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How to fight corruption and uphold the rule of law

By Camino Mortera-Martínez



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- ★ Corruption damages the economy, can lead to the collapse of governments and diminishes citizens' trust in institutions. While it may be possible for corrupt systems to coexist with the functioning of the rule of law, in practice the worse the corruption, the more likely it is to endanger the rule of law.
- ★ The COVID-19 pandemic is testing the strength of Europe's democratic institutions. The post-pandemic recovery fund will be part of the EU's biggest budget to date, and will be susceptible to corruption, political manipulation and outright fraud.
- ★ The EU will need a stronger anti-graft strategy to ensure that corruption does not undermine democracy in the member-states, and that the bloc's post-pandemic budget boosts economic recovery rather than enriching well-connected elites. The Union must upgrade its lines of defence.
- ★ The new European Public Prosecutor (EPPO), an EU body with powers to prosecute criminals for the misuse of EU funds, is a good idea but risks failure because some member-states, including those with significant corruption problems, have chosen not to take part in it.
- ★ The EU should help the EPPO by, for example, using existing instruments such as European Investigation Orders, to initiate anti-corruption investigations in countries that do not belong to the EPPO. The EU should also make the disbursement of EU funds conditional on joining the EPPO.
- ★ But the EPPO must be part of a wider plan: a full-spectrum anti-corruption strategy should not focus on laws and institutions alone. One crucial part of this strategy should be an uncompromising defence of the judiciary.
- ★ Recent case law from the European Court of Justice allows the EU to penalise governments for attacking the judiciary through seemingly innocent moves, such as changing internal disciplinary procedures. The Union should use these coercive powers forcefully.
- ★ The EU should set up better anti-corruption enforcement mechanisms. It should begin by joining the Council of Europe's Group of States against Corruption (GRECO). It should also make better use of the European Semester process, which the EU uses to scrutinise national macroeconomic and budgetary policies, to further fight corruption. Ultimately, in order to reduce money laundering the EU could give the European Banking Authority (EBA) greater oversight powers.
- ★ The EU should revamp its rule of law review mechanism to give itself more powers to fight corruption. This could take the shape of a properly enforced peer-review mechanism of member-states' democratic institutions, as allowed by Article 70 of the Lisbon treaty.
- ★ The EU's most pressing tasks in the coming years may be to defend democratic institutions and to protect them from corruption. But the Union will not succeed by sheer regulatory force and sanctions alone. To uphold the rule of law, the EU also needs policies to support a critical and strong civil society.

Corruption is a serious crime and happens everywhere. It is also very expensive: depending on the data one chooses to believe, corruption reduces EU GDP by between €120 and €990 billion every year.¹ Corruption reduces growth and investment in Europe: in countries where corruption is perceived as widespread, like Cyprus, Greece or Romania, it can act as a deterrent to the establishment of both local and foreign companies.² Whatever the true figure, corruption is an undeniable drag on the European economy.

Corruption is a major geopolitical challenge. In the past three years, corruption scandals have toppled governments in Austria, Estonia and Spain, and triggered mass public protests in Bulgaria, Romania and the Czech Republic. In Slovakia, Prime Minister Robert Fico resigned in 2018 following the murder of journalist Ján Kuciak and his fiancée, Martina Kušnírová. Kuciak had been looking into alleged ties between Fico and the Italian syndicate known as the *'Ndrangheta*. Croatia's former prime minister, Ivo Sanader, was convicted of corruption and sentenced to eight years in prison on November 13th. In Luxembourg, investigative reporting on the so-called Luxembourg leaks and Openlux scandals has suggested that the Grand Duchy's tax and corporate policies allow, and sometimes promote, fraud and money laundering. Cyprus' so-called golden passport scheme, whereby Nicosia grants Cypriot citizenship to wealthy foreign investors, has worried the EU, too. Following an investigation by Qatari news agency Al Jazeera – in which the network went undercover and managed to get a passport for a (fake) convicted Chinese businessman – Cyprus has said it will scrap the scheme. The EU has nonetheless initiated court cases against both Cyprus and Malta for their 'passport selling' schemes.

“In the past three years, corruption scandals have toppled three European governments and triggered mass protests in many others.”

Malta is also at the centre of another corruption scandal. Daphne Caruana Galizia, a famous journalist, was murdered in 2017. At the time of her death, she was involved in the exposure of the Panama papers, which revealed how wealthy individuals and politicians used offshore accounts to evade taxes, and a string of money-laundering cases in the Baltics, Malta and Luxembourg. She had also written about money laundering by government officials. Popular outrage at her murder, partly thanks to the world-wide campaign mounted by Caruana Galizia's three sons, led to the resignation of

Malta's prime minister, Joseph Muscat, and the arrest of his chief of staff, Keith Schembri.

The EU institutions are not immune to corruption either. Most of the more recent cases involve the misuse of EU funds (including irregularities when money has not been spent according to the institutions' rules). In 2019, the European Parliament, which has the power to reject nominees to the European Commission, turned down the candidacy of France's Sylvie Goulard. She failed to satisfy enough MEPs that while she herself was an MEP she had spent parliamentary allocations correctly. She is now deputy governor of the Banque de France.³ Poland's Janusz Wojciechowski faced a similar problem. Eventually, he cleared the parliamentary hurdle and has been Commissioner for Agriculture since December 2019.

Somewhat less spectacularly, the European Parliament and the Commission routinely carry out internal investigations of their own staff. Over the years, some of these investigations have resulted in convictions and jail sentences in national courts for officials accused of embezzlement or bribery. For example, former United Kingdom Independent Party (UKIP) MEP Ashley Mote was given a five year sentence over fraudulent expense claims amounting to almost half a million euros. More recently, the European Court of Justice (ECJ) has upheld a Parliament decision to claim back €300,000 in misspent EU money from far-right politician and former MEP Marine Le Pen. And MEPs have fiddled the Parliament's rules to employ their relatives or, lately, their colleagues' families.⁴

Perhaps one of the more serious risks of corruption is that it contributes to the erosion of the rule of law by diminishing trust in institutions and governments. According to a recent European Parliament survey, a sizeable majority of EU citizens (77 per cent) think that the EU should only give money to those governments that respect the rule of law, including the fight against corruption.⁵ A poll published in November 2020 by the European Council on Foreign Relations showed that 38

1: The higher figure comes from a 2016 European Parliament paper, 'The cost of non-Europe in the area of organised crime and corruption', March 2016. The Commission's 2014 anti-corruption report estimated the cost at around €120 billion.

