

# COMBATTING CORRUPTION IN THE EUROPEAN UNION

**Analysis and recommendations on the  
proposed EU Directive**

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# A CRUCIAL OPPORTUNITY FOR RAISING THE STANDARD

On 3 May 2023, the European Commission released their proposed Directive on combatting corruption in the European Union (EU).<sup>1</sup> The proposed legislation aims to make all offences under the United Nations Convention against Corruption (UNCAC) mandatory under EU law and to harmonise them across all member states. It also aims to increase the criminal sanctions which apply to such offences, and expand the tools and measures available to law enforcement in the investigation and prosecution of such crimes. In addition, it seeks to establish minimum standards in the measures taken by each member state to prevent corruption.

Transparency International welcomes the Commission's proposal and its efforts to address some of the inadequacies in legal frameworks and enforcement across the EU. We urge the European Parliament and European Council to uphold and reinforce the undertakings in the proposed Directive as it passes through the legislative process, and to ensure that the EU raises the standard globally as the leading enforcer against corruption. Furthermore, Transparency International and our national chapters offer to actively engage in dialogue and consultations on both the EU and national levels.

## POSITIVE ASPECTS OF THE DIRECTIVE

While certain provisions need to be strengthened, the proposed Directive provides strong foundations for the combatting of corruption in the EU. Transparency International particularly welcomes the following new measures:

- + mandatory active and passive offences of bribery;

- + misappropriation and abuse of functions in both public and private sectors;
- + mandatory trading-in-influence offence;
- + the inclusion of aggravating circumstances;
- + minimum standards on the maximum sanctions applicable to natural persons;
- + minimum limitation periods applicable to each offence;
- + the application of Directive 2019/1937 to each offence and the provision of necessary protection, support and assistance;
- + the inclusion of preventative measures and training.

## RECOMMENDATIONS FOR IMPROVEMENT

Transparency International proposes a number of additions and improvements to the proposed Directive in order to ensure that it meets or raises international standards:

### 1. Ending impunity

- + Address grand corruption to combat the most serious corrupt behaviour. Additional tools and measures should be made available for such offences.
- + Prescribe measures to ensure victims of corruption are sufficiently represented – before, during and after a prosecution or non-trial resolution – and compensated.
- + The definition of high-level public officials should be brought in line with international best practice.
- + Recognise involvement of a high-level official as an aggravating circumstance. Involvement of

<sup>1</sup> [COM/2023/234 final](#), Proposal for a Directive of the European Parliament and of the Council on combating corruption

repeat offenders from third countries and offenders who perform a dispute resolution function should be aggravating circumstances.

- + Establish the competency of the European Public Prosecutor's Office over money laundered into the Union as proceeds of corruption above €10 million when member states refrain from establishing jurisdiction.

## **2. Holdings legal persons accountable**

- + Create a framework for the use of non-trial resolutions subject to certain key principles.
- + Lay down that legal persons should be held liable for the corrupt acts of any associated persons – not just those in a leading position – and they should only be able to use anti-bribery and corruption programmes as a mitigating circumstance if these were established before the offence was committed.

## **3. Investing in preventative measures**

- + Require member states to update their legal frameworks to include provisions defining and regulating lobbying activities as well as the financing of political parties.
- + Member states and the European Commission should set up a standardised and interoperable system for the collection and publication of high value anti-corruption datasets.
- + Member states should ensure that anti-corruption agencies, election management bodies, ethics bodies, ombudspersons, financial intelligence units, tax authorities, law enforcement units, have clear rules and protocols enabling swift and where possible automatic data sharing, within member states and across the EU to the extent that is needed to fulfil their duties.
- + Member states should actively engage and consult civil society, non-governmental organisations and community-based organisations in anti-corruption activities and assessments. Including supporting a conducive enabling environment for civil society to work and have meaningful engagement in anti-corruption activities.

## **4. Cooperating internationally**

- + Authorise EU agencies with investigative and prosecutorial mandates to conduct or coordinate investigations of wrongdoing affecting international organisations or international courts that have a seat in any EU member state if the particular international organisation or international court requests that.
- + Set forth that the European Commission should provide financial resources and/or technical resources to third countries that seek help in carrying out enforcement.

