

Transparency and development

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Abstract

In this contribution to the *www* initiative in Dnipro ‘Elimination and Prevention of Corruption at State, Public and Personal Level’, I focus on a few aspects of ecosystems which favour corruption, dedicating greater attention to the justice system because of its responsibility in contributing to a corruption-free society. Aspects of corruption including its consequences will be concisely mentioned, namely citing several international organizations. Benefiting from better knowledge of my own country, greater emphasis is dedicated to the situation in Portugal. Hopefully, readers might want to peruse the sources in order to deepen the information for their own countries.

Keywords: transparency; corruption; development.

1 Introduction

Corruption is an evil, detrimental to the healthy development of societies and countries. It thrives in the presence of weak institutions, first of all the judicial system. It discourages people from assuming risks and taking initiatives, since it promotes the feeling that it is not the individual’s capacity that is at stake but instead it is the obscure non-transparent force of corrupted people that in the end prevail. It includes a continuum of varieties from petty to grand and systemic corruption, and involves unlawful situations, but also a range of grey situations including legal situations which are nonetheless ethically incorrect.

Judicial systems where decisions suffer excessive delays are not efficient. Some laws facilitate never-ending defense strategies to delay decisions with the intention of achieving prescription of the wrong-doings. These strategies have been successfully used by high profile figures that can afford never-ending litigation. Which leads to another question: the ethics of law making. The surgical drafting of some laws suggests support of private interests or in the limit the intention to place a few individuals above commoners.

A questionable variety of laws are those that favour tax avoidance games, where commoners pay every cent of their applicable taxation, whereas big shots may choose some tax-haven without the need to contribute to the budget of their own country. Curiously, the EU tolerates the existence of tax-havens, as for ex. the Netherlands.

In this brief note reference is made to some situations in Portugal and Ukraine, with other countries being invoked as convenient for illustration.

2 Ukraine and Portugal – a few details

Corruption has been a major concern in Ukraine, see *e.g.* [1], [2]. Recently the Ukrainian parliament adopted the law on the Principles of State Anti-Corruption Policy for 2021–2025 and the Anti-Corruption Strategy for 2021–2025 which was coordinated by the National Agency on Corruption Prevention (NACP) [3]. Corruption is a major issue in the context of Ukraine’s accession to the EU [4], as well as in the reconstruction effort [1], [5].

Transparency International is an NGO concerned with the corruption phenomenon worldwide. It publishes yearly rankings of countries concerning their situation *vis a vis* the perceived levels of public sector corruption, the so-called corruption perceptions index (CPI). The methodology used may be consulted in their site, [6]. Recent results concerning Portugal, Denmark and Ukraine are presented in Figure 1, showing rank among the approximately 180 countries analysed every year.

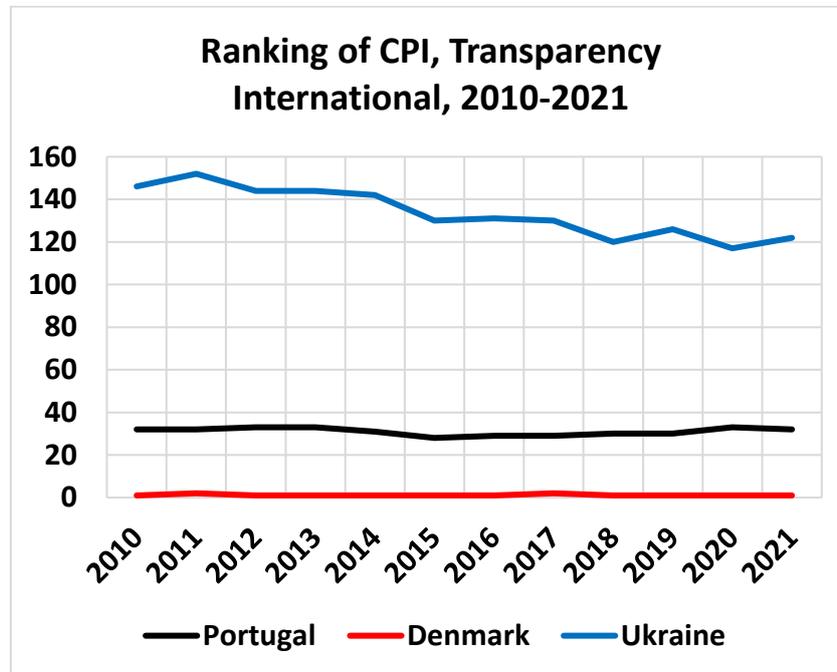


Figure 1. Corruption perceptions index (CPI) ranking, Transparency International. Selected countries: Denmark, Portugal and Ukraine.