2: According to the European Commission's Eurobarometer poll, 100 per cent of Cypriot companies; 96 per cent of Romanian and Greek businesses; and 94 per cent of Italian companies think corruption is widespread in their countries. European Commission, 'Flash Eurobarometer 457: Businesses' attitudes towards corruption in the EU', December 2017.

3: For full disclosure, Sylvie Goulard is a member of the CER's advisory board.

4: See Nicholas Aiossa, 'Three ways MEPs can fiddle expenses', Transparency International, January 27th 2017.

5: European Parliament, 'Public Opinion in the EU in times of COVID-19', (3rd survey), October 20th, 2020.

per cent of citizens in Austria, Denmark, Finland, France, Germany, the Netherlands, Poland and Sweden think that the biggest risk to the EU's post-pandemic recovery fund is that it may be wasted or end up in the hands of corrupt politicians.⁶ According to the poll, waste and corruption are the biggest concern to voters in these member-states when it comes to the recovery fund – the second biggest worry being that the EU will spend too much money on post-pandemic recovery, with 22 per cent of voters agreeing with the statement. These figures show that corruption represents one of the most pernicious threats to the quality of a country's institutions and public trust in them.

“Corruption contributes to the erosion of the rule of law by diminishing trust in institutions and governments.”

There is a very close link between the fight against corruption and the rule of law. This connection has become even more apparent in the latest spat between Hungary and Poland, on the one side, and the EU on the other. Warsaw and Budapest threatened to veto the EU recovery fund and long-term budget, because the EU made payments conditional on respecting the rule of law. Orbán has been accused of misusing EU funds to fuel his own political ambitions.⁷ Hungary's prime minister and Poland's ruling Law and Justice party have used their

growing power to weaken the independence of their national judiciaries by amending laws and changing their constitutions. By vetoing the disbursement of much-needed recovery money on the basis of legal arguments, Budapest, with Warsaw's backing, hoped to avoid, or at least delay, EU action against corruption and rule of law violations. The EU, on the other hand, wanted to introduce an effective means of addressing rule of law issues, including systemic, government-sponsored corruption. Eventually, the parties found a compromise – the European Court of Justice will review the rule of law conditionality mechanism – and payments will begin on time. But conditionality will remain a contentious issue at least for as long as the current leaders of Poland and Hungary are in office.

This policy brief scrutinises the EU's plans to fight corruption; it examines the link between corruption and the rule of law and looks at the newly-created European Public Prosecutor's Office. The paper concludes with a critical assessment of the Union's anti-corruption strategy and offers policy recommendations to improve it, with a view to strengthening the rule of law in Europe.

This policy brief is part of a series on the future of EU justice and home affairs, and examines some ideas that have been discussed at meetings of the Amato Group, a reflection group chaired by former Italian Prime Minister Giuliano Amato. The group is an initiative led by the CER and supported by the Open Society European Policy Institute (OSEPI).

Corruption and the rule of law

There is no universal definition of corruption. Most governments and international organisations agree that corruption is a crime that can take many shapes. Perhaps the simplest description comes from the World Bank, which defines corruption as “the abuse of public office for private gain.”⁸ This does not mean that corruption only exists in public activities. Individuals and private companies can engage in corruption, too – for example by cheating their way through procurement processes, bribing public employees or committing fraud.⁹ Not all corruption involves bribes – former US president Donald Trump putting his New York socialite daughter on the public payroll as a government adviser is a form of corruption, for example. But the commonest form of corruption is when politicians or officials trade favours for benefits, such as former Austrian vice chancellor, Heinz-Christian Strache, agreeing to give a fake Russian businesswoman government contracts in exchange for her purchasing an Austrian tabloid to help his electoral campaign.

Government corruption can happen at two levels: bureaucratic and political. Sometimes the two compound each other – with politicians and bureaucrats co-operating and profiting from corruption together. Meanwhile, both government and private sector corruption can be either rare or systemic.

In countries where corruption is rare, the vast majority of officials and others involved in public matters adhere to the rulebook and refrain from using their positions for personal gain. There may be cases of corruption, but when they are uncovered those engaged in it are usually prosecuted and sanctioned. In countries where corruption is systemic, unlawful and unethical behaviour is so widespread that it suits most people to go along with it.¹⁰ For example, the police forces in some EU former communist states are almost always willing to negotiate a speeding ticket. And where the mob exercises control over EU towns or regions, many businesses and

6: Susi Dennison and Pawel Zerka, 'The transformative five: A new role for the frugal states after the EU recovery deal', European Council on Foreign Relations, November 25th 2020.

7: Gabriela Baczyńska, 'Worried by “systemic irregularities”, EU ties recovery funds to Hungary procurement reform', Reuters, February 8th 2021.

8: The World Bank Group: 'Helping countries combat corruption: The role of the World Bank'.

9: Vito Tanzi, 'Corruption around the world: Causes, consequences, scope and cures', IMF working paper, International Monetary Fund, 1998.