# 1. ENDING IMPUNITY

## GRAND CORRUPTION

The inclusion of aggravating offences in the Directive is a positive development. However, for the most egregious corruption crimes, which Transparency International term “grand corruption”<sup>2</sup>, law enforcement must be provided with additional tools and measures to increase the likelihood of investigation and prosecution of such serious criminality. More than six years have passed since the European Parliament called for the EU to develop changes at the national and international level to “address ongoing cases of impunity for grand corruption by stronger enforcement of anti-corruption laws, and implement reforms to close the systemic gaps in national legal frameworks that allow the proceeds of grand corruption to cross borders and evade the oversight of national financial regulators and tax authorities”.<sup>3</sup> Our proposal is for a new article which applies to circumstances where the public official is a high-level official, the offence was committed as part of a scheme and there was a gross misappropriation of property or a human rights violation or abuse that was serious, widespread or systematic. The exceptional nature of such crimes necessitates extended jurisdiction, no limitation periods, and limited immunities.

**Address grand corruption to combat the most serious corrupt behaviour. Additional tools and measures should be made available for such offences.**

International crimes are already considered to be worthy of universal jurisdiction where a state “is unwilling or unable genuinely to carry out the investigation or prosecution”<sup>4</sup> and it is therefore

essential that other states take on the role of “agent of the international community”.<sup>5</sup> Perpetrators of grand corruption also often escape justice for the same inability or unwillingness to act. This has a significant impact on human rights, global peace and security, democratic institutions, sustainable development, internal and regional political and macro-economic stability. Any failure by a member state to fulfil their obligations to suppress grand corruption committed within their jurisdiction exposes other member states to related harm because of the four freedoms of the EU.

It is therefore essential that a member state is able to establish jurisdiction for the most serious corruption crimes which occur within the jurisdiction of any other member state, based on the principle of horizontal complementarity. The risk of a conflict of jurisdiction could be mitigated by the involvement of Eurojust, which is already mandated to play this role in relation to cross-border crimes.<sup>6</sup> Where a member state’s enforcement authorities do not institute proceedings against the most serious corruption crimes within a reasonable time, another member state should be able to take this on in the interest of international justice and the wider interests of the EU. Therefore, under the principle of horizontal complementarity, any member state should be entitled to establish jurisdiction over grand corruption. This should be provided for in a new paragraph 20(4).

On the same basis as the extended jurisdiction, the most serious corruption crimes should not be subject to any statute of limitation. Given the serious harm involved in grand corruption cases, the possibility of long concealment of the illicit activities and the challenges it poses for cross-border investigations and proceedings, such crimes should not be subject to any statute of limitations in line with other such serious crimes. In the event of

<sup>2</sup> Gillian Dell (September 2023), [Tackling Grand Corruption Impunity: Proposals for a Definition and Special Measures](#) (Transparency International), p.12

<sup>3</sup> [European Parliament resolution of 13 September 2017 on corruption and human rights in third countries \(2017/2028\(INI\)\)](#), Paragraph 20

<sup>4</sup> [Rome Statute of the International Criminal Court](#), Art 17(1)(a)

<sup>5</sup> European Parliament (2018), [‘Workshop: Universal jurisdiction and international crimes: Constraints and best practices’](#), European Parliament’s Subcommittee on Human Rights (DROI), p.9

<sup>6</sup> Eurojust, [Conflicts of jurisdiction](#) (webpage); [Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings](#), Art. 12

grand corruption, this should be included in a new paragraph 21(6).

Those who commit the most serious corruption crimes should not be able to rely on functional immunity<sup>7</sup> and should only have limited personal immunity. Such limited personal immunity should only apply to serving heads of government, foreign ministers and diplomatic or consular agents in foreign jurisdictions. In addition, no immunity should be afforded to property owned by a public official who uses a legal vehicle to disguise their ownership. This is in line with the position taken in such cases in Switzerland.<sup>8</sup> This lifting of immunities in the event of grant corruption should be included in new paragraphs 19(2), 19(3) and 19(4).

## VICTIMS OF CORRUPTION

The absence of victims of corruption in the Directive is an unfortunate omission. The enforcement of corruption crimes is incomplete if the victims of the criminality have not been offered adequate remedies. Our proposal is for an entirely new Article which obligates member states to introduce a clear process to ensure that both state and non-state victims of corruption offences are given appropriate consideration during the investigation and prosecution stages. In addition, member states should ensure non-state entities are able to represent the interests of victims in criminal cases, including the need to appoint a victim's ombudsperson. Finally, this Directive should be harmonised with the Victims' Rights Directive.

