Combating Corruption in EU Legislation

An Analysis of Some Aspects of the Commission Proposal for the EU Anti-corruption Directive

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

The anti-corruption package presented by the European Commission in May 2023 reaffirms the priority given to combating corruption crimes in the EU. In response to the current disharmony and fragmentation of national legal systems, the proposal for a new EU Directive on combating corruption calls for greater alignment at the European level. By applying the EU's "non-exclusive" competence in criminal matters, serious corruption offenses will be countered on a shared basis, also in view of their potential cross-border dimension. The authors argue, however, that there are provisions in the proposed directive that raise serious doubts as to the adherence to the principle of proportionality, the tendency to largely equalize responses to corruption in the public and private sectors, and the preservation of basic principles of criminal law, such as legality and the degree of certainty required for offences.

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CITATION SUGGESTION

M. Bellingeri, F. Luppi, "Combating Corruption in EU Legislation", 2023, Vol. 18(3), eucrim, pp281–286. DOI: https://doi.org/10.30709/eucrim-2023-025

Published in
2023, Vol. 18(3) eucrim pp 281 – 286
ISSN: 1862-6947
https://eucrim.eu

I. Premises

Corruption is highly damaging to society, to our democracies, to the economy, and to individuals. It undermines the institutions on which we depend and dilutes their credibility as well as their ability to deliver public services.[1] It distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish. This social and political phenomenon occurs in all countries (large and small, rich and poor), but its effects are most destructive in developing countries. Corruption undermines the efficiency of public spending and exacerbates social inequalities; it costs the EU economy at least €120 billion per year.[2] The negative effects of corruption are felt worldwide, undercutting efforts to achieve good governance, prosperity, and the United Nations Sustainable Development Goals.[3]

There is no universal agreement on the definition of corruption: practices considered corrupt in one cultural context may not be considered so in another. Even the often-cited definition of corruption as the abuse of power for private gain may not cover all instances of collusion for gain.[4]

Beyond the criminal law concept of active and passive bribery,[5] corruption can also be conceptualized as a broader socio-economic problem, encompassing a variety of issues such as:

- Conflict of interest: a situation in which an individual is in a position to derive personal benefit from actions or decisions made in his/her official capacity;
- Clientelism: a system to exchange resources and favors based on an exploitative relationship between a “patron” and a “client”;
- Various forms of favoritism, such as:
    - Nepotism and cronyism: someone in an official position exploits his/her power and authority to provide a job as a favor to a family member or friend, even though he/she may not be qualified or deserving;
    - Patronage: a person is selected for a job or government benefit because of affiliations or connections, regardless of qualifications or merits.

While these practices are not necessarily criminally sanctioned, they can be very harmful to states and societies, especially when they are widespread. They occur at all levels of society and their impact can vary, depending on the decision-making power of the corrupt entity.

Following this brief introduction on the ways in which different types of corruption manifest themselves and develop, it is appropriate to examine the regulatory provisions that have gradually been enacted by the EU. The next section will examine the status quo by outlining the various provisions that the EU has adopted from 1997 until now before section III will present the 2023 Commission proposal for a new anti-corruption directive, whose main aspects will be further analysed in section IV.

II. The Existing EU Legal Framework

The current EU’s legal anti-corruption landscape is as follows:

- The 1997 Convention on fighting corruption involving officials of the EU or officials of EU Member States;[6]

- The 2003 Council Framework Decision on combating corruption in the private sector, which criminalises both active and passive bribery;[7]
- The 2008 Council Decision on a contact-point network against corruption;[8]
- Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive").[9]

  The PIF Directive replaced the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention"). Based on Art. 83(2) TFEU, the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests.[10] These criminal offences (the "PIF offences") are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least €10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation of standards also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO) because the EPPO's powers are defined in reference to the PIF Directive as implemented by national law.[11]

Taken together, these instruments illustrate the strong alignment of EU Member States on certain standards in the fight against corruption. Despite these instruments and the adoption of the 2003 Council Framework Decision, however, significant discrepancies remain between Member States.