10: The World Bank Group.

government officials are involved in a mix of corruption, intimidation and violence. Of course, few countries are either completely free from or completely plagued by corruption. Most fall somewhere on the spectrum between being very clean or highly corrupt, to borrow the words used in Transparency International's latest 'corruption perception index'.¹¹

According to this index the EU is less corrupt than the average (the bloc's score is 64/100). Six out of the top

ten rated countries are in the EU – Denmark, Finland, Sweden, the Netherlands, Germany and Luxembourg; and even the bloc's worst-rated countries (Romania, Hungary and Bulgaria) are in the top half of the 180-strong list (see Table 1). Despite this relatively decent track record, perceptions of corruption vary widely across the EU: 92 per cent of Portuguese citizens think corruption is pervasive in their country as opposed to just 21 per cent of Danish citizens.¹²

Table 1: Corruption perception ranking: EU countries



Country	Score (out of 100)	Position (out of 180)
Denmark	88	1
Finland	85	3
Sweden	85	3
The Netherlands	82	8
Germany	80	9
Luxembourg	80	9
Austria	76	15
Belgium	76	15
Estonia	75	17
Ireland	72	20
France	69	23
Spain	62	32
Portugal	61	33
Lithuania	60	35
Slovenia	60	35
Cyprus	57	42
Latvia	57	42
Poland	56	45
Czechia	54	49
Italy	53	52
Malta	53	52
Greece	50	59
Slovakia	49	60
Croatia	47	63
Bulgaria	44	69
Hungary	44	69
Romania	44	69

Source: Transparency International.

11: Transparency International, '2020 Corruption perceptions index'.

12: European Commission, Special Eurobarometer 470, 'Corruption', December 2017.

The COVID-19 pandemic is testing the strength of Europe's democratic institutions, as governments everywhere have declared states of emergency that limit fundamental rights. Even countries with impressive scores have weakened accountability and transparency over public spending: for example, Belgium, Denmark, the Netherlands and Norway (a non-EU member) have

not published data on public contracts for the purchase of protective equipment.¹³ According to Transparency International, top performer Denmark fared worse in 2020 than in 2019 (see Table 2). Poland's 2020 score is its worst in five years. Italy has become much worse since 2016. And there has been no improvement in Germany, France or Spain.

Table 2: Change in public perception of corruption the last five years (top and bottom performers and the EU's five biggest countries)



Year	Average Western Europe (including EU) ¹⁴	Denmark	Finland	Germany	France	Spain	Italy	Poland	Hungary	Romania
2016	66/100	90	89	81	69	58	60	62	57	57
2017	65/100	88	85	81	70	57	50	60	45	48
2018	65/100	88	85	80	72	58	52	60	46	47
2019	66/100	87	86	80	69	62	53	58	44	44
2020	66/100	88	85	80	69	62	53	56	44	44

Source: Transparency International.

It may, in theory, be possible to have systems which have corruption and a functioning rule of law, or, conversely, not too much corruption but a lack of rule of law. But in general, the more pervasive the corruption, the more it endangers the rule of law. The Venice Commission (the Council of Europe's advisory body on constitutional matters) says that the rule of law has six elements: legality; legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts; respect for human rights; and non-discrimination and equality before the law.¹⁵ As corruption becomes widespread, it can jeopardise one or several of these elements. For example, a bribe to a local councillor in Portugal's Algarve in exchange for a permit to build a hotel in a protected area would breach four of those principles: legality (the councillor would change the administrative act classifying the area as protected);

legal certainty (a protected area where citizens could expect to enjoy nature would disappear); prohibition of arbitrariness (the councillor is abusing his power); and non-discrimination (the city would only allow companies which pay a 'fee' to build hotels and profit from them).

Corruption also weakens democracy. The Economist Intelligence Unit's democracy index, which ranks countries according to the health of five elements (electoral processes and pluralism; functioning of government; political participation; political culture; and civil liberties) shows that political culture and political participation are more at risk in countries where corruption is pervasive (see Table 3). Conversely, four out of the indexes' top ten countries (Sweden, Finland, Denmark and Ireland) are also amongst the EU's least corrupt countries.¹⁶

13: Transparency International, 'CPI 2020: Trouble at the top – an analysis', January 28th 2021.

14: Western Europe (including EU) countries are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, Switzerland and the United Kingdom. Transparency International does not give separate scores for the EU and Western Europe for the years 2016 and 2017. Note that combined scores for both areas tend to be higher than when looking at each individually (the EU scored 64/100 in 2020, for example).

15: Ian Bond and Agata Gostyńska-Jakubowska, 'Democracy and the rule of law: Failing partnership?', CER policy brief, January 2020. For more definitions of the rule of law, see: Communication from the Commission to the European Parliament, the European Council and the Council, 'Further strengthening the Rule of Law within the Union State of play and possible next steps', April 3rd, 2019; Rafał Mańko, 'Protecting the rule of law in the EU: Existing mechanisms and possible improvements', European Parliament Research Service, November 2019; and Thomas von Danwitz, 'The rule of law in the recent jurisprudence of the ECJ', Fordham International Law Journal, Volume 37, Issue 5, 2014.

16: The Economist Intelligence Unit, 'Democracy Index 2020'.

Table 3: Corruption and democracy scores for top and bottom performers in 2020

Country	Overall score democracy index (out of ten)	Overall score corruption perception index (out of 100)	Score political participation (out of ten)	Score political culture (out of ten)
Sweden	9.26	85	8.33	10.00
Finland	9.20	85	8.89	8.75
Denmark	9.15	88	8.33	9.38
Ireland	9.05	72	8.33	9.38
Bulgaria	6.71	44	7.22	4.38
Hungary	6.56	44	5.00	6.25
Romania	6.40	44	6.67	3.75

Sources: Transparency International and The Economist Intelligence Unit.

The EU's institutions worry about corruption because it is costly, linked to cross-border crime and sometimes involves EU funds. In recent years, it has become clear that there is a direct causal connection between

corrupt networks and democratic backsliding in some European countries. The pandemic makes an even more compelling case for strengthening the oversight of both democratic institutions and the EU budget.

The EU's plans to fight corruption: Fit for purpose?

The EU considers corruption to be a euro-crime. That means it is included in a list of particularly serious crimes with a cross-border dimension, for which the EU sets baseline rules to try to ensure that all member-states consider them criminal offences and apply roughly similar penalties.¹⁷ The EU's anti-corruption efforts have focused mainly on four areas: regulation, monitoring, assistance and data. Some have been more successful than others.