Figure 1 shows a relatively stable situation in Denmark and Portugal, with Denmark consistently coming first in this ranking, and Portugal occupying positions around the 30th. Ukraine improved from 152 in 2011 to 122 in 2021, which is good but insufficient progress (in the same period Armenia, for ex., improved 71 positions from 129 to 58).

The United Nations Development Program (UNPD) publishes yearly the Human Development Index (HDI), “a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living. The HDI is the geometric mean of normalized indices for each of the three dimensions”, [7]. In 2021, the results for Denmark, Portugal and Ukraine are collected in Table 1. This illustrates the inverse relationship of corruption and human development: the less corruption the higher the development.

Table 1. United Nations Development Program. Human Development Index (HDI).

country	Gross national income per capita (constant 2017 PPP\$)	HDI
Denmark	60365	0.948
Portugal	33155	0.886
Ukraine	13256	0.773

As expectable, the UN includes the fight against corruption and the promotion of transparency in its Sustainable Development Goals (items 16.5 and 16.6 of goal 16), [8].

Another report of Transparency International discusses the problem of foreign bribery, [9]. It is a matter of interest in Portugal particularly because of a never explained case involving submarines bought in Germany. On Portugal, [9] mentions “*Weaknesses in legal framework and enforcement system: Among the main deficiencies are an inadequate definition of foreign bribery; deficiencies in the law on the liability of legal persons; and inadequate sanctions for legal persons. There is also a lack of human and financial resources for investigations and in the court system, as well as a lack of expertise and training on the enforcement of economic crimes. The sluggishness and complexity of the judicial system is also an obstacle to the effective prosecution of corruption*”. Corruption is also mentioned in the yearly evaluation of the USA think tank Freedom House, ‘Freedom in the World’: “*Portugal is a stable parliamentary democracy with a multiparty political system and regular transfers of power between political parties. Civil liberties are generally protected. Ongoing concerns include corruption, certain legal constraints on journalism, poor or abusive conditions for prisoners, and the effects of racial discrimination and xenophobia. Prosecutors have pursued corruption cases against top officials in recent years*”, and scores 95/100 (free country) in its ranking, [10].

The Transparency International report ‘*Global Corruption Barometer. European Union 2021. Citizens’ Views and Experiences of Corruption*’ [11], analyses in some detail the EU member countries. Figure 2 gives results of some relevant items for Denmark, Italy and Portugal (but no data for Ukraine, not yet a member of the EU).

Transparency International published in 2015 a study where a ranking of institutions/stakeholders of the national integrity systems of several ex-soviet socialist republics was presented, ranking strongest to weakest institution/stakeholder, see Table 2, [12]. Particular notice should be given to ranking of ‘Judiciary’ in Table 2. Given the fact that situations may change - for the better or for the worse - in a relatively short time, it would be interesting to see an updated version of this study.

Another evaluation of critical areas as far as corruption in Ukraine is concerned, is given in [3]: “*the areas Ukrainians consider the most corrupt [are]:*

- *customs and taxation;*
- *courts and law enforcement agencies;*
- *state regulation of economy;*
- *construction and land relations;*
- *defense sector;*
- *health care;*
- *social protection.*”.

Press freedom is essential for the promotion of the fight against corruption. A post in the Brookings Institution site [13] presents eloquently the role of investigative journalism in the Ukrainian situation.