**Prescribe measures to ensure victims of corruption are sufficiently represented – before, during and after a prosecution or non-trial resolution – and compensated**

<sup>7</sup> UNODC (2019), [Preventing and Combating Corruption Involving Vast Quantities of Assets – Expert Recommendations](#); Recommendation 43, p.17

<sup>8</sup> Open Society Justice Initiative (2019), [Legal Remedies for Grand Corruption the Role of Civil Society](#), p.61

<sup>9</sup> French Anti-Corruption Agency, [Guidelines on the Implementation of the Convention Judiciaire D'interet Public](#), p.11

<sup>10</sup> UK Serious Fraud Office (2019), [Compensation Principles to Victims Outside the UK](#)

As part of a process on how victims of corruption should be treated by member states, the Directive should ensure the following issues are covered:

- + **Identification and inclusion of victims (state and non-state).** Prosecutors should be obligated to identify and notify appropriate victims of their status at the earliest possible opportunity in a prosecution and prior to any agreement with the suspect in the case of non-trial resolutions. This standard is already part of guidelines in France<sup>9</sup> and the United Kingdom.<sup>10</sup> Member states, third countries, and, as far as possible, all persons who would be affected by any conviction, recognition of civil or administrative liability or non-trial resolution should be notified of their status at the earliest possible opportunity, given a right to representation at hearings before authorities and be informed of how to make representations about remedies they seek. In the case of non-trial resolutions, member states should allow for victims of the criminality to give or refuse their consent to the settlement or plea agreement, as is the case in Estonia and Slovenia.<sup>11</sup>
- + **Standing rights for non-state public interest representatives of victims.** Individual victims often lack the capacity and resources to initiate cases against corrupt actors or bring claims for the loss they have suffered. This is where non-state representatives of victims, such as public interest non-governmental organisations (NGOs), can bring compensation claims on their behalf. Some member states allow for standing rights for non-state representatives without direct injury, such as the *accion popular* in Spain which allows any citizen to bring a case if in the public interest. Alternatively, some member states allow non-state actors, such as NGOs, the right of legal action as a civil party, as is the case in Belgium<sup>12</sup> and France,<sup>13</sup> or to collaborate with the prosecutor, as is the case in Portugal.<sup>14</sup> Whilst these NGOs are not officially designated

<sup>11</sup> Gillian Dell and Andrew McDevitt (October 2022), [Exporting Corruption 2022: Assessing Enforcement of the OECD Anti-Bribery Convention](#), p.18

<sup>12</sup> Belgian Judicial Code, Art 17

<sup>13</sup> [French Code of Criminal Procedure](#), Section 2-23

<sup>14</sup> [Portuguese Code of Criminal Procedure](#), Articles 68 and 69

as representatives of victims, they can play a key role in ensuring that corrupt actors are held to account and can support the restitution claims of victims for their loss. There are numerous examples where European law grants non-state actors with an interest in a relevant area, such as environmental or consumer protection, standing rights to challenge decisions,<sup>15</sup> launch injunctions,<sup>16</sup> or enforce directives.<sup>17</sup> Member states should therefore ensure that qualified non-state actors with sufficient interest in anti-corruption are able to represent victims, or their interests, in criminal cases. In the majority of cases, the actions of these CSOs are motivated by the willingness to denounce acts of corruption, hold the perpetrators accountable and fight impunity. Although there is no exhaustive study on this point, most of CSOs that bring cases to courts do not claim damages or only symbolic sums to cover their legal fees.

- + **Victims' coordinator.** It can be difficult for victims in jurisdictions where corruption take place to find out about the possibility of receiving compensation in foreign jurisdictions. It is therefore incumbent on member states to appoint an independent coordinator to ensure that victims' interests are represented, much like the US Department of Justice committed to do last year for white-collar crimes.<sup>18</sup>
- + **Reference to the Victims' Rights Directive.** Member states should ensure that they recognise victims and apply the rights afforded to them under Art. 2(1)(a) of Directive 2012/29/EU,<sup>19</sup> establishing minimum standards on the rights, support, and protection of victims of crime (the "Victims' Rights Directive") in regard to any of the offences referred to in Articles 7 to 14 of the Directive. Given the widespread harm caused by corruption, this Directive should also ensure that any collective and indirect harm suffered by victims is considered and defined in this Directive, in line with the United Nations Declaration of Basic

<sup>15</sup> [Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003](#), Art. 3 point 7 inserting Art. 10a into Directive 85/337/EEC; [Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014](#), Art. 74 (2)

<sup>16</sup> [Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009](#), Art. 3(b)

<sup>17</sup> [Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011](#), Art. 23 (2)(b)

Principles of Justice for Victims of Crime and Abuse of Power.<sup>20</sup>

## DEFINITION OF HIGH-LEVEL PUBLIC OFFICIALS

The inclusion of a harmonised definition of "*high level officials*" and "*public official*" in Art. 2 is a positive development. However, amendments to these definitions should be made in order to bring them in line with international best practice

