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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

Delegations will find in annex a Presidency note with a debrief from the latest negotiations, including some questions to delegations.

Summary of the technical discussions and questions to delegations

The Presidency's note summarises the latest discussions held at technical level with the Parliament's negotiating team. Following the summary of the discussions on each article, delegations will find comments and, in some cases, questions from the Presidency, indicated in *bold/italics*.

Delegations are invited to reflect on these comments and questions – in the light of the need to strike a compromise on the text, possibly at a later stage - at the meeting of COPEN on 26 February.

- **Article 2 – Definitions**

- The Presidency and the Parliament's team tentatively agreed on the definition of "property", which would only include "crypto assets", in line with the recently adopted Directive on asset recovery and confiscation.
- They also tentatively agreed on the definition of "Union official", as both positions did not differ. The structure of the definition of public official (i.e. whether it should follow the logic of the PIF directive or the Commission's proposal) will be further discussed.
- Finally, they tentatively agreed on the definition of "breach of duty" as proposed by the Council (line 66).
- Regarding the definition of "public official", on point (b) (line 60), the Parliament explained it wished to cover any person "providing a public service" to avoid any gap. This is also the purpose of its amendment: "person assigned **or** exercising a public service function". Finally, the Parliament expressed openness to include the first amendment contained in the general approach ("including those mandated by or under the authority of a public authority")
- On point (c) (line 60a), the Parliament expressed openness to separate the issue of international organisations or international courts, as proposed by the Council.
- Regarding the definition of "national official" (line 59f), the Parliament explained that the aim of its first amendment is to cover situations where any provision contained in the draft directive would refer exclusively to national officials, but is not intended to cover public officials. In the Commission's proposal, a public official is defined as: (a) a Union official or a national official; and (b) any other person assigned and exercising a public service function (...). Therefore, the Parliament repeats the functional definition covered by point (b) in the definition of a "national official".

- The first amendment of the Parliament's mandate would, in the Parliament's view, be more complete and avoid any gap. The Presidency expressed openness in looking into this issue but recalled that the impact would need to be assessed when discussing other provisions of the text that make a reference to national officials. Secondly, the Parliament insisted on maintaining "person assigned **or** exercising a public service function" as persons are not necessarily assigned to public service function but can nevertheless exercise it.
- The second Parliament's amendment ("or any person entrusted with tasks of public interest or in charge of a public service") will be subject to further discussions. Finally, the Parliament questioned the need to make a reference to national law in relation to persons "holding a legislative office". In its view, the PIF directive does not make such reference to national law for such persons, as an exception to the definition of national officials which refers to national law.
- The Parliament expressed openness to include definitions of arbitrators and jurors (lines 64a and 64b). The Parliament enquired about the Council's position to limit the inclusion of arbitrators and jurors to Article 7 (bribery in the public sector). It sees merit in criminalising other conducts for arbitrators and jurors, in particular trading in influence (Article 10).
- Other definitions were not discussed yet.

In light of the above, the Presidency invites delegations to:

- *Indicate whether the definition of "national officials" could contain the addition "or any other person assigned [or/and] exercising a public service function" in view of the Parliament's explanations.*
 - *Indicate whether there could be room for compromise on the wording proposed by the Parliament "person assigned or exercising a public service function".*
 - *Provide their reading of Article 4(4)(a) second and third subparagraphs of the PIF directive. In particular, do delegations consider that the PIF directive provide for a definition of "persons holding a legislative office" that is not bound by national law?*
 - *Indicate whether there could be some openness to include "arbitrators and jurors" in the scope of other offences under this Directive, for instance "trading in influence".*
- **Article 15 – Penalties**
 - The Parliament insisted on having high penalties as this would send the message that corruption is a serious criminal offence and can have a deterrent effect. Having high penalties is an important political point for the Parliament. It expressed some

disappointment with the Council's position which makes many provisions, which could have a deterrent effect, optional (penalties and additional measures, preventive measures).

- On the list of penalties and additional measures (lines 131 to 142), the Parliament insisted on the need to “harmonise” measures, at least to some extent. It doubted about the need to follow the logic of recently adopted directives. The Presidency defended the general approach. The Commission suggested that a compromise would be to split the additional measures, with some being optional and some not.
- Both institutions agree that penalties should be proportionate and therefore the level of penalties should be differentiated. Nevertheless, the Parliament and the Council adopted different approaches to deal with this issue (cf. for instance in line 128).
- On paragraph 4a proposed by the Parliament (line 142a), the Presidency agreed to check with the Member States its inclusion in recitals. Paragraph 4b (line 142b) should be discussed together with Article 19.

On line 128, the Presidency considers that both co-legislators share the same objective and invite delegations to consider whether there may be room for compromise on “committed to obtain a lawful act” or whether other wording could be provided in view of a future compromise.

On line 142a, the Presidency considers that the Parliament's amendment refers to a basic principle of criminal law and invites delegation to consider whether such wording could be integrated in recitals.