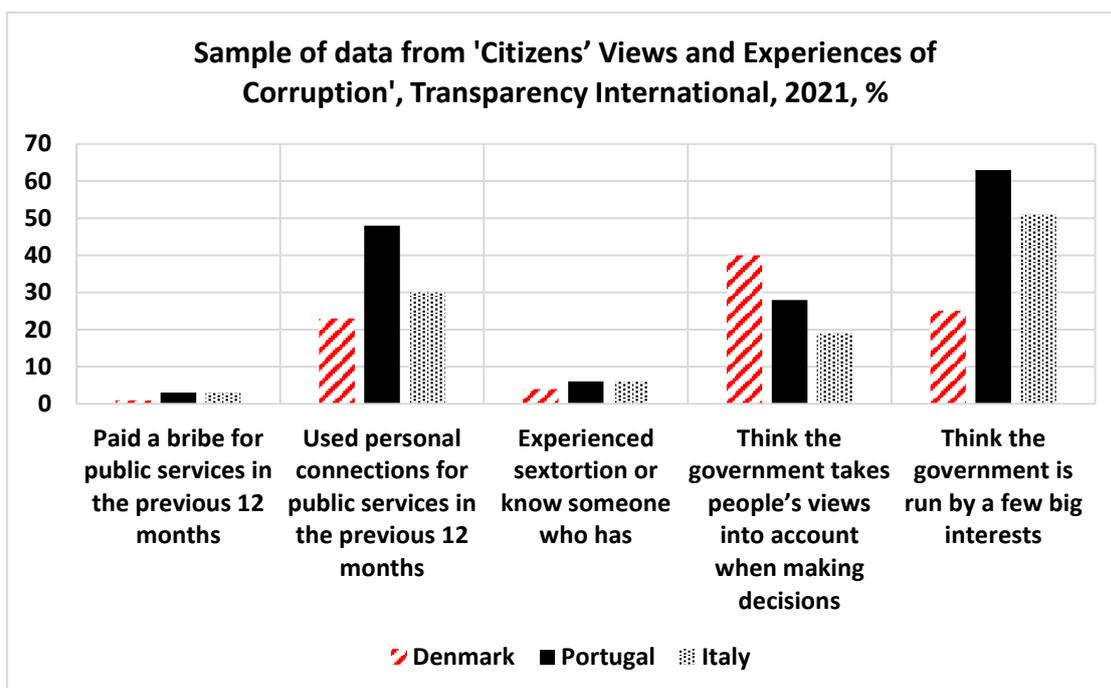


Figure 2. Sample of data for Denmark, Italy and Portugal, from *'Citizens' Views and Experiences of Corruption'*, 2021, [11].

Table 2. Ranking strongest to weakest institution/stakeholder of the national integrity system of given countries, [12].

Armenia	Azerbaijan	Georgia	Moldova	Ukraine
Ombudsman (Human rights defender)	Executive	Electoral management body	Executive	Civil society
Supreme audit institution (Chamber of control)	Law enforcement agencies	Supreme audit institution	Supreme audit institution	Executive
Electoral management body	Anti-corruption agencies	Executive	Law enforcement agencies	Ombudsman
Political parties	Ombudsman	Ombudsman (Public defender)	Electoral management body	Electoral management body
Legislature	Public sector	Law enforcement agencies	Public sector	Supreme audit institution
President	Supreme audit institution	Media	Media	Legislature
Executive	Electoral management body	Legislature	Anti-corruption agencies	Judiciary
Judiciary	Judiciary	Judiciary	Civil society	Media
Law enforcement agencies	Legislature	Political parties	Legislature	Anti-corruption agencies
Civil service	Media	Civil society	Judiciary	Law enforcement agencies
Business	Civil society	Business	Ombudsman	Business
Civil society	Political parties	Public sector	Business	Political parties
Media	Business		Political parties	Public sector

3 GRECO

After the 1974 carnation revolution Portugal joined the Council of Europe in 1976, whereas Ukraine is a member since 1995.

It should be reminded that the Council of Europe is an international organization founded in 1949 to promote and defend human rights, democracy and the rule of law in Europe¹. It is distinct from the European Union (EU); in particular it should not be confused with the Council of the European Union.

The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States’ compliance with the organisation’s anti-corruption standards. Portugal’s accession took place in 2002 and Ukraine’s in 2006.

*“GRECO’s objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption”.*²

In a recent survey on the independence of judges of the European Network of Councils for the Judiciary (ENCJ), [14], 494 Portuguese judges answered a questionnaire concerning their individual independence and the independence of the overall system. The *vexata quaestio* is question #9: *“I believe that in my country during the last three years individual judges have accepted bribes (receiving money) or have engaged in other forms of corruption (accepted non-monetary gifts or favours) as an inducement to decide case(s) in a specific way. If you agree or strongly agree, did this occur very rarely, occasionally or regularly. ?”*.