Moreover, it should be noted that European legislation has also been influenced by the United Nations Convention against Corruption (UNCAC). The UNCAC is the only legally binding universal anti-corruption instrument. Negotiated by the member states of the United Nations (UN), it was adopted by the UN General Assembly in October 2003 and entered into force on 14 December 2005. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem.

III. The EU Proposal for a New EU Directive on Combating Corruption

According to the European Commission, the regulatory instruments adopted so far – in particular the Framework Decision 2003/568/JHA on Corruption in the Private Sector, the 1997 Convention on Combating Corruption against Officials of the EU or EU Member States, and the PIF Directive – have failed to achieve their intended purposes. The tools currently available in the Member State to fight corruption have not been deemed complete. In order to ensure a more coherent and effective response within the Union, the Commission has therefore formulated a Proposal for a Directive on Combating Corruption through Criminal Law in May 2023.[12]

The objective of the legislative initiative is to ensure uniformity of legislation on forms of corruption, so that certain acts are considered criminal offenses in all Member States and punished with effective, proportionate, and dissuasive penalties, thus harmonising penalties across the EU. The Commission intends to step up its action by means of the following:

- Building on existing measures, thus strengthening efforts to integrate the prevention of corruption into the design of EU policies and programmes;

- Actively supporting Member States' work to put in place strong anti-corruption policies and legislation; Identifying challenges and issuing recommendations to Member States via the Commission's annual Rule of Law Report cycle.

The draft directive is supplemented by a proposal from the High Representative (supported by the Commission) to establish a dedicated Common Foreign and Security Policy (CFSP) sanctions regime[13] targeting serious acts of corruption worldwide. In sum, the package places a strong focus on prevention and the creation of a culture of integrity in which corruption is not tolerated, while strengthening enforcement tools.

IV. Analysis of Some Aspects of the Proposal for an EU Directive on Corruption

When it comes to the fight against and prevention of corruption, there are indeed gaps in national enforcement and obstacles in cooperation between competent authorities in different Member States. Member State authorities face challenges related to the excessive length of judicial proceedings, short statutes of limitation, rules on immunity and privileges, limited resources, lack of training, and restricted investigative powers. The Commission's legislative initiative updates the EU legislative framework by incorporating international standards binding on the EU, such as those of the UNCAC (see II. above). For the Commission, it is indispensable that the EU ensures that all forms of corruption are criminalised throughout the EU, that legal persons can also be held liable for corruption offenses, and that corruption offenses are punished with effective, proportionate, and dissuasive penalties in a harmonised way. This is flanked by proposed measures to prevent corruption in accordance with international standards and those to facilitate cross-border cooperation. Although the proposal has its positive aspects, it also encounters several problems. Some important issues in this regard will be analysed in the following.

1. Difficulty in finding a common definition

Even though corruption is a transnational phenomenon, finding a common definition in the legal frameworks is a continuous challenge.[14] Therefore, the Commission proposal follows the traditional approach, consisting in categorising specific manifestations of corruption in a broader sense: misappropriation of funds (Art. 9)[15]; trading in influence (Art. 10); abuse of functions (Art. 11); obstruction of justice (Art. 12); and enrichment through corruption offenses (Art. 13); these offences are supplemented by rules on accessory conduct (i.e., incitement, aiding and abetting, and attempt – Art. 14).

In this context, one of the main novelties of the directive is the transition of several semi-mandatory offences specified in the UNCAC (formulated there as a mere obligation *to consider* adopting a certain criminal provision) into mandatory ones. Offences that are not considered mandatory in the UNCAC are foreign passive bribery (Art. 16(2) UNCAC), trading in influence (Art. 18 UNCAC), abuse of functions (Art. 19 UNCAC), bribery and embezzlement in the private sector (Arts. 21-22 UNCAC), and illicit enrichment (Art. 20 UNCAC). In our view, the UNCAC intentionally listed these offences as non-mandatory because they are crimes where disagreements regarding the wording were more pronounced and consensus was more challenging to reach.