The EU uses its regulatory power to combat corruption in two ways. First, the Brussels institutions regularly include anti-corruption clauses in EU laws and policies, particularly those related to financial crimes, public administration and tendering. For example, recent EU laws on money-laundering and public procurement include provisions to fight corruption, such as excluding companies which have been convicted of fraud from tenders. Second, the EU has passed laws specifically designed to combat corruption, like a directive on the protection of the EU's financial interests (the so-called PIF directive, using its French acronym). This law targets fraud in EU finances, and harmonises national definitions

of corruption and fraud in member-states' criminal law codes.

Other EU laws to fight corruption include the whistleblower protection directive, which obliges member-states to introduce legislation to protect people who report breaches of Union law; and the 2018 anti-money laundering directive, which provides a definition of money laundering and makes it a criminal offence throughout the Union. While laudable, these efforts have had limited success. Misuse of farm subsidies, for example, is an ongoing problem in southern member-states. In Italy, 97 mafia-associated people, including politicians and accountants, are currently standing trial for a fraudulent scheme resulting in the alleged theft of at least €10 million.¹⁸ EU regulators are looking at more forceful ways to protect the EU's purse. The proposed rule of law conditionality mechanism is the latest example of Brussels' anti-corruption regulatory efforts: Article 3 of the regulation lists corruption amongst the rule of law deficiencies that may trigger a pause in the payment of EU funds.

17: Article 83.1 Treaty on the functioning of the European Union (TFEU). The list also includes terrorism, trafficking in human beings and sexual exploitation, illicit drug and arms trafficking, money laundering, counterfeiting of means of payment, computer crime and organised crime.

18: Hannah Roberts, 'Italian mafia trial could expose underbelly of massive EU fraud', *Politico*, March 4th 2021.

Because levels of corruption differ among member-states, one of the most important things the EU can do is ensure that all EU countries are doing enough to combat it. In 2014, then Commissioner for Home, Affairs Cecilia Malmström, unveiled the first ever EU anti-corruption report. The report provided an assessment of member-states' efforts to fight corruption and was supposed to be part of a wider, regular exercise to scrutinise anti-corruption laws and policies in the EU. After just one edition, though, the report was quietly discontinued. According to officials, disagreements over whether the report should also look at corruption within the EU institutions led to its eventual demise.

Despite this false start, the European Commission presented its first rule of law report in September 2020. The document analysed the state of the rule of law in all 27 members of the EU, including corruption levels and the policies that governments have put in place to deal with them.

“The Commission wants to spot systemic rule of law deficiencies before they become a Poland-sized political problem.”

The Commission's rule of law report came about after much negotiation and it does not please everybody. European officials critical of the report argue that it is an expensive gimmick devised to avoid having to single out specific countries. The Commission, however, believes that by having a fair assessment of the state of democratic institutions in every member-state, it can spot systemic rule of law deficiencies before they become a Poland-sized political problem. If done well, the report can be a useful bellwether of democracy around Europe. But for that to happen the Commission will need to overcome reservations not only from EU governments but from other EU institutions, too. If the fate of the 2014 anti-corruption report is anything to go by, though, the Commission may have a hard time pushing ahead with a yearly review of Europe's rule of law standards.¹⁹

The European Commission's anti-corruption monitoring strategy also includes issuing country-specific recommendations through the European Semester process, in which the Commission scrutinises national macroeconomic and budgetary policies. The Commission expresses views on a range of policies and issues. These include laws governing sanctions, elected officials who have conflicts of interests, and healthcare public workers

19: Although officials have already started work on the second edition.

20: Recommendation for a Council Recommendation on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy, May 20th 2020; Recommendation for a Council Recommendation on the 2020 National Reform Programme of Greece and delivering a Council opinion on the 2020 Stability Programme of Greece, May 20th 2020.

who may get informal payments.²⁰ Unfortunately, corruption does not have a dedicated section under the European Semester process. As a result, the media often fails to give corruption the attention it deserves in the recommendations the Commission addresses to the member-states. Finally, the Commission's justice scoreboard, a yearly data-gathering exercise on the functioning of national judiciary systems, collects data about the independence of prosecutors and their ability to effectively fight corruption in their member-states. National authorities sometimes provide patchy data for the justice scoreboard, so its results are not always reliable. Because justice systems across the continent are so different, a separate problem is that the scoreboard's indicators are not always comparable.

The EU also helps member-states to address corruption through funding and the sharing of best practice. The Commission gives money to EU governments and civil society organisations to help them build stronger anti-corruption strategies. For example, the Commission funded a cross-border project to unmask the real owners of suspicious companies, trusts and other legal entities which informed subsequent reforms of the EU's anti money-laundering laws, including a forthcoming proposal for a new directive.²¹ In January 2020, the EU set up DG REFORM, a new directorate general “to help EU countries build more effective institutions, stronger governance frameworks and efficient public administrations”.²² The department replaces a previous, underused initiative, the EU's Structural Reform Support Service, which was supposed to help member-states to design structural reform plans, including anti-corruption and money laundering strategies, by, for instance, sending experts to trouble spots for specific projects. By the end of 2019, no member-state had used this service – leading to questions as to whether the EU institutions could find better routes to encourage member-states to use available EU support.

Finally, the EU has a role in improving the quality of corruption data and indicators across the EU. The EU regularly publishes surveys on corruption, which measure citizens and businesses' perceptions across Europe. The Commission, together with the Council of Europe, a non-EU body, has also worked to identify the best indicators to measure corruption data in Europe and is supposed to publish reports on these indicators every two years.

Officially, the fight against corruption falls within the remit of the EU's directorate-general for home affairs and migration (DG HOME). But in practice, the

21: Project Bownet: Identifying the beneficial owner of legal entities in the fight against money laundering.

22: European Commission, 'Structural reform support'.

bloc's justice department (DG JUST) has effectively been the Commission's anti-corruption unit.²³ DG Justice spearheaded the most salient initiatives to fight corruption over the past few years, including the financial interests (PIF), whistleblowing and anti-money

laundering directives. DG Justice has also overseen the setting up of the Union's most ambitious idea to penalise the misuse of EU funds: the new European Public Prosecutor's Office (EPPO).

