of. 658/2004)	Oversight by prefects	Various	30.5.2020
84.	RO	Lege nr. 109 din 25 aprilie 2007 privind reutilizarea informațiilor din instituțiile publice (Law on reuse of information from public institutions, M. Of. 300/2007)	Transparency/ reuse of public information	6.9.2007	18.09.2019
85.	RO	Lege nr. 144 din 21 mai 2007 privind înființarea, organizarea si funcționarea Agenției Naționale de Integritate – Republicare (Law on the national integrity agency, M. Of. 535/2009	Integrity – national integrity agency	6.8.2009	8.5.2020
86.	RO	Lege nr. 161/2003 privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției (Law on transparency in the public and private sector and against corruption, M. Of. 279/2003)	Transparency public/private sector	21.4.2003	11.4.2018
87.	RO	Lege nr. 500 din 11 iulie 2002 privind finanțele publice (Law on public finance, M. Of. 597/2002)	Transparency of government expenditure	1.1.2003	14.12.2019
88.	RO	Lege nr. 52 din 21 ianuarie 2003 privind transparența decizională în administrația publică – Republicată (Law on decisional transparency, M. Of. 749/2013	Transparency	6.12.2013	30.5.2020
89.	RO	Lege nr. 571 din 14 decembrie 2004 privind protecția personalului din autoritățile publice, instituțiile publice și din alte unități care semnalează încălcări ale legii (Law on protection of whistle-blowers, M. Of. 1214/2004)	Whistle-blowers	20.12.2004	30.5.2020
90.	RO	Lege nr. 682 din 19 decembrie 2002 privind protecția martorilor (Law on protection of witnesses, M. Of. 964/2002)	Witness protection	28.1.2003	16.07.2019
91.	RO	Lege nr. 7 din 18 februarie 2004 privind Codul de conduită a funcționarilor publici – Republicare (Law on code of conduct for public officials, M. Of. 525/2007)	Code of conduct civil servants (replaced by Administrative Code)	Abrogated 5.7.2019	24.7.2019

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
92.	RO	Lege nr.318/2015 pentru înființarea, organizarea și funcționarea Agenției Naționale de Administrare a Bunurilor Indisponibilizate și pentru modificarea și completarea unor acte normative (Law on the confiscated assets management agency, M. Of. 961/2015)	Asset recovery	27.12.2015	30.05.2020
93.	RO	Legea 115/1996 privind declararea si controlul averii demnitarilor, magistratilor, functionarilor publici si a unor persoane cu functii de conducere (Law on asset declarations of dignitaries, magistrates, public officials and certain management positions, M. Of. 263/1996)	Asset declarations & monitoring	28.10.1996	21.2.2019
94.	RO	Legea 182/2002 privind protectia informatiilor clasificate, M.Of. 4.12.2002 (Law on classified information, M. Of. 248/2002	Confidential information	12.6.2002	25.2.2018
95.	RO	Legea 184/2016 privind instituirea unui mecanism de prevenire a conflictului de interese in procedura de atribuire a contractelor de achizitie publica (Law on prevention of conflicts of interest in public procurement, M. Of. 831/2016).	PREVENT automatic tender check	20.6.2017	1.6.2019
96.	RO	Legea 290/2004 privind cazierul judiciar – REPUBLICARE (Law on criminal records, M. Of. 777/2009)	Criminal records	30.7.2004	22.2.2018
97.	RO	Legea 477/2004 privind Codul de conduită a personalului contractual din autoritățile și instituțiile publice (Law on the code of conduct contract workers in the public sector, M. Of. 1105/2004)	Code of conduct contract workers	Abrogated 5.7.2019	30.5.2020
98.	RO	Legea 544/2001 privind liberul acces la informațiile de interes public (Law on free access to information of public interest, M. Of. 663/2001)	Transparency	23.12.2001	18.09.2019
99.	RO	Legea 672/2002 privind auditul public intern – REPUBLICARE (Law on internal audits in the public sector M. Of. 780/2011)	Monitoring	27.12.2002	24.12.2018
100.R	RO	Legea 78/2000 pentru prevenirea, descoperirea si sanctionarea faptelor de coruptie (Law on prevention, discovery and sanctioning of corruption, M. Of. 219/2000)	Corruption, criminal law	18.5.2000	21.2.2019

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101.	RO	Legea 98/2016 privind achizițiile publice (Law on public procurement, M. Of. 390/2016)	Conflicts of interest in procurement	26.5.2016	1.6.2018
102.	RO	Ordin nr. 1.798 din 19 noiembrie 2007 pentru aprobarea Procedurii de emitere a autorizației de mediu, (Regulation on environmental permits, M. Of. 808/2007)	Transparency of permits	1.12.2007	17.12.2019
103.	RO	Ordinul 314/2018 pentru aprobarea Metodologiei de control ex-post privind modul de atribuire a contractelor/ acordurilor-cadru de achiziție publică, a contractelor/acordurilor-cadru sectoriale, a contractelor de concesiune de lucrări şi a contractelor de concesiune de servicii (Implementing regulation on the verification of public procurement, M. Of. 229/2018)	Audit of public procurement	14.3.2018	1.6.2018
104.	RO	Ordinul nr. 3753/2015 privind monitorizarea respectării normelor de conduită de către funcționarii publici și a implementării procedurilor disciplinare (Regulation on verification of the respect of rules for conduct and discipline, M. Of 844/2015)	National Agency for Public Officials (ANFP)	Abrogated 5.7.2019	30.5.2020
105.	RO	Ordonanță de urgență nr. 57 din 3 iulie 2019 privind Codul administrative (Administrative Code, M. Of. 555/2019).	Rights and obligations of public officials	6.7.2019	31.3.2020
106.	RO	Ordonanta urgenta 153/2002 privind organizarea si functionarea Oficiului Registrului National al Informatiilor Secrete de Stat, (Emergency regulation on the bureau for state secrets, M.Of. 826/2002)	Classified information and background checks	15.11.2002	25.2.2018
107.	RO	Ordonanta urgenta 98/2017 privind funcția de control ex ante al procesului de atribuire a contractelor/acordurilor-cadru de achiziție publică, a contractelor/ acordurilor-cadru sectoriale şi a contractelor de concesiune de lucrări şi concesiune de servicii (Emergency regulation on ex ante verification of public procurement, M. Of. 1004/2017).	Public procurement	15.6.2018	7.6.2018

	Jurisdiction	Act	Relates to aspect(s)	Entry into force/ abrogated	Date last reviewed (version in force on date)
108.	RO	Regulamentul de organizare şi funcţionare al Agenţiei Naţionale a Funcţionarilor Publici (internal regulation of the ANFP, M. Of. 141/2001)	ANFP	21.3.2001	30.5.2020
109.	RO	Lege 188/199 privind statutul funcţionarilor publici, republicată (Law on the public servants' Statute, M. Of. 365/2007)	Public servants	Abrogated (minus some temporary articles).	12.5.2020
110.	UN	United Nations Convention against corruption	International framework	14.12.2005	10.5.2020

Most people agree that corruption in the public sector is harmful to society. Therefore, corruption of civil servants must be prevented. But how do governments approach this issue? This study explores the international and national rules and practices in The Netherlands, Romania, and France, and makes a comparison of law and policy between these three studied countries. It draws conclusions about current practice and offers recommendations for national governments.

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