### The definition of high-level public officials should be brought in line with international best practice.

Whilst the definition of "*public official*" is broadly in line with Art. 2(a) of UNCAC, there are a few discrepancies. Firstly, Article 2(3)(b) should be amended to reflect that a public official can be someone who *either* exercises a public function *or* provides a public service. Secondly, this should not be limited to those who have been "*assigned*" a public function and should simply require that they exercise that function or provide that service. Finally, a new Article 2(3)(c) should be included to ensure any other person defined as a 'public official' in the domestic law of that member state should be covered by the definition.

Whilst there is no international definition for a high-level official, the Financial Action Task Force (FATF)'s definition of Politically Exposed Persons (PEPs)<sup>21</sup> states that these individuals include, "*for example, Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.*". This is broader than the definition in Article 2(8) and the Directive should be amended to bring it in line with the FATF definition.

<sup>18</sup> Wall Street Journal (March 2022), [Justice Department to Step Up Focus on White-Collar Crime Victims](#)

<sup>19</sup> [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012](#)

<sup>20</sup> UN General Assembly (1985), [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#)

<sup>21</sup> [FATF Recommendations, General Glossary](#) (2012), p. 131

The aggravated circumstances referred to in Article 18(1)(a) should also not be limited to just the high level official. UNCAC refers to “*individuals who are, or have been, entrusted with prominent public functions and their family members and close associates*”.<sup>22</sup> It is therefore essential that Art. 2(8) is also amended to include the family members and close associates of such high-level officials.

## AMENDMENTS TO THE AGGRAVATING CIRCUMSTANCES

We welcome the inclusion of aggravating circumstances in Article 18 of this Directive. However, we propose changes to this Article to make them more effective.

**Recognise involvement of a high-level official as an aggravating circumstance. Involvement of repeat offenders from third countries and offenders who perform a dispute resolution function should be aggravating circumstances.**

Articles 18(1)(a), 18(1)(b) and 18(1)(e) should be amended as follows:

- + **Article 18(1)(a).** It is positive that the Directive reflects that it is an aggravating circumstance where an offender is a high-level official. However, this should also apply to any offender in each offence where a high-level official is involved, not just the official themselves.
- + **Article 18 (1)(b).** It is important that the Directive reflects that repeat offenders should be subject to more serious penalties. However, a number of cases involving the offences referred to in Articles 7 to 14 take place outside the EU and can involve large multinational companies operating globally. It is therefore important to reflect that any natural or legal person, including parent or subsidiary entities, who commits these offences (or their equivalent), whether in a member state or third

country, should be penalised as a repeat offender.

- + **Article 18(1)(e).** It is also important that the Directive reflects the important role law enforcement, prosecutors and judges have in the fight against corruption. If such individuals are implicated in corrupt activity, it damages the integrity of the justice system. It is right that such offenders should be subject to an aggravated offence. However, there are other forums where corruption is adjudicated, such as dispute resolution or arbitration,<sup>23</sup> which should also be included here. Contracts determined in such forums are often worth billions of euros, and this is increasing.<sup>24</sup> This importance should be reflected in the Directive.

## EPPO COMPETENCY OVER CORRUPTION OFFENCES AFFECTING THE FINANCIAL INTERESTS OF THE UNION

The US Dollar is the world’s most transacted currency,<sup>25</sup> which makes the ability of the US Department of Justice to claim Foreign Corrupt Practices Act (FCPA) jurisdiction over dollar transactions which pass through a US bank account an extremely effective weapon against corrupt actors to protect the integrity of their financial system. However, the Euro is a close second and far ahead of any other currency.<sup>26</sup> Therefore, in the event a member state refrains from establishing its jurisdiction over money laundered through its territory, we propose a new paragraph 28(9) and 28(10) which grants the European Public Prosecutor’s Office (EPPO) competency over such activity provided they are linked to any of the crimes referred to in Article 4 of Directive 2017/1371 (the fight against fraud to the EU’s financial interests by means of criminal law) and the proceeds of crime are at least €10 million.