The European Public Prosecutor's Office: A bumpy road ahead

So far, the European Union's attempts to tackle corruption have had a limited impact. This is not necessarily the EU's fault: the Brussels institutions are restricted in what they can do on a matter that falls outside their direct remit unless it touches the EU's pocket. And even then, EU governments and the EU institutions do not find it easy to agree on how to protect EU money.

The EU's budget first line of defence is the Court of Auditors (ECA). Mirroring similar independent auditing bodies in the member-states, the ECA's role is to monitor how the EU institutions and EU governments spend their money and make sure they do so according to pre-established budgetary principles. For example, one of the Court's jobs is to ask officials in charge of EU spending whether they could have achieved the same result with less money. But the ECA does not have legal powers. When it suspects fraud, corruption or other illegal activity, it must report it to the European Anti-Fraud Office (OLAF).

“So far, despite its best efforts, the European Union's attempts to tackle corruption have had a limited impact.”

OLAF is the EU budget's second line of defence. Set up in 1999, following the *en masse* resignation of the Santer Commission due to a scandal involving French Commissioner Édith Cresson and the mismanagement of EU funds, OLAF has a two-pronged mandate. It “investigates fraud against the EU budget, corruption and serious misconduct within the European institutions”.²⁴ It also helps the EU to shape its anti-fraud policy. OLAF is an independent authority when it carries out investigations, but belongs to the European Commission in its policy-making role.

Despite the hefty financial cost of corruption to the EU's coffers (member-states estimate that some €638 million of EU structural funds were misused in 2015), OLAF may bark, but it very rarely bites: while it is allowed to conduct dawn raids, it can only open administrative investigations. If it finds evidence, OLAF must refer any

official query to national authorities who then decide whether to open a criminal investigation. This is a lengthy process that seldom leads to conviction. Only half of OLAF's recommendations lead to an indictment and, more often than not, money is not recovered, either because it disappears before an investigation is launched or because rules and procedures across borders are so confusing that criminals end up keeping their proceeds.

For the past few years, the EU has been busy building its third, and hopefully more powerful, defence against the corrupt use of EU money: the European Public Prosecutor's Office. In 2010, the Lisbon treaty paved the way for establishing a new office to “combat crimes affecting the financial interests of the Union.”²⁵ The EPPO is a leap forward in EU politics, as it is the first ever EU body with powers to prosecute criminals.

According to the treaties, the creation of the EPPO requires the approval of all member-states, unless at least nine member-states agree to press on with plans to set up the prosecutor through the enhanced co-operation procedure. That mechanism allows like-minded member-states to pursue a project despite opposition from a small number of countries. In April 2017 a group of 16 countries launched the process to set up a European Public Prosecutor. More countries have since joined and, at the time of writing, all member-states except for Denmark, Hungary, Ireland, Poland and Sweden are part of this new initiative.²⁶ In October 2019, the European Parliament and the member-states agreed to appoint Romanian prosecutor Laura Codruța Kövesi as the EU's first chief prosecutor – despite resistance from her own government, which was placed under investigation for corruption during Kövesi's time as chief prosecutor for Romania's anti-corruption agency.

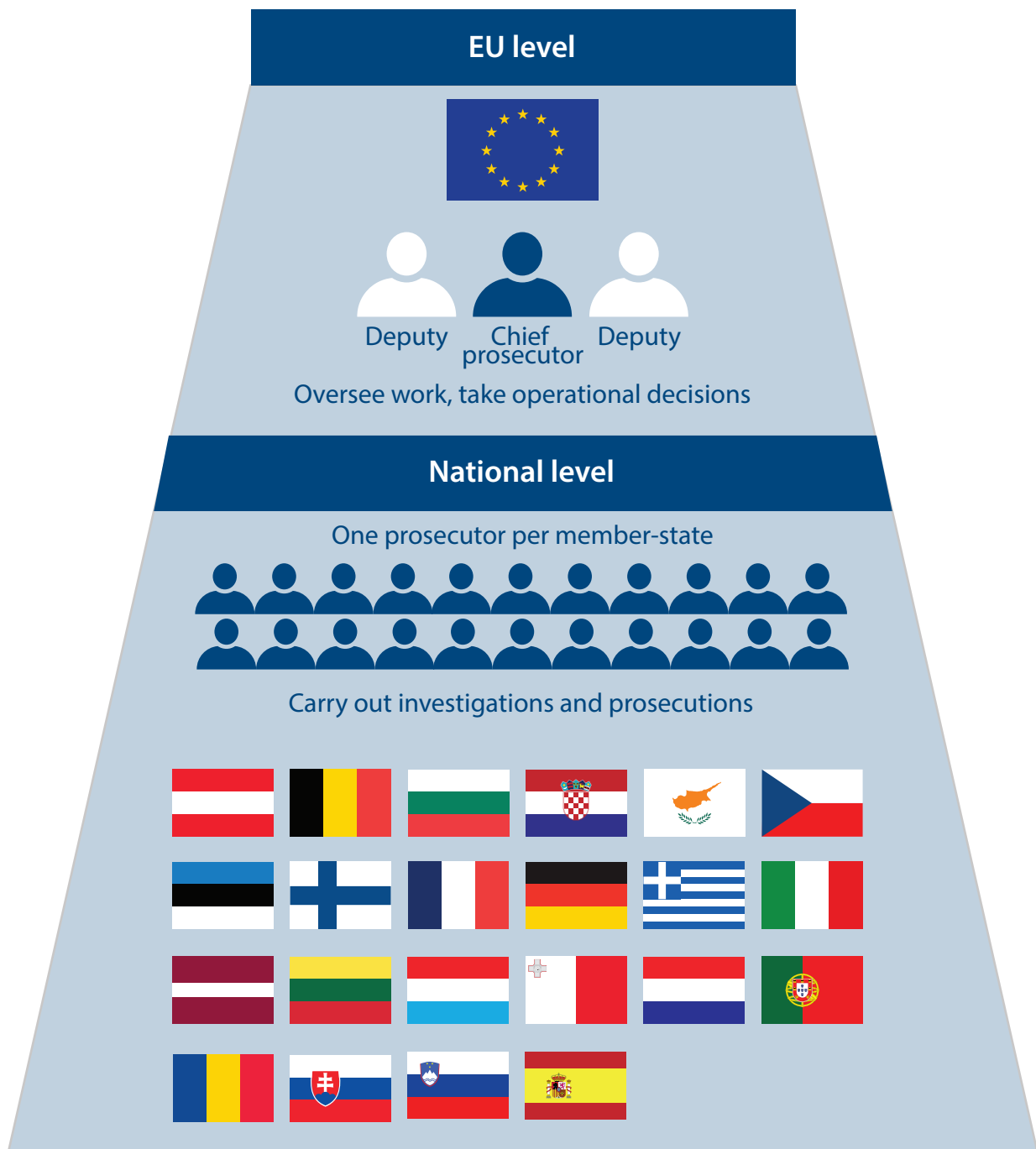
The EPPO will have a complex structure with two levels: a ‘central’ EU level comprising the chief prosecutor, two deputies and one prosecutor per participating member-state. They will be in charge of overseeing the EPPO's work and taking operational decisions; and a ‘national’ level consisting of delegated prosecutors responsible for carrying out the actual work of investigating and prosecuting criminals in the member-states.