The poor ranking of Portugal in this question – see a selection of results in Table 3 - may be due to high profile cases known in 2019 and 2020. In [15] the president of the *Associação Sindical dos Juízes Portugueses* emphasises that the result of the ENCJ survey in Portugal is not ‘25% of the Portuguese judges believe their colleagues are corrupt’; instead, taking into account those high profile 2019 and 2020 cases, 25% believe that in the preceding 3 years there were cases of corruption. Clearly there is an important difference between the two statements above. But given the apparent consensus that those 2019 and 2020 cases did exist, then the concern may be why just 25% of the universe of respondents recognize that fact. Anyway, as well noted in a leading Portuguese newspaper, this matter – integrity – must be a core virtue of any judicial system, [16].

¹ as of Nov. 7 2022 with 46 member states, (after Russia was expelled on March 15 2022: <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>).

² <https://www.coe.int/en/web/greco/about-greco/what-is-greco> ;
<https://www.coe.int/fr/web/greco/structure/member-and-observers> ;
 Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe:
https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f .

Table 3. European Network of Councils for the Judiciary (ENCJ) report [14]. *“I believe that in my country during the last three years individual judges have accepted bribes (receiving money) or have engaged in other forms of corruption (accepted non-monetary gifts or favours) as an inducement to decide case(s) in a specific way ?”.*

Euro Area countries³	Responses	Agree / strongly agree (%)
Austria	740	3
Belgium	457	2
Cyprus	60	0
Estonia	67	6
Finland	227	0
France	1583	5
Germany	3140	3
Greece	826	14
Ireland	115	0
Italy	423	36
Latvia	200	6
Lithuania	181	26
Netherlands	775	0
Portugal	494	26
Slovakia	67	16
Slovenia	193	8
Spain	1191	11

Compliance of signatories countries with GRECO’s recommendations is monitored yearly, e.g. [17].

A recent evaluation of the Portuguese authorities compliance with recommendations shows a poor performance. As pointed out by *Público*, Portugal has not complied with the majority of GRECO’s 15 recommendations of 2015-6, since only 3 were implemented in a satisfactory way, [18]. *“GRECO concludes that Portugal has made only minor progress in connection with the fulfilment of recommendations found to be not implemented or partly implemented in the Fourth Round Second Interim Compliance Report; only three of the fifteen recommendations have been implemented satisfactorily or dealt with in a satisfactory manner. Of the remaining recommendations, ten have now been partly implemented and two remain not implemented”*, [19].

It is easy to understand that progress in legislation and anti-corruption tools takes time and may be difficult processes. Nevertheless, issues as a so far unexplained lapse of due reporting obligations concerning approximately 10 billion Euros that left Portugal to some tax-haven, the so-called ‘*apagão fiscal*’ issue, [20], may lead citizens to believe that authorities are dragging their heels on issues of transparency.

4 The transparency of the judicial system

The EU concern with the digitalization of justice is well expressed in the 2020 communications [21], [22].

From the 2022 EU Justice Scoreboard [23] pp.31-32:

³ No data for Luxembourg and Malta.

“Earlier editions of the EU Justice Scoreboard provided comparative data on certain aspects of the ICT in justice systems. As announced in the Commission’s Communication on the digitalisation of justice in the EU of 2 December 2020 [21], the Scoreboard has been substantially augmented with further data on digitalisation in the Member States. This should allow for more in-depth monitoring of progress areas and outstanding challenges. Citizen-friendly justice requires that information about national judicial systems is not only easily accessible but is also tailored to specific groups of society that would otherwise have difficulties in accessing the information.”

Portugal shows little availability of online information about the judicial system for the general public, see Fig. 41, p.32 of [23].

One key aspect of transparency is online access by the general public to published judicial decisions, [21] (p.37), with the associated question of anonymisation of judicial decisions before publication being briefly discussed in the 2022 EU Justice Scoreboard [23].

Recently Granado, Teixeira da Mota *et al.* wrote in *Público* about the lack of transparency that results from the non-integral publication of judicial decisions in Portugal. Only decisions of higher courts are indeed made public and even those just in part following selection criteria that are not published or known, [24]. In a free translation of the mentioned article, *“When will the transparency in the full publication of judicial decisions in Portugal? Even this partial and opaque publicity of national jurisprudence only covers the decisions of the higher courts – about the decisions of the courts of first instance, nothing exists”*. [...] *“In Portugal, the possibility of knowing and fully accessing the decisions of the courts remains postponed, thus frustrating both the realization of the right to legal information and access to the law, as well as the principle of publicity of judicial decisions that arises, not only from the national constitutional and legal framework, but also of various supranational legal instruments”*. [...] *“The problem of access to jurisprudence is, ultimately, an expression of a cultural context that does not favour transparency, free dissemination of information and collective scrutiny. But it happens that, in the field of law, we cannot afford to do without these mechanisms of control and accountability if we want to continually reinforce the legitimacy and quality of the legal phenomenon in a democratic context”*.

