

## How Ambitious New EU Directive Seeks To Fight Corruption

By **Katharina Humphrey and Andreas Dürr** (June 7, 2023, 3:05 PM BST)

On May 3, the European Commission realized a promise made by Commission President Ursula von der Leyen in her 2022 State of the Union speech and proposed the Directive of the European Parliament and of the Council on combating corruption that would harmonize and significantly affect the anti-corruption provisions of European legal orders.[1]

In its corresponding press release, the commission describes its proposal as a "milestone in the fight against corruption." [2]

If the European legislator decides to adopt that directive, European Union member states would have 18 months to revamp their national laws to reflect the minimum standard prescribed by the directive.

Importantly, the 27 EU member states may go beyond these standards and enact even stronger anti-corruption rules, which is why the industry and legal practitioners may be well advised to closely monitor future developments in Europe.

### Redefinition of Corruption Offenses

In its very essence, the proposal for a directive of the European Parliament and of the Council of the EU on combating corruption contains substantive rules defining active and passive bribery both in the public sector and in the private sector, as well as related offenses such as "misappropriation," "trading in influence," "abuse of functions," "obstruction of justice," and "enrichment from corruption offenses."

Further substantive rules concern attempts to bribe, aiding and abetting and a variety of sanctions.

With respect to punishment, the commission resorts to its usual terminology by requiring member states to adopt "effective, proportionate and dissuasive" criminal penalties, but also provides rather detailed specifications for the ranges of punishment.

Pursuant to the proposed directive, bribery in the public sector, as well as obstruction of justice, need to be punishable by a maximum term of at least six years.



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For bribery in the private sector, the commission suggests a maximum term of at least five years. Further legal consequences envisioned by the proposed directive entail, among others, fines, removal and disqualification from public office or the exercise of commercial activities in the context of which the offense was committed, and exclusions from access to public funding.[3]

Apart from merely harmonizing substantive law, the proposed directive contains a range of member state obligations to prevent corruption, such as raising public awareness. It also introduces specialized bodies, both in the prevention and in the repression of corruption, to be established by member states. It makes further provisions for resources, training and investigative tools, as well as cooperation between member states and EU institutions.

### **Proposed Sanctions for Legal Entities**

The commission suggests not only criminalizing individual misconduct, but also sanctioning legal persons under certain circumstances. Such legal-entity liability requires that a natural person commit a relevant corruption offense for the benefit of a legal person and that this natural person has a leading position within the legal person based on at least one of the following:

- A power of representation of the legal person;
- The authority to take decisions on behalf of the legal person; or
- The authority to exercise control within the legal person.

However, risk attaches not only with regard to corruption offenses committed directly by such leading persons. If a more subordinate employee committed a relevant offense, legal persons must be held liable pursuant to the proposed directive if the lack of supervision or control by a leading person has made possible the commission of a crime for the benefit of the legal person by a person under his or her authority.

The practice of some legal orders that already contain comparable provisions, such as Germany's Act on Regulatory Offenses, Section 130, shows that this offense is often used as a bridge to justify the prosecution of legal entities.

Once liability of the legal person is established, the proposed directive stipulates that sanctions need to include criminal or noncriminal fines of a maximum limit of no less than 5% of the total worldwide turnover of the legal person. This will include related entities in the business year preceding the decision imposing the fine.

Further sanctions include:

- Exclusion from entitlement to public benefits or aid;
- Temporary or permanent exclusion from public procurement procedures;
- Temporary or permanent disqualification of that legal person from the exercise of commercial activities;
- Withdrawal of permits or authorizations to pursue activities in the context of which the offense was committed;

- The possibility for public authorities to annul or rescind a contract with the legal entity in the context of which the offense was committed;
- The placing of that legal person under judicial supervision;
- The judicial winding-up of that legal person; or
- Temporary or permanent closure of establishments that have been used for committing the offense.[4]

The proposed directive includes examples of aggravating and mitigating circumstances. A highly relevant mitigating circumstance applies to a legal entity if it has implemented effective internal controls, ethics awareness and compliance programs to prevent corruption prior to or after the commission of the offense. The proposed directive is not more detailed on the specific requirement in this regard.

A legal person can benefit from a further, arguably controversial, mitigating factor if it rapidly and voluntarily discloses the offense to the competent authorities and takes remedial measures.

This incentive forms part of a more general international trend to encourage legal entities to inform prosecuting authorities of criminal offenses committed in their corporate environment.[5]

### **Extraterritorial Reach**

The commission follows an ambitious approach by putting forward stronger rules to fight corruption in the EU and worldwide.[6]

The international relevancy of the commission's proposal manifests itself in its rules regarding jurisdiction. According to the proposed directive, jurisdiction of the member states over corruption offenses would attach if one of three conditions were met:

- The offense is committed in whole or in part in the territory of a member state;
- The offender is a national of or has their habitual residence in a member state; or
- The offense is committed for the benefit of a legal person established in the territory of a member state.[7]

This is arguably a similar framework to the version set out by the U.S. Foreign Corrupt Practices Act.[8]

However, practical enforcement will show whether extraterritorial enforcement of anti-corruption law by EU member states or the European public prosecutor's office will gain a more significant role than in the past.

The commission's global approach is also apparent from a parallel proposal to establish a dedicated common foreign and security policy sanctions regime to target serious acts of corruption worldwide.[9]

In a joint communication, the commission and the EU High Representative for Foreign Affairs proposed, among other matters, to establish a horizontal policy sanctions framework. This would enable the adoption of restrictive measures when acts of corruption seriously affect or risk affecting the

fundamental interests of the EU and the objectives of the policy.[10]

It would particularly affect countries appearing on the EU list of noncooperative jurisdictions for tax purposes, or countries suffering from strategic deficiencies in their national regimes on anti-money laundering and countering terrorism financing that pose significant threats to the financial system of the EU.[11]

## Outlook

In our view, the proposed directive forms another milestone in the long-term creation of a genuine European criminal law system. Since the entry into force of the Treaty of Lisbon in 2009, the EU obtained considerably more competencies in the area of criminal law and enforcement.

EU organs seem to make increasing use of these powers by shaping substantive criminal law provisions and by forming new bodies such as the European public prosecutor's office.[12]

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[1] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A234%3AFIN>.

[2] EU Commission, Anti-corruption: Stronger rules to fight corruption in the EU and worldwide, under [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2516](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516).

[3] Article 15(4) of the Proposed Directive.

[4] Article 17(2) of the Proposed Directive.

[5] See, e.g., Lisa Monaco, Memorandum of the U.S. Deputy Attorney General, Sept. 15, 2022, p. 3.

[6] EU Commission, Anti-corruption: Stronger rules to fight corruption in the EU and worldwide, under [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2516](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516).

[7] Article 20(1) of the Proposed Directive.

[8] 15 U.S. Code § 78dd-1 et seq.

[9] See n.2.

[10] EU Commission, Joint Communication on the Fight Against Corruption, pp. 16-17, available under [https://commission.europa.eu/publications/joint-communication-fight-against-corruption\\_en](https://commission.europa.eu/publications/joint-communication-fight-against-corruption_en).

[11] EU Commission, Joint Communication on the Fight Against Corruption, pp. 16-17, available under [https://commission.europa.eu/publications/joint-communication-fight-against-corruption\\_en](https://commission.europa.eu/publications/joint-communication-fight-against-corruption_en).

[12] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").