

The Commission Proposal for a Directive on Combating Corruption

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ABSTRACT

This article sketches the legal background and institutional history that has led the EU Commission to propose a Directive on Combating Corruption. It outlines the role the future directive shall play in the context of other EU tools, including those belonging to the 2023 anti-corruption package. The article looks at the objectives of the proposed anti-corruption directive, which are threefold: (1) consolidating the existing anti-corruption rules into one single legal act; (2) building up an effective integrity system through awareness-raising campaigns as well as research and education programmes in order to mitigate incentives for corruption; (3) facilitating the effective investigation and prosecution of corruption cases by ensuring sufficient resources as regards staff and dedicated investigative tools. Lastly, the article explains the potential future impact of the envisaged directive on the national anti-corruption frameworks, both in terms of repression and prevention.

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I. Introduction

The President of the EU Commission Ursula von der Leyen announced new actions to counter corruption in her 2022 State of the Union speech.¹ The anti-corruption package was later adopted by the Commission in May 2023.² The timing could not have been more appropriate, especially considering recent corruption cases that have shaken the heart of EU institutions, allegedly involving decision-makers in the European Parliament, their close advisers, and decision-influencers.³ Overall, the 2023 Eurobarometer survey data indicates that the majority of Europeans think corruption is a concrete problem.⁴ The anti-corruption package includes a Commission proposal for a directive to combat corruption by means of criminal law⁵ and a joint Communication (by the Commission and the High Representative of the Union for foreign affairs and security policy), with a proposal to establish a regime of sanctions against serious acts of corruption committed outside the EU.⁶ It also features the creation of the EU Network against corruption, which was then established in September 2023, whose key task will be to support EU-wide corruption risk-mapping, which will inform the future EU anti-corruption strategy.⁷

The anti-corruption package consolidates the existing framework composed of different EU anti-corruption legal texts, actions, and programmes. Anti-corruption is also dealt with in the Rule of Law Report⁸ as well as in some measures of the Recovery and Resilience Facility⁹ (which may be used to fund actions implementing recommendations stemming from the “European semester” reports).¹⁰ In addition, in the context of the conditionality rules,¹¹ the Commission may ask the Council of the EU to issue budgetary measures (e.g., suspension of payments or financial corrections) against Member States violating the Rule of Law, including its anti-corruption pillar, when it “directly affects or seriously risks affecting the sound financial management of the Union budget or of the financial interests of the Union in a sufficiently direct way”. In parallel, in June 2023, the Commission presented a proposal for establishing an EU ethics body,¹² with a view to creating a common set of ethics standards and types of conduct¹³ for members of the institutions,¹⁴ thereby preventing possible corruption-related malpractices.

II. The Proposal for the Directive on Combating Corruption

The EU legal framework on combatting corruption is considered fragmented, outdated and limited in scope.¹⁵ The current EU legal measures cover anti-bribery in private and public sectors.¹⁶ A number of corruption-related offences, also listed in the UN Convention Against Corruption (UNCAC), have yet to be harmonised at the EU level. As a result, the possible cross-border dimension of corruption is currently not properly addressed. At the operational level, differences in criminalisation leave loopholes regarding both specific types of corruption offences and corruption enablers. As indicated in various studies,¹⁷ gaps in and limited enforcement of existing legislation, together with the need for cooperation and capacities to prosecute cross-border cases, call for both the definition of common standards across the EU and more efficient law enforcement cooperation in corruption-related cases. Additionally, the lack of comparable statistics on corruption risks, cases and impact renders evidence-based policy development, both at the national and European levels, more difficult. Furthermore, the fight against corruption at the national level remains scattered among several law enforcement agencies, triggering concerns regarding national and cross-border institutional and operational cooperation.

The legislative proposal on the fight against corruption by means of criminal law is intended to update the EU legal framework, including through the integration of internationally binding standards, such as those of the

UNCAC, to which both the EU and all EU Member States are parties. The proposal seeks to ensure that all forms of corruption are criminalised in all Member States; that legal persons may also be held responsible for such offences; and that these offences incur effective, proportionate and dissuasive penalties. The legal basis for the proposal for the Directive is based on three provisions of the Treaty on the Functioning of the European Union (TFEU): a) Article 83 TFEU, which lists corruption as one of the “euro-crimes”; b) Article 83(2) TFEU as a legal basis for the proposed alignment with the so called “PIF Directive” (Directive no 1371 of 2017);¹⁸ and c) Article 82(1)(d) TFEU, which constitutes a legal basis for cooperation instruments.