5 Outlook

A scholarly review of international evolution of applicable law is found in [25]. Progress is being made on awareness of - and fighting - corruption, partially as a result of organizations as the UN [26], Council of Europe, OECD [27], European Union (namely through Eurobarometer, as [28]), NGO’s as Transparency International, or private sector actors that dedicate attention to the topic, as Ernst & Young through periodical assessments, *e.g.* [29]. This last document acknowledges *“a widening gap between higher levels of integrity awareness and lowering standards, as well as between the confidence in integrity standards displayed by companies’ leadership ranks and their employees”*. Indeed, according to [29], *“18% of all surveyed board members would be prepared to mislead external parties such as auditors or regulators to improve their own career progression or remuneration. This is six times that of employees”*. This curious result seems to be aligned with experimental research at UC Berkeley and Univ. Toronto by Piff *et al.* on wealth, power and privilege. One experiment looked at cars at a busy four-way intersection and found that it was people in the more expensive cars that were four times more likely to ignore the right-of-way laws than those driving cheaper and older

cars. And at pedestrian crossings people in the cheaper cars almost always stop, while only half of the expensive cars did, [30].

Nevertheless this negative tone, important progress is being made. For ex., according to The International Herald Tribune, “*as recently as 1997, the German government made bribes paid to foreign officials by German companies tax-deductible*”, [31], and large companies were involved in bribery cases, [32]. But currently German law against corruption is more rigorous [33] and the country ranks 10th in the 2021 Transparency International corruption perception index.

Outlook inevitably concerns the increasingly pervasive artificial intelligence (AI), with academic journals already dedicated to the topic as Springer’s ‘*AI and Ethics*’. AI poses unprecedented ethical questions, as discussed *e.g.* in [34]. The European Union Agency for Fundamental Rights (FRA) seeks to promote and protect human rights in the EU, and advises the EU and national decision makers; in a recent statement on AI, [35], “*... we have to continue to insist on a principle of transparency. We have got to know what is in the algorithms, why they are created, what their training content looks like, and all manner of other dimensions. Without transparency, we cannot have the effective oversight that is needed and the effective support and honouring of the rights of individuals*”.

Also, from [36], discussing risk assessment AI tools for use by courts, states the “*need for greater transparency about how these algorithms were developed, the assumptions that were made in their design, how their factors are weighted, and how frequently they are assessed and updated. While transparency alone will not necessarily reduce the likelihood of bias, it remains valuable for a number of reasons. First and foremost, greater transparency can help facilitate audits by outside researchers. It can also help increase the general understanding of these systems, how they work, and the tradeoffs involved in implementing them.*”.

As emphasised by EUROPOL, the use and abuse of AI is likely to become a central concern for law enforcement agencies in the close future, [37].

References

1. United States Agency for International Development USAID, *Dekleptification Guide. Seizing Windows of Opportunity to Dismantle Kleptocracy*. 2022.
2. Green, R. *Ukraine: From the USSR to the EU*. 2022 September 23; Available from: <https://www.ibanet.org/Ukraine-From-the-USSR-to-the-EU>.
3. National Agency on Corruption Prevention (NACP). *The Verkhovna Rada adopted the Anti-Corruption Strategy for 2021-2025*. 2022 June 20; Available from: <https://nazk.gov.ua/en/news/the-verkhovna-rada-adopted-the-anti-corruption-strategy-for-2021-2025/>.
4. European Commission, *Commission Opinion on Ukraine’s application for membership of the European Union*, in *Communication from the Commission to the European Parliament, the European Council and the Council*. 2022: Brussels.
5. Conley, H.A., *A Modern Marshall Plan for Ukraine. Seven Lessons from History to Deliver Hope*. 2022, German Marshall Fund of the United States (GMF).
6. Transparency International. *Corruption Perceptions Index*. 2021; Available from: <https://www.transparency.org/en/cpi/2021>.
7. United Nations Development Programme UNPD. *Human Development Index (HDI) 2022*; Available from: <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI>.