Furthermore, many of the terms and expressions used in the UNCAC are generic, and the definitions are very broad and vague. The draft directive reproduces these deficits.

2. Lack of impact assessment

The proposal may also entail problems related to the principle of proportionality in criminal law. In the Explanatory Memorandum, the Commission stated:[16]

> …[t]his proposal is exceptionally presented without an accompanying impact assessment. Moreover, the initiative is not likely to have significant economic, environmental, or social impacts and costs, or those entailing significant spending. At the same time, it should benefit the economy and society as a whole.

This approach can be criticised in several aspects. The impact of criminal law enforcement usually involves some degree of social cost. For instance, in the Italian experience, the provision of abuse of function (Art. 323 of the Italian Criminal Code) perfectly demonstrates the impact that overly extensive and unclear criminalisation can have on the effectiveness of administration. In 2021, only 40 of 5500 criminal proceedings in Italy resulted in convictions or a plea bargain.[17] For public officials, especially those in elected positions, being subjected to criminal proceedings can result in severe reputational damage, regardless of the final outcome of the case, which may take months or even years to be ultimately resolved. To avoid this inconvenience, we recommend that an impact assessment is due.

3. Corporate criminal liability

It can indeed be acknowledged that the introduction of corporate criminal liability represents a major development in criminal justice systems in most civil law countries over the past 20 years.[18] However, the legal environment and rules on corporate criminal liability vary from country to country. The Commission's proposal still includes some problematic items:

- The draft directive avoids explicitly stating the **"criminal" nature** of corporate liability.[19] It seems that the concept of a "legal person" (Art. 2, no. 7) does not include entities without a legal personality. If they are not included, it does not sound convincing, since even members of entities without legal status may also commit crimes.

- With respect to the **structure of liability**, the proposal follows the traditional EU model based on 1) the commission of the crime by a person in a leading position in the organisation; or 2) the leading person's failure to supervise the criminal conduct of an employee. However, this model seems to be outdated.

  In recent years an **alternative model** of corporate liability has gained prominence that emphasises the compliance efforts undertaken by the organization involved in the crime.[20] This mechanism for assigning liability to legal persons is based on the specific contribution of the entity to the commission of the crime in terms of organisational deficiencies or lack of adequate preventive systems. Countries such as Italy, Spain, the Czech Republic, Austria, Poland, and the United Kingdom have already adopted this approach.

  Although the draft does not ignore the importance of effective internal control mechanisms, ethics awareness, and compliance programmes to prevent corruption in advance (before the actual crime is committed), such controls are only considered a mitigating factor at the sanctioning level. As a result, the incentive to implement pre-crime compliance programmes may be insufficient if the penalty reduction is the same as that for post-crime compliance programmes (cf. Art. 18(2)b). In fact, companies may be induced to adopt a reactive rather than a proactive approach in the rare cases in which a violation is detected and enforced.

Conversely, the introduction of an independent mitigating circumstance related to voluntary disclosure and self-disclosure of a crime to the competent authorities, together with the implementation of corrective measures (as provided for in Art. 18(2)c)), are undoubtedly positive developments.

- Regarding the **penalties applicable to legal entities**, the method of quantifying fines based on total worldwide turnover (Art. 17(2)a)), including related corporate entities, is surely interesting. It aligns with the methods already outlined in other EU directives and regulations, such as those on market abuse[21],money laundering[22], and protection of personal data[23]. It might be appropriate to consider different maximum fines levels, however, depending on the size of the entity.

With regard to the list of sanctions applicable to legal persons, the following is questionable: The range of sanctions is quite broad and diverse, including measures such as the permanent disqualification of the legal person from engaging in business activities, or even the judicial liquidation of the legal person, without distinguishing the cases in which the most severe sanction should be applied. Moreover, the wording proposed could be interpreted as implying that all the measures and sanctions listed are mandatory for any corporate bribery offense, which would clearly be contrary to the principle of proportionality of penalties. It would be different if the list could be understood as a mere collection of sanctions and measures from which the national legislator, responsible for implementing the directive, could choose – without being obliged to adopt a specific sanction/measure or even the entire catalogue (for any corruption offense). The latter interpretation seems more reasonable, especially considering said proportionality principle, and it should lastly be clarified in the legal text.