The focus of the proposed Directive is threefold. First, it aims to consolidate existing anti-corruption rules into one single legal act. It does so by harmonising the definition of corruption offences as per the UNCAC. This covers bribery, misappropriation, trading in influence, abuse of functions, obstruction of justice and illicit enrichment related to corruption offences. The proposal also approximates the common minimum level of criminal sanctions for both individuals and legal persons¹⁹ as well as for aggravating and mitigating circumstances.²⁰

Secondly, the proposal includes measures for the prevention of corruption, which Member States should adopt in order to build an effective system for integrity system. These measures consist in awareness-raising campaigns, research and education programmes taken to mitigate incentives for corruption. The aim is to ensure that the public sector is made accountable. As a consequence, Member States are to establish qualitative transparency through access to information of public interest, the declaration of possible conflicts of interests and their mitigating measures, asset declaration systems for public officials, and frame contacts between the private and the public sectors; they should also have specialised anti-corruption bodies that are adequately equipped (with financial, human, and technical resources), and suitably trained.²¹

Thirdly, the proposal is to facilitate the effective investigation and prosecution of corruption cases. Competent law-enforcement agencies, services, as well as prosecuting and investigating entities should thus be properly resourced and able to use dedicated investigative tools.²² This also covers the adoption of minimum rules on the statute of limitations, notably to prevent foreclosure in complex cases requiring lengthy investigations. Lastly, the proposal also addresses the misuse of privileges and immunity when aimed to prevent criminal investigations.²³

III. Outlook

Reducing the demand side of corruption and ensuring deterrent penalties for criminals are expected to increase the overall level of security and disrupt organised crime activities. The increased level of harmonisation in the field of anti-corruption is also expected to alleviate obstacles to cross-border cooperation in criminal matters. The question remains as to what extent the content of the proposal will be maintained in the final text of the directive that still has to be approved by the two EU co-legislators, i.e. the Council of the European Union and the European Parliament. Negotiations over the proposal are now ongoing. The ambitious expectation is to reach an agreement on the text before the end of the term of the current European Parliament’s mandate, set for June 2024. Member States’ initial reactions have been relatively cautious: beyond conventional criticism concerning the legal basis, some decision-makers underlined the text’s weak proportionality in addressing both preventive and repressive measures.²⁴ In exchange for their support on the draft directive against corruption, Member States may ask for more stringent measures to prevent, investigate, and prosecute integrity cases inside the EU institutions.²⁵ The recent bribery scandal allegedly involving EU officials,²⁶ and the fact that national authorities acted first to detect and investigate this

case, may be a reason used to call for a larger competence to be allocated to the European Public Prosecutor's Office.²⁷