<sup>22</sup> [UN Convention Against Corruption](#) (2003), Art. 52(1)(a)

<sup>23</sup> Kush Amin (October 2020), [Did an alleged corrupt natural gas contract rob Nigeria of US\\$9.6 billion?](#) (Transparency International)

<sup>24</sup> International Institute for Sustainable Development (2020), [Compensation Under Investment Treaties](#), p.1

<sup>25</sup> International Bar Association (August 2023), [Non-trial Resolutions of Bribery Cases Subcommittee](#)

<sup>26</sup> Center for Strategic and International Studies (May 2022), [Sanctions, SWIFT, and China’s Cross-Border Interbank Payments System](#)



**Establish the competency of the European Public Prosecutor's Office over money laundered into the Union as proceeds of corruption above €10 million when member states refrain from establishing jurisdiction**

The European Commission, in the Explanatory Memorandum to this proposed directive, state themselves that “[i]f no action is taken at EU level, the scale of the corruption problem is likely to increase significantly in coming years. This would have clear cross-border implications and a direct effect on the single market, the financial interest of the EU, and internal security more generally”.<sup>27</sup> This sentiment is shared by Europol<sup>28</sup> and the European Parliament.<sup>29</sup>

It follows that the EU should seek to broadly interpret their own territorial jurisdiction over corrupt money flows into the Union by any natural or legal persons. However, the structure of the EU makes this a greater challenge than the federal enforcement of the FCPA in the United States. Therefore, in the event a member state refrains from exercising its jurisdiction, we propose a new Article 20(4) which states that the EPPO are well placed to play this role within the EU as they have competence “in respect of the criminal offences affecting the financial interests of the Union”.<sup>30</sup> The corruption crimes subject to the mandate of the EPPO in Directive (EU) 2017/1371 are already harmonised with this Directive in Article 28 and the legal basis for both Directives are same (Article 83(2) Treaty on the Functioning of the European Union). Any conflict over jurisdiction can be referred to Eurojust who already have this mandate.<sup>31</sup>

<sup>27</sup> [Proposal for a Directive of the European and of the Council on combating corruption](#), p.6; see also [Commission Staff Working Document Impact Assessment Accompanying the Anti-Money Laundering Package](#), p.14; [Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities](#), p.2

<sup>28</sup> [Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities](#), p.26

<sup>29</sup> European Parliament, [Prevention of the use of the financial system for the purposes of money laundering or terrorist financing: mechanisms to be put in place by the Member States](#)

<sup>30</sup> [Council Regulation \(EU\) 2017/1939 of 12 October 2017](#), Art.22(1); [Council Act of 26 July 1995](#), 5th Recital (“CONVINCED that protection of the European Communities' financial interests calls for the criminal prosecution of fraudulent conduct injuring those interests and requires, for that purpose, the adoption of a common definition”).

<sup>31</sup> Eurojust, [Conflicts of jurisdiction; Council Framework Decision 2009/948/JHA of 30 November 2009](#), Art. 12

# 2. HOLDING LEGAL PERSONS ACCOUNTABLE

## NON-TRIAL RESOLUTIONS FOR LEGAL PERSONS

Prosecutors in recent years have clearly determined that non-trial resolutions are their preferred method of pursuing accountability against legal persons in foreign bribery cases,<sup>32</sup> with 80% of these cases now resolved through such mechanisms.<sup>33</sup> However, their use remains at the discretion of the prosecuting authority. Whilst we have concerns about whether such mechanisms offer effective deterrence, we believe that their use should be subject to a clear set of rules. We therefore propose a new paragraph 17(3) which obligates member states to provide a clear and transparent framework for the use of such resolutions and highlight certain key principles to ensure that the use of such resolutions is in line with the principles of due process and international best practice. These proposed principles go beyond the requirements in the OECD's 2021 Anti-Bribery Recommendation.<sup>34</sup>

### Create a framework for the use of non-trial resolutions subject to certain key principles

As part of a framework on the use of non-trial resolutions, the Directive should ensure that certain principles, among others, are reflected to effectively dissuade corrupt activity:

- + **Circumstances in which non-trial resolutions should not be used.** Non-trial resolutions should not be used if the natural person, legal person, or legal persons parent or subsidiary companies, have been subject to any

enforcement action as a result of a corruption offence in any member state or third country.