IV. Conclusion

The anti-corruption directive proposed by the European Commission in May 2023 confirms that the fight against corruption is a high political priority in the EU. If approved by the Council and the European Parliament, the new legislation will have a significant impact on national legislations. As we have seen, however, the proposed strategy not only has positive aspects but also negative ones.

The EU's intervention in the fight against corruption certainly produces an added value that cannot be achieved exclusively by the repressive policies of individual states. It is necessary to bring the criminal law of the Member States closer together, helping to create a level playing field and enable greater coordination. In addition, the decision to intervene through the instrument of a directive makes it possible to achieve a mitigation of the major divergences between the different criminal law disciplines of the countries of the Union – binding for the Member States as to the result to be achieved – while leaving the necessary regulatory discretion on forms and methods of adaptation.

If the objective of the proposal is to determine a common "minimum" standard that would be applicable to all EU member states (Article 83(1) and (2) TFEU), it would be desirable to specify the standards more accurately, while also respecting the general principle of proportionality in European law. This is considered very important as it could ensure more uniform justice in the member states (e.g., it would prevent different limitation periods, set by each state, from encouraging the commission of corruption offenses in one state rather than another, given their potential cross-border dimension).

Failure to achieve the goal of harmonizing offenses at the European level could lead to unequal treatment and, in any case, to the inefficiency of the anti-corruption system at the European level. This comes in consideration of the difficulties encountered by Member States when implementing the semi-mandatory provisions of the UNCAC, which the European Union would now turn into (fully) binding rules. It has been argued

here that a mere “copy-paste” approach to the UNCAC provisions is insufficient and inappropriate. The drafting of the proposed directive represents a significant opportunity to revitalize and streamline the fight against corruption at the European level. Let’s not waste this opportunity.

