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NOTE

From:	Presidency
To:	Delegations
Subject:	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 - Presidency note

Introduction

Following the meeting of inter-institutional meeting on 24 October, the Presidency informed JHA Counsellors of the state of play in a short meeting on the same day.

The next meeting of JHA Counsellors, scheduled for the morning of 13 November, will build on the exchanges at the meeting of 24 October and be used to consult delegations on the main outstanding issues, i.e. Article 11 (abuse of functions) and the provisions relating to amnesty, pardon, privileges and immunities in the draft Directive. The immediate purpose of the meeting is to prepare the inter-institutional technical meeting that will take place later the same day in the premises of the Parliament.

Article 11 (abuse of functions)

The co-legislators are still in the process of identifying a text that could be agreeable to all. The Presidency has proposed a text that is in line with Article 19 of the United Nations convention against corruption (UNCAC), i.e. "Member States **shall consider** to take the necessary measures to ensure that the following conduct is punishable…", and has essentially argued that such a text would ensure that Member States will actively assess what is the most effective measure to fight abuse of functions at national level. The Parliament has opposed to this proposal, and the estimation of the Presidency is that it is also not prepared to agree to it, at least not in a foreseeable future.

The Presidency will continue to defend the "shall consider" text in the upcoming negotiations. However, it appears very possible that this will not be sufficient to reach a full agreement with the Parliament on the Directive. **In this sense, the Presidency invites delegations to consider whether the following wording of Article 11 could be acceptable as a last resort**, in the context of a global compromise on the whole Directive:

"Article 11

Misconduct in office

Member States shall take the necessary measures to ensure that at least certain serious violations of law in the performance of or failure to perform an act by a public official in the exercise of his functions are punishable as criminal offence, when committed intentionally."

Accompanying recital:

"Member States should identify the serious violations of law, being it actions, or omissions, or both, as well as the relevant public officials that fall under the misconduct in office definition. Member States may exclude from the application of Article 11 persons holding a legislative office at EU, international, national, regional or local level in order to take into account the respect of the freedom of mandate of members of parliaments and parliamentary assemblies."

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The Presidency would again underline that this text would only be proposed as a last resort. It would in such case be made very clearly that this would constitute a major concession for the Council, which should be balanced by concessions of the Parliament on other outstanding issues.

The proposed compromise package on amnesty, pardon, privileges and immunities

As reported at the last meeting, the co-legislators appear to be very close to an agreement on a compromise covering recital 5a, recital 24, Article 19 and Article 26, as set out in the four column table. It is possible that such an agreement could be struck at technical level already before the final political trilogue.

In the light of the latest discussions with Member States, the Presidency will advocate a full deletion of the draft recital 5a at the upcoming inter-institutional technical meeting. Given that EP has repeatedly underlined the importance of avoiding impunity for corruption offences, it can however not be excluded that it will insist on the maintenance of highlighting this in the said recital. The Presidency would in such case – again as a last resort – consider proposing the following text of recital 5a, which appears to respond to the main concerns of the Parliament:

> "While this Directive fully respects all relevant rules in national constitutions, constitutional principles and law, it is emphasised that the use of any national legal means to unjustly shield individuals – particularly holders of public office – from accountability for corruption offences might undermine public trust in a way incompatible with the objectives of this Directive."

Delegations are invited to consider if this text would be acceptable within the frame of a global compromise on the full text of the Directive.

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