- + **Transparency.** All non-trial resolutions, regardless of whether natural or legal persons are party to it, should be made available to the general public, including the names of the offenders, the legal basis for the resolution, the terms of the agreement, detailed justification for why a non-trial resolution is suitable for the case, the sanctions and an agreed statement of facts which reflects a recognition of responsibility for wrongdoing and provides a significant level of detail in order to identify the victims of the criminality. Court documents relating to the approval of settlement should be published. An admission of responsibility is required. In addition, details of performance of the non-trial resolution should also be published. In the interest of due process, as well as of effective, proportionate and dissuasive sanctions, the resolutions of all criminal procedures have to be made public. Non-trial resolutions cannot be less transparent than trial resolutions rendered in open court. The right to personal data protection and right to privacy are not unrestrictable rights and such restrictions are consistent with human rights standards applicable within the EU.
- + **Dissuasive sanctions.** The penalties imposed must be significant enough to effectively dissuade corrupt behaviour by offenders. This should be quantified as a multiple of the benefit derived from the offence, as is the case in Australia.<sup>35</sup> In the United States, it is possible to use the alternative fine based on gain or loss, which has a maximum amount set at "*the greater of twice the gross gain or twice the gross loss*".<sup>36</sup> In addition, any settlement should not

<sup>32</sup> OECD (2019), [Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention](#), p.13

<sup>33</sup> International Bar Association (2023)

<sup>34</sup> OECD, [Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#)

<sup>35</sup> Commonwealth of Australia (2017), ['Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia](#), p.78

<sup>36</sup> OECD (2019), p.117; [18 U.S. Code § 3571 - Sentence of fine](#)

preclude any further legal action in other jurisdictions.

- + **Admission of guilt.** Member states should always insist on an admission of responsibility by the defendant and, where possible, an admission of guilt.
- + **Judicial review of an agreed resolution.** It is important that all forms of non-trial resolution are subject to judicial involvement. This can be prior to the agreement of the resolution, as is the case for deferred prosecution agreements in the United Kingdom (UK),<sup>37</sup> or it can be final confirmation of the resolution, including the agreed terms, underlying facts, procedural conditions, and substantive conditions. Any confirmation hearing should also take place in open court. As stated in Recommendation 2 (above), it is at this stage that identified victims should be able to give their consent or refusal to the resolution and their claims for compensation should be considered.
- + **Accountability of senior officials.** The lack of senior-level accountability in high profile non-trial resolutions for foreign bribery has damaged the public perception of such resolutions as an appropriate deterrence mechanism. Without the investigation and prosecution of senior individuals, the decision to enter into corrupt activity simply becomes a calculation of legal and financial risk. These individuals must also face the serious prospect of prosecution or disqualification for non-trial resolutions to be an effective dissuasive tool.
- + **Data collection.** Member States should be required to collect data on the number and form of non-trial resolutions they enter into, and such data should be disaggregated by each offence in this Directive. This should be included in a new Art. 26(2)(l).

## LIABILITY OF LEGAL PERSONS AND MITIGATING CIRCUMSTANCES

The inclusion of an offence to hold legal persons to account for their lack of supervision or control which leads to one of the crimes referred to in Articles 7 to 14 of the Directive is a positive development. It is also important to ensure that

effective mitigating circumstances are included to incentivise self-reporting and effective anti-bribery and corruption policies. However, we propose changes to these Articles to bring it in line with best practice and incentivise proactive behaviour by legal persons.

**Lay down that legal persons should be held liable for the corrupt acts of any associated persons – not just those in a leading position – and they should only be able to use anti-bribery and corruption programmes as a mitigating circumstance if these were established before the offence was committed**

Article 16(1) refers to legal persons who should be held liable if the natural person who committed the act of corruption was in a “*leading position*”. This is defined as based on whether said person holds certain powers or authorities within the legal person. However, this may create an ambiguity when member states implement the Directive. We therefore propose that the natural person need only have an association with the legal person for them to be liable. This is in line with the ‘Failure to Prevent’ offence in Article 7 of the UK Bribery Act<sup>38</sup> and ensures that there is no inconsistency when implemented by member states. We also propose a similar meaning of “*associated person*” to Article 8 of the UK Bribery Act, namely any natural person “*who performs services*” for the legal person. It also includes a non-exhaustive list of examples, including employees, agents, or subsidiaries which this Directive should also use.

Article 18(2)(b) refers to mitigating circumstances which legal persons can raise in their defence. Article 18(2)(b) refers to the implementation of internal controls, ethics awareness, and compliance programmes. However, legal persons are allowed to use the effective implementation of such programmes before and after the commission of the offence as a relevant mitigating circumstance. We propose that this should be limited to any programmes implemented only before the commission of the offence. This would incentivise legal persons to proactively implement and maintain effective anti-bribery and corruption policies as soon as possible.