- **Article 16(1) and (2) – Liability of legal persons**

- The Presidency underlined the importance of maintaining the coherence of this type of provision throughout the EU criminal law and noted that the Council text is modelled on the Environmental crime Directive.
- The Parliament explained that their intention is to broaden the scope of the provision to cover all persons acting for or on behalf of a legal person, and expressed openness as regards the means to reach this goal.
- The Parliament also explained the reasons for the inclusion of the terms “recognised” in the definition of legal persons (Article 2(7) – line 67) and “effective” in Article 16(2) (line 148). On the first term, it explained that it was meant to cover entities in the process of registration in the Member States. The Presidency indicated that this is a standard definition in EU criminal law that should not be changed. The Parliament seemed open to consider its deletion. On the second term, the Parliament indicated that it wished for supervision to reach

a certain qualitative threshold. The Presidency argued in fact that this would make it more difficult to prove the liability of the legal person and that this is not the right place to define what is expected in terms of supervision and control.

- **Article 17 – Penalties and measures for legal persons**

- The Presidency again referred to the recent acquis in the area of criminal justice and the need to ensure horizontal coherence.
- The Parliament would be ready to agree to the title of the Article as proposed by the Council.
- On paragraph 1 (line 151), the co-legislators put forward their respective arguments. The Parliament expressed openness to move their suggested last amendment to the recitals.
- On paragraph 2 (line 152), the Parliament proposed to render at least some of the additional penalties compulsory. The Presidency explained the background to the wording of the subpoints. The Parliament appeared to agree to most of the wording of the Council as such which would align it with previously agreed directives. As regards point (ia) (line 161a), the Parliament would be ready to adapt to the wording of the Directive on the violation of restrictive measures.
- On paragraph 3 (lines 161b to 161e), the Parliament (as in other files) questioned the complexity of the calculation methods, but seemed open to agree to them. Line 161f was tentatively agreed.
- On paragraph 2b as proposed by the Parliament (line 161g), the Parliament's intention is to make sure that, when non-trial resolution processes already exist in Member States, these should be effective and transparent. The concept as such aims at covering plea agreements between prosecutors and defendants.

The Presidency invites delegations to indicate whether there could be room for a compromise on line 161a) having regards to Article 7(1)(h) of the Directive on the violation of restrictive measures. In addition, in light of the Parliament's explanation, the Presidency invites delegation to indicate whether there may be room for compromise on the issue of non-trial resolution processes, and, if so, under which conditions.

- **Article 18 and 18a – Aggravating and mitigating circumstances**

- The Parliament agreed with separating these two issues in two articles. The Parliament considers that a compulsory list of aggravating circumstances would add value.

On aggravating circumstances:

- As regards paragraph 1(a) (line 164), reference was made to the definition of high-level official. The Parliament would prefer including a list of offices without a reference to national law, as it would provide for minimum rules regarding the persons covered. The Presidency underlined the interest of having a functional definition instead of an enumeration. Co-legislators agreed that Union officials should be covered, albeit the exact wording would need to be further discussed.
- On paragraph 1(b) (line 165), the Parliament is ready to reformulate their proposal to bring it in line with the rest of the text, but maintains the substance of its proposal.
- On paragraph 1(d) (line 167), the Parliament made reference to the political context in which the Commission adopted its proposal. The Presidency questioned the vagueness of the wording of the Parliament/Commission proposal. An alternative wording will be proposed to give the provision more precision.
- On paragraph 1(e) (line 168), the Parliament explained that their reference to “dispute resolution” concerns for example arbitrators.
- On paragraph 1(g) (line 170), the Parliament maintains its position and referred to the Anti-money laundering directive.
- The Parliament withdrew its proposal for point (gc) but maintained its proposals for points (ga) (taking advantage of the vulnerable situation of a person) and (gd) (commission of the offence by a person having a leading position, linked to its position on Article 16(1)). It will further provide explanations on (gb) (notions of “ingenious deception or instrumentalisation”).

On mitigating circumstances:

- The Parliament considers that a compulsory list of mitigating circumstances would add value.
- On paragraph 2(b) (line 175), the Parliament agreed to delete “prevention tools”. On the deletion of “after”, it explained that compliance cannot be done after the offence has been committed. The Parliament explained the Council’s position on which the Parliament will reflect. Line 176a was tentatively agreed.

The Presidency invites delegations to reflect on the possibility to define high-level officials by way of a list with no reference to national law. The Presidency also invites delegations to indicate whether there would be open to include paragraph 1(g) in the list of aggravating circumstances, in light of the Anti-money laundering directive. In addition, the Presidency invites delegation to indicate whether the aggravating circumstance on “organised crime” could be made mandatory, in light of the PIF directive.

- **Article 19 – Privileges or immunity**

- Co-legislators explained their respective positions and agreed that this will be left to a political discussion.

