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EU Commission Proposes Harmonized Framework to Combat Corruption

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On May 3, 2023, the European Commission (the "**Commission**") proposed a new directive[1] in the area of criminal law with the goal to harmonize corruption offenses, sanctions, related prevention and enforcement (the "**Proposed Directive**"). If adopted by the European Parliament and Council, the directive would significantly contribute to unifying and tightening rules across Europe. EU Member States would have to transpose that framework into national law within 18 months.[2] Since the Commission proposes "***minimum rules*** *concerning the definition of criminal offences and sanctions in the area of corruption, as well as measures to better prevent and fight corruption*"[3], the Member States may go beyond the standards set out in the Proposed Directive and adopt even stricter rules in the area of corruption.

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1. Key Takeaways

- The Commission suggests minimum standards to harmonize the definitions and sanctions for active and passive bribery both in the private and public sectors, as well as of related offenses such as "misappropriation", "trading in influence", "abuse of functions", "obstruction of justice", and "enrichment from corruption offences".
- The Proposed Directive is based on a broad notion of public officials, not only covering EU officials, but also – across branches – functionaries of Member States, third country and international organizations and courts.
- The proposal reflects that certain elements of gifts and hospitality are socially more accepted in the area of private enterprise compared with interactions with state functionaries.
- If committed by a leading person, a legal person can be held liable for corruption offenses committed for its benefit.
- The Commission resorts to its usual terminology by requiring Member States to adopt "effective, proportionate and dissuasive" sanctions, both for natural persons and legal entities. Penalties for human beings may include imprisonment, the sanctions for legal entities may entail fines of no less than 5% of the total worldwide turnover. Further consequences include debarment or disqualification from commercial activities.
- Effective internal controls, ethics awareness, and compliance programs to prevent corruption are considered a mitigating factor, as well as the rapid and voluntary disclosure to the competent authorities.
- Jurisdiction attaches, (1) if the offense is committed in whole or in part in the territory of a Member State; (2) if the offender is a national of or has his or her habitual residence in a Member State; or (3) if the offense is committed for the benefit of a legal person established in the territory of a Member State.

2. Individual Criminal Liability

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At its core, the Proposed Directive provides definitions of bribery in the public sector and the private sector; both in the active and passive alternative.

a) Bribery in the Public Sector

Section 7 of the Proposed Directive defines bribery in the public sector as such:

> Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offense, when committed intentionally:
>
> (a) the promise, offer or giving, directly or through an intermediary, of an advantage of any kind to a public official for that official or for a third party in order for the public official to act or refrain from acting in accordance with his duty or in the exercise of that official's functions (active bribery);
>
> (b) the request or receipt by a public official, directly or through an intermediary, of an advantage of any kind or the promise of such an advantage for that official or for a third party, in order for the public official to act or to refrain from acting in accordance with his duty or in the exercise of that official's functions (passive bribery).

The Proposed Directive is based on a broad notion of public officials, including not only (European) "Union officials," but also national officials of Member States and of third countries, as well as any other person assigned and exercising a public service function in Member States or third countries, for an international organization or for an international court.[4] The definition of national officials is said to not only include persons holding executive, administrative or judicial offices, but also legislative office[5] (an area in which some countries such as Germany may have had some deficiencies in terms of combatting corruption[6]).

However, the Proposed Directive also contains elements that may, if interpreted broadly, limit the scope of the offense considerably. By way of example, the "advantage" to the public official or third party needs a connection with some performance of the public official in return, given that it must be "***in order for*** *the public to act or refrain from acting in accordance with his duty or in the exercise of that official's functions*". This is arguably more restrictive than some current national laws that criminalize the granting or accepting of benefits without a specific compensation in return.[7]

b) Bribery in the Private Sector

The EU Commission also seeks to introduce an concept of bribery in the private sector

> Member States shall take the necessary measures to ensure that the following conduct shall be punishable as a criminal offense, when committed intentionally and in the course of economic, financial, business or commercial activities:
>
> (a) the promise, offer or giving, directly or through an intermediary, an undue advantage of any kind to a person who in any capacity directs or works for a private-sector entity, for that person or for a third party, in order for that person to act or to refrain from acting, in breach of that person's duties (active bribery);
>
> (b) the request or receipt by a person, directly or through an intermediary, of an undue advantage of any kind or the promise of such an advantage, for that person or for a third party, while in any capacity directing or working for a private-sector entity, to act or to refrain from acting, in breach of that person's duties (passive bribery).[8]

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In principle, this offense appears to be similarly conceptualized as bribery in the public sector. However, a remarkable feature is that this offense requires an "*undue advantage*" as opposed to a mere "*advantage*". By suggesting this qualification, the Commission seems to reflect that certain elements of gifts and hospitality are socially more accepted in the area of private enterprise compared with interactions with state functionaries. Interestingly, the Proposed Directive does not contain a definition of "advantage", let alone of an "undue advantage", which may open the door for a broad interpretation of that element.

c) Further Offenses and Substantive Stipulations

The Proposed Directive would also impact national criminal laws, in that its Articles 9 to 13 require Members States to introduce or refine further offenses which form part of the fight against corruption, i.e. "misappropriation", "trading in influence", "abuse of functions", "obstruction of justice", and "enrichment from corruption offences".