<sup>37</sup> [UK Crime and Courts Act 2013](#), Paragraph 7

<sup>38</sup> [UK Bribery Act 2010](#)

# 3. INVESTING IN PREVENTATIVE MEASURES

## ADDRESSING UNDUE INFLUENCE BY CLOSING REGULATORY GAPS ON LOBBYING AND POLITICAL FINANCE

Opaque political finance and lobbying are two major sources of undue influence on democratic processes, including elections and lawmaking. Lack of adequate transparency rules and practice opens the door to illicit financial flows, domestic or foreign, to interfere with democratic processes. This risk is particularly high where donations from unidentified sources, legal entities without complete beneficial ownership transparency, or spending by third parties pursuing electoral outcomes are allowed. These and other loopholes on transparency and verification leave political systems across the EU vulnerable to the influence of money and foreign actors – threatening the integrity of national as well as EU elections. On the other hand, unequal access to decision makers remains a corruption risk as many EU member states do not appropriately define lobbying or interest representation and have no transparency requirements in place.<sup>39</sup>

**Member states should update their legal frameworks to include provisions defining and regulating lobbying activities as well as the financing of political parties.**

The directive should encourage all member states to develop a regulatory framework for lobbying activities, including the proactive publication of lobby meetings, the establishment of a legislative footprint as well as adequate rules regulating revolving doors and indirect lobbying activities from think tanks and NGOs.

<sup>39</sup> OECD (May 2021), *Lobbying in the 21st Century: Transparency, Integrity and Access* –

The directive should also encourage all member states to develop and update their regulatory frameworks on the financing of politics and political campaigns, including beneficial ownership disclosure for legal entities making donations, as well as equal obligations for contestants and non-contestants who participate in campaigns to collect and publish all data on income, liabilities, and expenditure.

Competent authorities should be given the mandate and resources to audit, verify and publish all relevant data on lobbying and political finance, and should be empowered to monitor compliance and sanction breaches of regulations.

## STANDARDISED COLLECTION AND PUBLICATION OF HIGH VALUE ANTI-CORRUPTION DATASETS

To detect influence peddling, national authorities need to have full information on the sources of influence that may be exercised on public officials. Sources of influence may derive from personal or political benefits, including assets and interests of officeholders, gifts and travel offers as well as donations to their or their political party election campaigns. The Directive acknowledges in recital 12 that "*having in place well-functioning rules on disclosing conflicts of interest, on 'revolving doors' or on the financing of political parties, can also help to avoid grey areas and prevent undue influence*". However, there are no such provisions addressing transparency of financial disclosure for public officials or political finance in the proposed articles.

[Annex A. Detailed transparency and integrity standards on lobbying activities](#)

**Member states and the European Commission should set up a standardised and interoperable system for the collection and publication of high value anti-corruption datasets**

To better equip member states and their competent authorities to identify cases of trading in influence and illicit enrichment, it is important that all EU member states share interoperable systems for the publication and disclosure of assets and interests for high level officials, political party finance, gifts and travel registers and lobbying registers.

These datasets should furthermore be made publicly available, in accessible machine-readable formats and downloadable in bulk, to ensure that media and civil society can contribute to public accountability efforts.

## **COOPERATION BETWEEN COMPETENT AUTHORITIES, DOMESTICALLY AND ACROSS THE EU**

The functions of corruption prevention and repression are often split between different competent authorities, with different mandates and in different branches of government. When it comes to detecting conflicts of interest, breaches of campaign finance rules, abuses with public tenders or illicit lobbying practices, the work of competent authorities is often hindered by slow and ineffective cooperation within and between EU member states. For example, institutions in charge of verifying assets and interests of officials, are often not empowered to request data from Financial Intelligence Units or tax authorities. This cooperation is particularly ineffective when it comes to non-criminal cases.

**Member states should ensure that anti-corruption agencies, election management bodies, ethics bodies, ombudspersons, financial intelligence units, tax authorities, law enforcement units, have**

**clear rules and protocols enabling swift and where possible automatic data sharing, within member states and across the EU to the extent that is needed to fulfil their duties.**

The directive should encourage all member states to develop a regulatory framework which facilitates the cooperation of key corruption prevention and repression institutions, including but not limited to anti-corruption agencies, ethics bodies, election management bodies, ombudspersons, financial intelligence units, tax authorities and law enforcement units. Cooperation modalities can include data sharing and data exchange protocols, joint training workshops and designated points of contact. The European Commission should ensure that these cooperation modalities between competent prevention and repression institutions are established across member states as well.

The Directive should also encourage all member states to sign and ratify and request the European Council to accede to the International Treaty on Exchange of Data for the Verification of Asset Declarations.<sup>40</sup>

Further to these, the directive shall mandate the Commission to propose a new EU law instrument on mutual legal assistance and information exchange in non-criminal matters that covers the above-mentioned areas of prevention and detection of corruption.