23: Several other Commission departments also help implement the EU's anti-corruption plans, most notably the so-called spending DGs, like REGIO (Regional and Urban Policy); EMPL (Employment, Social Affairs and Inclusion); and INTPA (International Partnerships).

24: European Commission, ‘European Anti-Fraud Office.’

25: Article 86, Treaty on the functioning of the European Union.

26: Although Sweden is expected to join soon, according to officials.



The mix of EU and national responsibilities will also be mirrored at an operational level. If the EPPO opens an investigation, the EU investigation will take precedence and national authorities will refrain from carrying out their own investigation into the alleged crime. National courts will, however, be able to review the EPPO's procedures and the ECJ will ensure the EPPO operates in a consistent manner across participating member-states by examining cases referred to it by national courts.

The EPPO has missed its self-imposed deadline of November 2020 to begin operations. Once it is up and running, the office will be able to investigate and prosecute crimes against the EU budget. These include fraud, corruption, money-laundering and cross-border VAT fraud above €10 million. The EPPO will have a heavy workload from the outset. Because it is competent to examine cases of mishandling of EU funds since 2017, officials estimate that the EPPO will have to deal with some five to six thousand cases (around a third of which will result from the backlog of the past three-and-a-half years).

As soon as it begins working, Kövesi and her team will have their work cut out: the EPPO will have the all-important job of policing the use of the EU's record €1.82 trillion budget, including its post-pandemic €750 billion recovery fund.²⁷

It took considerable political capital from both the EU institutions (including the German presidency of the Council of the EU) and the member-states to forge an agreement on the recovery fund, since it involves transfers between member-states and EU borrowing. The agreement also included some vague wording about linking payments to rule of law requirements. In November 2020, those vague words were given substance in the so-called rule of law conditionality mechanism – an EU regulation that demands compliance with rule of law principles for EU funds to be disbursed.

“The EPPO has begun operations at what can be described as a very weird time for the EU.”

Budapest and Warsaw opposed the regulation, which was ultimately agreed by qualified majority voting. They threatened to veto the law that allowed the EU to go to financial markets to raise the money for the recovery fund. The Polish and Hungarian governments argued that rule of law conditionality should not be applied to EU funds for two reasons. First, there was already a legal mechanism to hold countries responsible for rule of law breaches in the EU (Article 7 of the Lisbon treaty allows the EU to suspend voting rights in cases of serious breaches of EU values). Second, there were already mechanisms to hold countries responsible for misusing EU funds (OLAF, and the EPPO for those countries which are members). Unfortunately, however, Article 7 procedures, which have been instigated against both Hungary and Poland, have very little chance of succeeding since they require a unanimous vote in the Council of Ministers; and neither OLAF nor the EPPO has been, or will be able to, stop the financing of cronyism in either country, as they have a limited remit.

Eventually, the German Presidency of the European Council brokered a compromise by adding an explanatory memorandum to the December European

Council conclusions. Under the compromise, the EU commits not to apply the conditionality mechanism if, and while, there is a challenge to it before the European Court of Justice.²⁸ The legal fudge allowed both camps to claim victory: Budapest and Warsaw lifted their veto, hoping to delay the triggering of the mechanism for long enough to make it irrelevant; and the EU camp managed to press ahead with the recovery fund without having to tweak its rule of law conditionality mechanism – with the hope that any challenge before the ECJ would be resolved quickly, and in its favour.

But the fracas serves as a reminder of the EPPO's bumpy road ahead: the office had the misfortune of beginning operations at what can at best be described as a very weird time for the EU. It will not only need to oversee the EU's biggest budget to date, but also to tread carefully around the politically sensitive recovery fund, an enormous pot of money that was hard to agree upon, and is currently at the centre of a row over the EU's values and the bloc's urgent need to get its economy going again after the pandemic. The recovery fund will also be technically difficult to oversee: it sets out the priorities for spending in very broad terms, making it hard to prove conclusively whether particular items qualify for funding or not.

The EU wants the fund to pay for projects that help to make the EU's economy greener and more digital, but it will be up to the member-states to put forward their funding proposals. The European Commission and OLAF will have a role in ensuring that the money go to projects that fall within the recovery plan's remit, but there are risks of misuse and pork barrel spending. To counter the pandemic, the recovery fund will also have to be spent quickly and with some degree of freedom by national policy-makers and officials. The EPPO will play a crucial role in ensuring that none of these funds end up in the pockets of corrupt politicians.

Too much political capital has been spent on the recovery fund for it to fail. The EU will need a well-designed anti-corruption plan, with proper enforcement powers, to ensure that no countries or individuals misspend the funds, and to help reversing democratic backsliding in some EU countries.

A mighty task, if there ever was one.

27: European Council conclusions, July 17th-21st 2020. According to officials, the European Council's explicit mention of the EPPO was politically motivated. There was no need to specify that the office will be in charge of policing the new budget, as this is the EPPO's main job. But by referring to the office in the same document where the EU announced its new budget and recovery fund, Brussels tried to send a message to those countries which are not part of the EPPO (notably Hungary and Poland). As one official eloquently put it “the idea was to let these countries know that, no matter what they will do, they will have the EPPO on their back”.