1. State of the Union 2022 - President von der Leyen's speech, available at: <https://state-of-the-union.ec.europa.eu/state-union-2022_en>. All hyperlinks in this article were last accessed on 8 December 2023.↵
2. European Commission, Press release of 3 May 2023, "Anti-corruption: Stronger rules to fight corruption in the EU and worldwide", <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516>.↵
3. <<https://www.euractiv.com/topics/qatargate/>>.↵
4. 64% of Europeans think corruption is unacceptable, with 70% of European citizens (2% higher than in 2022) and 65% of companies in the EU thinking that the problem of corruption is widespread in their country. Cf.: Directorate-General for Migration and Home Affairs, News Article of 13 July 2022, "Citizens and businesses have spoken – corruption remains a serious problem in EU countries", <https://home-affairs.ec.europa.eu/news/citizens-and-businesses-have-spoken-corruption-remains-serious-problem-eu-countries-2022-07-13_en>.↵
5. 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, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A234%3AFIN>>. See also T. Wahl, *eucrim* 2/2023, 140-141.↵
6. Commission press release, *op. cit.* (n. 2).↵
7. On 20 September 2023, the EU network against corruption met for the first time in Brussels. This network aims to foster collaboration, identify trends, and build more effective anti-corruption policies across the EU. It brings together all stakeholders in the fight against corruption, from national authorities and experts to international organisations and relevant EU bodies. More information is available at <https://home-affairs.ec.europa.eu/news/eu-network-against-corruption-convenes-first-time-brussels-2023-09-21_en>. See also T. Wahl, *eucrim* 2/2023, 141.↵
8. The aim of the report is to identify possible problems in relation to the rule of law as early as possible, as well as best practices, so that problems can be discussed in a timely manner in individual Member States, Member States can exchange good experiences, inter-institutional cooperation is stimulated, and a rule-of-law culture can be developed across the EU. For more detail, refer to T. Wahl, "Commission's First Rule of Law Report", *eucrim* 3/2020, 158-159, <<https://eucrim.eu/news/commissions-first-rule-of-law-report/>>. NB: According to the State of the Union (SOTEU) in September 2023, the Rule of Law report will be extended beyond EU states and applied to accession countries, in order to "place them on an equal footing with Member States, and support them in their reform efforts, and it will help ensure that our future is a Union of freedom, rights and values for all" See the full SOTEU at <https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4426>.↵
9. Cf. <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en>.↵
10. Cf. <https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester_en#:~:text=The%20European%20Semester%20is%20the,of%20economic%20and%20social%20policies.>>.↵
11. For the Rule of Law Conditionality Regulation, see <https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,on%20the%20proposal%20of%20measures.>>.↵
12. European Commission, Press release of 8 June 2023, "EU Ethics Body: Commission proposes the creation of common ethics standards for all EU institutions", <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3106>.↵
13. E.g., on acceptance of gifts, hospitality, and travel offered by third parties; conditionality and transparency and publicity measures; interests and assets to be declared; side jobs or external activities, including those carried out post-mandate.↵
14. Commission Press release of 8 June 2023, *op. cit.* (n. 12).↵
15. JOIN(2023) 12 final, Joint Communication to the European Parliament, the Council and the European Economic And Social Committee on the fight against corruption, available at <https://commission.europa.eu/system/files/2023-05/JOIN_2023_12_1_EN.pdf>.↵
16. Currently applicable legal instruments are the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector and the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.↵
17. European Commission, Gaglio, I., Guzzon, J., Bartz, K., et al., *Strengthening the fight against corruption. Assessing the EU legislative and policy framework: final report for acceptance*, Publications Office, 2023, available at: <<https://op.europa.eu/de/publication-detail/-/publication/d7a6cfdb-8fcb-11ed-b508-01aa75ed71a1>>.↵
18. NB: The purpose is to ensure that the Member States have in place equivalent measures to counter both corruption affecting the Union's and their own financial interests; the proposal contains suggestions as to aligning Directive (EU) 2017/1371 in terms of sanctions, aggravating and mitigating circumstances, and limitation periods. For the impact of the proposal on the PIF Directive, see L. Zoli, "The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption" → related link.↵
19. Art. 15 (Penalties and measures for natural persons). This proposal sets the minimum maximum penalty between four and six years, depending on the seriousness of the offence, which represents an increase in comparison to the above-mentioned penalties at the EU level for bribery. The Directive also sets a number of additional sanctions that the competent authorities should be able to impose upon persons convicted for a corruption offence. In Art. 16 (Liability of legal persons), the provision follows a standard formula, one that can be found in other EU legal instruments, obliging Member States to ensure that legal persons can be held liable for criminal offences (referred to in the Directive) committed for their benefit by any person with leading positions, within the legal person, or by other persons under their control or supervision. It is not required that such liability be exclusively criminal.↵
20. Art. 18 (Aggravating and mitigating circumstances) provides a list of circumstances that must be regarded as aggravating circumstances in order to allow the judiciary to consider the broader societal damage, e.g., perpetrated by organised groups or persons holding positions of public responsibility. It also provides a list of circumstances that must be regarded as mitigating circumstances, e.g., covering cases in which offenders provide information or collaborate with authorities.↵
21. In this sense, see the UNODC Jakarta Statement on Principles for Anti-Corruption Agencies (of 2012). In addition, as per the UNODC Colombo commentary on the Jakarta statement (of 2020), while there is no agreed formula on what constitutes "sufficient financial resources", meeting this benchmark at the operational level requires funding to cover administrative costs (e.g., for sufficient personnel, capacity development and

- training, equipment and travel) as well as operational costs (e.g., for activities in relation to prevention, education, investigation, prosecution, and coordination). The resources of the anti-corruption agency should be derived from a regular budget rather than *ad hoc* contributions provided by an executive decree or donor funding. This ensures that ministries and departments cannot reduce the budget of the ACA prior to legislative approval. For more, refer to <https://www.unodc.org/documents/corruption/Publications/2020/20-00107_Colombo_Commentary_Ebook.pdf>.↵
22. It is worth noting that, on 7 September 2023, the Court of Justice of the EU ruled in Case C-162/22 (*Lietuvos Respublikos generalinė prokuratūra*) that the Directive on privacy and electronic communications precludes the use, in connection with investigations into corruption in the public service, of personal data relating to electronic communications, which were retained by providers of electronic communications services and subsequently made available to the competent authorities for the purpose of combating serious crime. See also T. Wahl, *eucrim* 2/2023, 149-150.↵
23. Member States shall ensure that privileges and immunities can be lifted during corruption investigations in a timely manner through an effective and transparent process pre-established by law.↵
24. Among others, some national parties seem to oppose parts of the draft directive, e.g., Italian parties (see <https://www.ansa.it/english/news/politics/2023/07/19/centre-right-rejects-eu-anti-corruption-directive_de41d451-46fb-40c2-9b85-328547704680.html>); Czech parties (<<https://www.euractiv.com/section/politics/news/czechia-opposes-new-eu-anti-corruption-directive/>>).↵
25. NB: The proposal for the directive also covers the EU institutions. See Commission Press release of 8 June 2023, *op. cit.* (n. 12).↵
26. B. Moens, C. Gijs and P. Haack, “Belgium closes in on Qatargate win”, *Politico.eu* <<https://www.politico.eu/article/belgium-qatargate-investigation-european-parliament-corruption/>>.↵
27. See also L. Salazar and F. Clementucci “Per una nuova anti corruzione europea: EU-rbi et orbi”, (7-8/2023) *Sistema Penale*, <https://www.sistema-penale.it/pdf_contenuti/1689732585_sp-2023-7-8-salazar-clementucci.pdf>.↵

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