## **ACTIVE ENGAGEMENT, CONSULTATION AND SUPPORT TO CIVIL SOCIETY**

Measures to promote the participation of civil society, non-governmental organisations and community-based organisations in anti-corruption activities are broadly in line with UNCAC Art. 13, which encourages State Parties to take measures “to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise

<sup>40</sup> Regional Anti-Corruption Initiative, [Regional Data Exchange on Asset Disclosure and Conflict of Interest](#)

public awareness". However, amendments to this article should be made to include the active role of civil society participating and being consulted in anti-corruption activities included in the Directive. This includes anti-corruption policy development, implementation and monitoring of anti-corruption activities and assessments. Fully recognising international standards<sup>41</sup> that actors outside government – especially civil society – are an essential component to anti-corruption successes and enhancing national anti-corruption capacities.

**Member states should actively engage and consult civil society, non-governmental organisations and community-based organisations in anti-corruption activities and assessments. Including supporting a conducive enabling environment for civil society to work and have meaningful engagement in anti-corruption activities.**

Furthermore, the Directive should be amended to set a global example in supporting and resourcing an enabling environment for civil society to act both as watchdogs and as partners in implementing national anti-corruption activities in EU member states.<sup>42</sup>

<sup>41</sup> Recognising UN SDG 16.17, and the Human Rights Council Resolution 27/24 tasking the United Nations High Commissioner for Human Rights (OHCHR) study ([A/HRC/30/26](#)) which states that public participation includes the right to be consulted at each phase of legislative drafting and policy-making; to voice opinions and criticism; and to submit proposals aimed at improving the functioning and inclusivity of all state bodies

<sup>42</sup> [Human Rights Council Resolution A/HRC/32/20](#), which identifies five essential ingredients in creating a safe and enabling environment for civil society: a robust legal framework compliant with international standards that safeguards public freedoms and effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in decision-making processes; and long-term support and resources for civil society.

# 4. COOPERATING INTERNATIONALLY

## COOPERATION WITH INTERNATIONAL ORGANISATIONS OR INTERNATIONAL COURTS

We welcome the inclusion of specific obligations on member states to co-operate with each other and the EU agencies most responsible for tackling corrupt behaviour. However, relevant EU law should expand this co-operation to other international organisations or international courts based in member states. EU agencies with a criminal justice mandate should be authorised to conduct or coordinate investigations of wrongdoing affecting international organisations or international courts that have a seat in any EU member state if the particular international organisation or international court requests that.

**Authorise EU agencies with investigative and prosecutorial mandates to conduct or coordinate investigations of wrongdoing affecting international organisations or international courts that have a seat in any EU member state if the particular international organisation or international court requests that**

It is essential for member states and relevant authorities at the EU level (e.g., Europol, Eurojust, the EPPO, the European Anti-Fraud Office (OLAF) and the Commission) to work together to tackle cross-border criminality. However, there are other international organisations or international courts based in member states which may have internal bodies to undertake investigations into corrupt activities, such as the Council of Europe<sup>43</sup> or the Organization for Security and Co-operation in Europe.<sup>44</sup> Others do not and their scope of authority, expertise and resources vary a lot. It is

<sup>43</sup> Council of Europe, [Directorate of Internal Oversight: Investigation](#) (webpage)

essential that member states and relevant EU institutions and bodies co-operate with and support international organisations or international courts to ensure that competent authorities are able to bring the strongest possible cases against corrupt actors.

## FINANCIAL RESOURCES FROM THE COMMISSION TO THIRD COUNTRIES

The inclusion of Art. 25(4) on the Commission's ability to support member states with financial resources is welcome. However, such support should be extended to third countries in a new Art. 25(5) in order to facilitate cross-border collaboration on transnational crimes.

**Set forth that the European Commission should provide financial resources and/or technical resources to third countries that seek help in carrying out enforcement.**

As shown by the inclusion of Article 5, the resources made available for competent authorities to investigate and prosecute corruption is essential. However, given the cross-border nature of these crimes, it is essential that the Commission extend this support to third countries in order to ensure that there is a willingness to engage with and support cases in their jurisdiction. A new Article 25(5) should state that the Commission will inform member states of funding available to third countries where member states require financial resources for technical assistance programmes and projects in third countries where they have ongoing investigations. Such support is backed up by commitments made by all member states in UNCAC.<sup>45</sup>

<sup>44</sup> OSCE, [About OIO](#) (webpage)

<sup>45</sup> UN Convention Against Corruption, Art 60(7)