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1. UN Office on Drugs and Crime, “EU and UNODC meet for 2nd Anti-Corruption Dialogue”, Vienna 5 October 2023, <https://www.unodc.org/unodc/en/frontpage/2023/October/eu-and-unodc-meet-for-2nd-anti-corruption-dialogue.html>. All hyperlinks in this article were last accessed on 3 January 2024.↩
2. Report from the Commission to the Council and the European Parliament, *EU Anti-Corruption Report*, COM (2014) 38 final; European Parliament Research Service, *Stepping up the EU’s efforts to tackle corruption*, Cost of Non-Europe Report, January 2023.↩
3. European Commission - Press release, “Anti-corruption: Stronger rules to fight corruption in the EU and worldwide”, Brussels, 3 May 2023 <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516>.↩
4. Piotr Bąkowski, *Combating corruption in the European Union*, EPRS Briefing, December 2022, <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739241/EPRS_BRI(2022)739241_EN.pdf>.↩
5. The terms define the transactional offences: "active bribery" usually refers to the offering or paying of the bribe, while "passive bribery” refers to the receiving of the bribe (cf. Arts. 2 and 3 of the Council of Europe Criminal Law Convention on Corruption, ETS No 173).↩
6. 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, 2.↩
7. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, 54.↩
8. Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, OJ L 301, 12.11.2008, 38. This Decision established a network of EU Member States contact points to prevent or suppress corruption. Its purpose is to improve cooperation between the authorities combatting corruption at the EU level. The network consists of the relevant authorities and agencies in each EU Member State and performs the following tasks: 1) providing a forum for the exchange of best practices and experiences in the prevention and suppression of corruption; 2) facilitating the creation and maintenance of contacts among its members. ↩
9. 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, 28.7.2017, 29.↩
10. A. Juszczak and E. Sason, “The Directive on the Fight against Fraud to the Union’s Financial Interests by means of Criminal Law (PFI Directive)” (2017) *eucrim*, 80.↩
11. P. Csonka, A. Juszczak and E. Sason, “The Establishment of the European Public Prosecutor's Office”, (2017) *eucrim*, 125, 128.↩
12. Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM (2023) 234 final, 5 May 2023.↩
13. European Commission, Press release of 3 May 2023, *op. cit.* (n. 3); T. Wahl, “"Commission and HR Set Out EU Action against Corruption", (2023) *eucrim*, 139.↩
14. The term “corruption” is used internationally, particularly within the framework of the UN and other international organisations and institutions (OECD, Council of Europe, World Bank, etc.), by global civil society organisations like Transparency International, and in criminological literature on the matter, in the wide sense of “abuse of entrusted power for private gain”; this definition encompasses both public and private sectors and goes beyond bribery offences in the strict sense: OECD, *Corruption. A Glossary of International Criminal Standards*, Paris, 2007, p. 19; World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, 1997, p. 8; Transparency International, *The Anti-Corruption Plain Language Guide*, Berlin, 2009, p. 14: corruption is “the abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs”; definition also followed by the UN, *Global Compact, Principle Ten: Anti-Corruption*, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-10>; UNODC-GRACE, *Knowledge tools for academics and professionals. Module Series on Anti-Corruption, Module 1: What Is Corruption and Why Should We Care?*, <https://grace.unodc.org/grace/uploads/documents/academics/AntiCorruption_Module_1_What_Is_Corruption_and_Why_Should_We_Care.pdf>. For legal literature references, cf: J.W. Williams and M.E. Beare, “The Business of Bribery: Globalization, Economic Liberalization, and the ‘Problem’ of Corruption”, in M.E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, Toronto, 2003, p. 117; in this sense, already J.J. Senturian:“corruption is the misuse of public power for private profit”, cited in R. Babu, *The United Nations Convention Against Corruption: A Critical Overview*, 2006, p. 5.). Conversely, the term “bribery” refers specifically to corruption in a narrow sense: a corrupt exchange of mutual benefits or a unilateral act (offer, request) with such intent.↩
15. If not stated otherwise in the text, Articles refer to the Commission proposal in COM (2023) 234, *op. cit.* (n. 12)↩
16. Explanatory Memorandum, COM (2023) 234, *op. cit.* (n. 12), pp. 13-14.↩
17. Speech by Prof. Antonio Mogillo, given at the European Economic and Social Committee (EESC), Expert Hearing on the Anti-Corruption Legislative Framework, 14 July 2023.↩
18. See M. Pieth, and R. Ivory, (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk*, Dordrecht, 2011, pp. 9 et seq; A. Fiorella (ed.), *Corporate Criminal Liability and Compliance Programs, vol. 1: Liability “Ex Crimine” of Legal Entities in Member States*, Napoli, 2012; *vol. 2: Towards a Common Model in the European Union*, Napoli, 2012; C. Vermeulen, W. De Bondt and C. Ryckmann, *Liability of legal persons for offences in the EU*, Antwerp, 2012; V. Mongillo, *La responsabilità penale tra individuo ed ente collettivo*, Torino, 2018, pp. 176 et seq; OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, 2016; Council of Europe, *Liability of Legal Persons for Corruption Offences*, 2020, pp. 19 et seq..↩
19. On this issue, V. Mongillo, “The Nature of Corporate Liability for Criminal Offences: Theoretical Models and European Union Member States’ Laws”, in: A. Fiorella(ed.), vol. II, *op. cit.* (n. 18), pp. 55-120.↩
20. See Allens Arthur Robinson, *'Corporate culture' as a basis for the criminal liability of corporations* (report for the use of the United Nations Special Representative of the Secretary General for Business and Human Rights (UNSRSG)), February 2008, <https://media.business-humanrights.org/media/documents/f72634fd87adfd3d31a22f5f4b93150267b8a764.pdf>.↩
21. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, OJ L 173, 12.6.2014, 1.↩

22. Anti-money laundering and terrorist financing Directive V – 2018/843/EU; Anti-money laundering and terrorist financing Directive IV – 2015/849/EU.↩
23. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons about the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union