28: Hungary and Poland launched a legal case against the rule of law conditionality mechanism before the European Court of Justice on March 11th 2021.

How to fight corruption and uphold the rule of law

Article 2 of the Treaty on European Union says that the Union is founded, among other values, on the rule of law. Pervasive corruption undermines the independence and efficiency of public authorities and erodes citizens' trust in their institutions. There can be no functioning rule of law without a robust anti-corruption strategy.

To uphold the rule of law in Europe, and in some unfortunate cases, to restore it altogether, the European Union needs to have a forceful plan to fight corruption, both by ensuring that no EU funds end up in the pockets of corrupt politicians and their friends, and by helping member-states to eradicate corruption. In the words of EPPO boss Laura Kövesi, the fight against corruption is first and foremost a fight to change mentalities. No EU campaign will reverse cronyism in, say, rural Greece. But there are several things the EU can do to help.

“To uphold the rule of law, and sometimes, to restore it altogether, the EU needs a forceful anti-corruption plan.”

A well-functioning public prosecutor

In some ways, the setting up of a EPPO resembles the introduction of the euro. In both cases, the EU put the cart before the horse by skipping several steps in the policy integration process. With the euro, the Union federalised monetary policy without creating a common fiscal policy or system of banking supervision; with the EPPO, the EU institutions have fulfilled a long-term ambition of creating some sort of body with criminal enforcement powers even if there is not, and probably never will be, such a thing as European criminal law.

Like the euro, the EPPO will have to clear high hurdles to succeed. Perhaps the highest is that, much like Europe's common currency, not all member-states are members of the EPPO. This will create problems of enforcement across the EU. The EPPO will be ineffective if the more corrupt countries in the EU do not belong to it.

One solution could be to use European Investigation Orders (EIOs) to initiate anti-corruption investigations in countries that do not belong to the EPPO. A European Investigation Order is a court decision by one EU country asking the judiciary of another EU country to gather or use evidence in criminal investigations. Once the EPPO starts working, it will have the power to issue EIOs, just like any national judicial authority. Because EIOs apply to

all member-states except Ireland and Denmark (which have opt-outs from aspects of EU justice and home affairs), the EPPO will be able to ask courts in Hungary, Poland and Sweden to carry out anti-corruption investigations.

Another idea would be to make the disbursement of EU funds conditional on joining the EPPO. This would be a step further on the ongoing process of linking EU money and the rule of law. It would be technically feasible – much like the rule of law conditionality regulation, the Council of Ministers could approve a law by qualified majority that makes it compulsory for member-states to be members of the EPPO in order to receive funds.²⁹ But such a law would be a tough sell not only in Hungary and Poland, but also in Denmark, Ireland and Sweden, which are also not members for less contentious reasons.

To police the EU budget and the recovery fund, the EPPO will need to have more resources than originally planned, both in terms of money and staff. The road to setting up a European Public Prosecutor was not easy and many, including this author, were sceptical of the need for such an overarching EU body, particularly when there are no plans to abolish OLAF, an agency which will become largely redundant if the EPPO is a success.³⁰ The EPPO's mix of federal and national responsibilities, the result of political rather than operational considerations, may make it less effective. But the pandemic has changed things. If the bloc is serious about using its money to help European economies recover from the pandemic while reforming the continent's economic model and preventing democratic backsliding, then it will definitely need some help. A fully-resourced, resolute and respected Public Prosecutor's Office will provide an additional level of accountability for the spending of EU funds when domestic courts and law enforcement are captured or otherwise rendered ineffective.

An all-encompassing anti-corruption strategy

For the EPPO to function effectively it must be part of a wider strategy to address corruption and the rule of law in Europe, including ensuring co-operation with more reluctant member-states that do not participate in the EPPO. As shown by the so-called Article 7 procedures against Poland and Hungary, punitive measures alone have often a limited use as a deterrent and fail to address the root of the problem. Romania is another good example: Kövesi herself spearheaded one of the world's most effective anti-corruption units, with a conviction rate of almost 90 per cent. And yet corruption is still

29: Denmark, Hungary, Ireland, Poland and Sweden would not have the necessary votes to block a vote in the Council of Ministers.

30: To work, the EPPO not only will need to be effective in prosecuting crimes against the EU's financial interests and recovering funds, but also in convincing all member-states to join. For as long as not all EU-27 are members of the EPPO, OLAF, or something similar to it, will be needed to cover the blind spots.

widespread in Romania. To curb corruption in the EU, the Brussels institutions and the member-states need to deal with the underlying structural problems.

A full-spectrum anti-corruption strategy should not only focus on laws and institutions, but also encompass broader issues like the need for fairer entry systems to national civil services, to reduce cronyism, or better access to broadband services and e-government, to avoid cash payments and help people know their rights. A robust civil society and a free press will also contribute to ensuring European governments are accountable and held to the highest standards; and perhaps help to shape Europe's diplomatic and economic relationships with large and powerful authoritarian – and more corrupt – countries like Russia or China.

“One crucial part of the EU's anti-graft strategy must be an uncompromising defence of the judiciary.”

One crucial part of this strategy must be an uncompromising defence of the judiciary. There can be no anti-corruption plan if there is no one there to act upon it. There is a reason why illiberal governments have been reducing the independence of their courts: while all democratic institutions suffer when the rule of law is under threat, the judiciary tends to take the worst hit, as it has no tools to defend itself.

Until recently, the EU had few powers to counter attacks on the judiciary in member-states, as this was considered a matter of national competence. Whenever it wanted to address questions concerning the judiciary, the EU had no choice but to resort to the Article 7 procedure. A 2018 ground-breaking ECJ ruling changed that: in a case between the Portuguese judiciary trade union and Portugal's Court of Auditors, the ECJ said that, because national judges should be considered EU judges, the EU was competent to intervene when their working conditions stopped them from providing effective judicial protection under EU law.³¹ This ruling opened the door for the EU institutions to bring countries to court when their governments attack their judiciary through seemingly innocent tricks, such as changing the rules governing internal disciplinary procedures.³² The EU should make sure it uses this power, together with broader sanctions, when it suspects a government is targeting the judiciary.