Member States are also requested to ensure that they can punish these offenses in cases of incitement, as well as aiding and abetting.[9] The Proposed Directive does not require Member States to criminalize "attempts" of bribery and passive bribery,[10] but this is an area where Member States may go beyond the Proposed Directive.[11]

3. Sanctions

With respect to punishment, the Commission resorts to its usual terminology by requiring Member States to adopt "e*ffective, proportionate and dissuasive*" criminal penalties, but also provides rather detailed specifications for the ranges of punishment.[12] 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. Bribery in the private sector is apparently deemed less grave, as the Commission foresees 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.[13]

4. Jurisdiction

In essence, the Proposed Directive foresees jurisdiction of the Member States over corruption offenses if one of three conditions apply:

1. The offense is committed in whole or in part in the territory of a Member State;
2. The offender is a national of or has his or her habitual residence in a Member State; or
3. The offense is committed for the benefit of a legal person established in the territory of a Member State.[14]

This is arguably a similar framework to the version set out by the U.S. Foreign Corrupt Practices Act.[15] Practical enforcement would need to show whether extraterritorial enforcement of anti-corruption law by EU Member States or the European Public Prosecutor's Office would gain a more significant role than in the past.

5. Corporate Liability / Relevancy of Compliance Programs and Internal Control Systems

The Proposed Directive prescribes that the Member States take necessary measures to ensure that legal entities can be "held liable" for any of such crimes.[16] This language is supposedly due to the fact that European legal orders vary significantly when it comes to "corporate crime". Presumably against this background, the Proposed Directive takes a

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narrow approach, in that it requires that the offense be committed:

1. for the benefit of a legal person;
2. by a natural person within the legal person, acting either individually or as part of an organ of the legal person; and
3. by having 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.

If a more subordinate employee committed a relevant offense, legal persons must be held liable if the lack of supervision or control by a leading person has made possible the commission of a crime by a person under his or her authority.[17]

In terms of sanctions for legal persons, the Proposed Directive stipulates that they need to include criminal or non-criminal fines of a maximum limit of no less than 5% of the total worldwide turnover of the legal person, including related entities, in the business year preceding the decision imposing the fine.[18] Further sanctions include the exclusion from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures; temporary or permanent disqualification of that legal person from the exercise of commercial activities; the 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 the temporary or permanent closure of establishments which have been used for committing the offense.[19]

Article 18 of the Proposed Directive includes examples of aggravating and mitigating circumstances. A very 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.[20] 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.[21] This incentive forms part of a general international trend to encourage legal entities to inform prosecuting authorities of criminal offenses committed in its corporate environment.[22]

6. Prevention, Enforcement and Monitoring

The Commission goes considerably beyond merely harmonizing the substantive law, but aims through a variety of means to lay the ground for a comprehensive fight against corruption. For instance, the Proposed Directive sets out several Member State obligations to prevent corruption (such as raising public awareness).[23] It also introduces “specialized bodies”, both in the prevention and repression of corruption, to be established by the Member States,[24] and makes further provisions for resources, training, and investigative tools,[25] as well as cooperation between Member States and EU institutions[26].

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[1] Eur-Lex, *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*, dated May 3, 2023, available under https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A234%3AFIN (last visited May 15, 2023).

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[2] Article 29(1) of the Proposed Directive.

[3] Article 1 of the Proposed Directive (emphasis added).

[4] Article 2 no. 3 of the Proposed Directive.

[5] Article 2 no. 5 of the Proposed Directive.

[6] *See* 2022 Mid-Year FCPA Update / Covid-19 Mask Scandal.

[7] See, e.g. sections 331 and 333 of the German Criminal Code.

[8] Article 8 of the Proposed Directive.

[9] Articles 14(1) and (2) of the Proposed Directive.

[10] Article 14(3) of the Proposed Directive.

[11] By way of example, see sections 331(2), 332(1), and 334(2) of the German Criminal Code.

[12] Articles 15(1) and (2) of the Proposed Directive.

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

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

[15] 15 U.S. Code §§ 78dd-1 et seq.

[16] Article 16(1) of the Proposed Directive.

[17] Article 16(2) of the Proposed Directive.

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

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

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

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

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

[23] Article 3(1) of the Proposed Directive.

[24] Article 4 of the Proposed Directive.

[25] Articles 5, 6, and 23 of the Proposed Directive.

[26] Articles 20(2) and 24 of the Proposed Directive.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. If you wish to discuss any of the matters set out above, please contact the Gibson Dunn lawyer with whom you usually work, any member of Gibson Dunn's White Collar Defense and Investigations or Anti-Corruption and FCPA practice groups in Germany, or the following authors in Munich:

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