8. United Nations (UN). *Sustainable Development Goals. Goal 16: Promote just, peaceful and inclusive societies*. 2015; Available from: <https://www.un.org/sustainabledevelopment/peace-justice/>.
9. Dell, G. and A. McDevitt, *Exporting Corruption 2022: Assessing Enforcement of the OECD Anti-Bribery Convention*. 2022, Transparency International.
10. Freedom House. *Freedom in the World 2022. The Global Expansion of Authoritarian Rule*. 2022; Available from: <https://freedomhouse.org/countries/freedom-world/scores>.
11. Kukutschka, R.M.B., *Global Corruption Barometer. European Union 2021. Citizens' Views and Experiences of Corruption*. 2021, Transparency International.
12. McDevitt, A., *The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine*. 2015, Berlin: Transparency International.
13. Patrucic, M., et al. *Investigative journalism is essential for Ukraine reconstruction and anti-corruption*. 2022; Available from: <https://www.brookings.edu/blog/up-front/2022/10/06/investigative-journalism-is-essential-for-ukraine-reconstruction-and-anti-corruption/>.
14. ENCJ - European Network of Councils for the Judiciary, *ENCJ Survey on the Independence of Judges*. 2022.
15. Soares, M., *Há corrupção na Justiça?* Público, 2022(November 2): p. 8.
16. Fonseca, C., *Fazer as mesmas coisas e esperar resultados diferentes*. Público, 2022(August 19).
17. GRECO, *Group of States Against Corruption. Anti-corruption trends, challenges and good practices in Europe & the United States of America. 22nd General Activity Report (2021)*. 2022, Council of Europe: Strasbourg.
18. Begonha, A.B., *Portugal fez "pequenos progressos" na prevenção da corrupção no Parlamento e na Justiça*. Público, 2022(September 6).
19. GRECO, *Fourth Evaluation Round. Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors. Second Compliance Report – Portugal. Adopted by GRECO at its 91st Plenary Meeting (13-17 June 2022)*. 2022, Council of Europe: Strasbourg.
20. Gomes, A., *Carta aberta: apagar o "apagão fiscal"?* Público, 2022(April 3).
21. European Commission, *Digitalisation of justice in the European Union. A toolbox of opportunities*, in *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*. 2020.
22. European Commission, *Commission Staff Working Document. Accompanying the Communication 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Digitalisation of justice in the European Union. A toolbox of opportunities'*. 2020.
23. European Commission, *The 2022 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions*. 2022, European Union: Luxembourg.
24. Granado, A., et al., *Para quando a transparência na publicação integral das decisões judiciais em Portugal?* Público, 2022(August 10): p. 7.
25. Wouters, J., C. Ryngaert, and A.S. Cloots, *The international legal framework against corruption: achievements and challenges*. *Melbourne Journal of International Law*, 2013. **14**(1).
26. United Nations (UN), *United Nations Convention against Corruption. General Assembly resolution 58/4 of 31 October 2003*. 2004, United Nations Office on Drugs and Crime, Vienna: New York.

27. Organisation for Economic Co-operation and Development (OECD). *Anti-Corruption and Integrity Hub*. Available from: <https://www.oecd.org/corruption-integrity/>.
28. European Commission, *Special Eurobarometer 523: Corruption*. 2022.
29. Ernst & Young, *Global Integrity Report 2022. Tunnel vision or the bigger picture? How a focus on enhanced governance can help reimagine corporate integrity*. 2022.
30. Piff, P.K., et al., *Higher social class predicts increased unethical behavior*. PNAS, 2012. **109**(11).
31. Dougherty, C., *Germany takes aim at corporate corruption* The International Herald Tribune, 2007(February 14).
32. Schubert, S. and T.C. Miller, *At Siemens, bribery was just a line item*. The New York Times, 2008(December 20).
33. Helck, T., K.-J. Xylander, and T. Schauenburg. *Bribery and Corruption Laws and Regulations 2022: Germany*. 2022; Available from: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany>.
34. Holford, W.D., *'Design-for-responsible' algorithmic decision-making systems: a question of ethical judgement and human meaningful control*. AI and Ethics, 2022. **2**: p. 827-836.
35. O'Flaherty, M. *Safeguarding fundamental rights in the digital age* 2022 February 11; Available from: <https://fra.europa.eu/en/speech/2022/safeguarding-fundamental-rights-digital-age>
36. Kehl, D., P. Guo, and S. Kessler. *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*. 2017; Available from: https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf.
37. Ciancaglini, V., C. Gibson, and D. Sancho, *Malicious Uses and Abuses of Artificial Intelligence*. 2020: European Union Agency for Law Enforcement Cooperation.