31: C-64/16 - Associação Sindical dos Juizes Portugueses, February 27th 2018.

Better anti-corruption supervision

Over time, the EU has built up its anti-corruption supervisory powers by setting up of numerous mechanisms – from the rule of law report to the European Semester. But these have not as yet helped the bloc better anticipate full-blown corruption scandals and the consequent erosion of support for public institutions. There are some steps the EU could take to improve supervision.

First, the EU could join the Council of Europe's Group of States against Corruption (GRECO), a non-EU body that monitors anti-corruption efforts on the European continent (including in Turkey and Russia) as well as in the US. Since 2019, the European Union has been an observer to the group, which means it can attend all meetings and have access to all relevant documents, but it cannot vote. While a majority of member-states support the idea of the EU joining GRECO as a fully-fledged member, this has not happened yet.

Second, policy-makers need to realise that corruption has an effect on the EU's internal market (by, for example, excluding foreign companies from contracts, which are instead awarded to cronies) and start treating it as a serious economic problem, not just a criminal offence. The EU could, for example, make better use of the European Semester process to boost the fight against corruption and strengthen the rule of law. Some EU capitals take the Commission's quarterly recommendations on their economic governance more seriously than others. But non-compliance might damage countries' reputations, and could lead to fines, in theory at least. Recommendations also get a fair amount of media coverage in the member-states. If anti-corruption recommendations were to have their own, stand-alone chapter within the country report, they would stand a better chance of being respected and publicised – which would help the EU when it is at loggerheads with national governments on rule of law issues. In any event, if the recovery fund was to be made permanent (and that is a big “if”) rule of law compliance, including anti-graft and anti-money laundering plans, should be a prominent criterion when assessing member-states' economic governance.

Third, the EU could upgrade the role of banking supervision in preventing money laundering. The Panama Papers scandal has shown that banks are not always as diligent in this area as they should be. This appears to be a particular problem in smaller member-states. An additional complication is that financial intelligence

32: See ongoing infringement procedure from April 29th 2020, Commission v. Poland for 'Violation of EU law by the legislative changes affecting the judiciary'. Also, see Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', European Constitutional Law Review, Volume 14, Issue 3, September 2018.

units (FIUs, EU-mandated national agencies that gather and investigate suspicious financial transactions) systematically fail to follow up leads and co-operate with one another. A recent report by the Centre for European Policy Studies (CEPS) found that only 10 per cent of suspicious activity reports recorded by Europol have been investigated by authorities.³³ A Europol official estimates that around 90 per cent of all reports involve cross-border activities. And yet the EU has no way of ensuring that national authorities complete their investigations and communicate with each other. That is why the EU is considering whether an EU-wide anti-money laundering authority, similar to the European Central Bank's Single Supervisory Mechanism, could help improve banking supervision and enforcement mechanisms. The European Parliament wants a new, fully-fledged agency with powers to supervise both financial and non-financial institutions, while experts and some officials at the EU institutions are more cautious and would prefer a more gradual approach.³⁴ As the CEPS report notices, such an approach might entail giving the European Banking Authority (EBA) additional supervisory competences for money laundering, which might evolve into a separate governing structure within the EBA.

Finally, in time, the EU should have more anti-corruption powers through a revamped rule of law revision

mechanism. While the current framework, including the rule of law report and the justice scoreboard, is an improvement on previous attempts at understanding and publicising corruption, it is still a relatively toothless exercise.

The Commission has assumed the role of supervisor of member-states' rule of law standards, and its top-down approach is opposed by the countries it wants to single out. Less corrupt countries complain that there is no reason for them to be subject to a time-consuming exercise to allow the Commission to claim it is treating everyone equally. A way forward could be to complement the annual report with a proper peer-review mechanism.

Article 70 of the Lisbon treaty allows member-states to "conduct objective and impartial evaluation of [policies facilitating mutual recognition]". With its current rule of law report, the EU has been reluctant to set up such a review, opting for a somewhat lighter, business-as-usual Commission report. But if Hungary, Poland and others continue to thumb their noses at the EU's efforts to defend the rule of law, the bloc should not hesitate to use all the tools available in the treaties to hold them accountable.

Conclusion

Corruption is no longer the purview solely of a few officials in Brussels worried about what a public servant in the Dordogne or Jaén might be doing with EU agricultural funds. Over the past few years, corruption has become a major cross-border crime which has a knock-on effect on European economies and, ultimately, erodes public trust and confidence in state institutions. That produces fertile ground for populism, and the risk of a downward spiral in which populist leaders nurture yet more corruption. This is why corruption is at the centre of democratic backsliding in Europe, as both a cause and a consequence of the actions of illiberal and less law-abiding governments across the EU.

Defending the rule of law may be the EU's most pressing task over the coming years. It will also be difficult, as the recent fracas over the recovery fund shows. The EU will not succeed in stopping governments from capturing their judiciaries, creating LGTBQI-free zones or weakening their parliaments by sheer regulatory force alone. Nor would sanctions ever be 100 per cent effective, even if adopted, as they tend to affect citizens more than governments.

To uphold the rule of law, the EU needs a broad strategy that includes credible and enforceable anti-corruption measures. A European Public Prosecutor accepted by all 27 member-states, better supervisory mechanisms and policies to support a critical and strong civil society should all be parts of the bloc's fight against corruption.

Beyond the EU, governments should start treating corruption as a major risk not only to their economies but also to the quality of their democratic systems and even to their relationships with vital foreign partners, such as countries in their neighbourhood or the US. For the EU and its member-states, the need to support a rules-based international order – an order that the Union itself is based upon – is existential.

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33: Eero Heinälouma, Karel Lannoo and Richard Parlour, 'Anti money laundering in the EU: Time to get serious', CEPS-ECRI Task Force report, Centre for European Policy Studies (CEPS), January 2021.

34: Meetings with EU officials and think tankers, February 2021.