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NOTE

From:	Presidency
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Corruption) JHA Counsellors on Judicial Cooperation in Criminal Matters (COPEN)
N° Cion doc.:	ST 9241/23
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 – Exchange of views on the Presidency note

Delegations will find in annex a note from the Presidency.

ANNEX

At the meeting of JHA Counsellors on 15 April, the Presidency will give a short debriefing from the ITM of 10 April, and present the preparations for the upcoming ITM's scheduled for 24 and 29 April. A short summary of the state of play in the relevant parts of the draft directive follows here below, linked to a number of tentative redrafts which have – given the still early phase of negotiation on some topics - the objective to initiate the detailed analysis of what room for compromise there may be rather than to propose final drafting. Delegations are invited to comment on the text and reply to the questions below at the meeting of JHA Counsellors or in writing by **22 April cob** to jai.criminal.justice@consilium.europa.eu and brussels.eu.copen.plpres@msz.gov.pl.

1. The ITM of 10 April

This meeting discussed the following topics:

- **Articles 3-6 – Prevention, Specialised bodies, Resources, Training**

  - *Article 3*

    The *Presidency* presented the preliminary position of the Council as defined at the meeting of COPEN on 4 April, including in the documents used at this meeting. In particular, it referred to the limits of the legal basis when it comes to some of the provisions proposed by the EP. It also indicated a readiness to move towards the EP on some of these issues, in particular but not exclusively through the recitals, without expressing any specific commitments in this sense. The Presidency also asked the EP to reduce the level of detail in its requests.

    The *EP* indicated that it is ready to remove the obligations of institutions and agencies from the scope of Article 3. For the rest, the EP broadly defended its text, while at the same time expressing quite some flexibility when it comes to the exact definition and formulation of the rules. As regards its additions, it seemed to put particular accent on awareness raising, the education elements, prevention measures in relation to funding of political parties (point 3c), reviews and reports (whereby the EP in particular insisted on the term "regular" in point 5, line 203i).

    The *co-legislators* seemed to agree on limiting the scope of the Article 3 to such forms of prevention that can be considered accessory to the criminal law provisions. The EP will in this light consider what concrete parts of its proposal it would be ready to withdraw.

    Delegations are invited to reflect on this state of play in line with the possible drafting below, and particularly on the inclusion of elements important for the EP as mentioned above.

Tentative redraft on the basis of the discussions

Article 3

Prevention of corruption

1. Member States shall take appropriate action, s**uch as information and awareness-raising campaigns and education programmes**, to raise public awareness **among the public and private sector** on the **impact and** harmfulness **of corruption** with the objective to reduce the overall commission of corruption offences as well as the risk of corruption.
2. Member States shall take measures to ensure ~~the highest degree~~ **high** level of integrity, transparency and accountability in public administration and public decision-making with a view to prevent corruption.
3. Member States shall take measures to ensure that preventive tools are in place. Those may include, for instance, **an anticorruption strategy**, an appropriate access to information of public interest, rules for the disclosure and management of conflicts of interests in the public sector, rules for asset declaration by national officials designated by national law and rules regulating the interaction between the private and the public sector **including regulation of interest representation and revolving doors situations.**

(3c) Member States shall take appropriate measures to ensure transparency in the funding of candidatures for elected public officials and political parties in accordance with national law.

4. Member States shall ~~adopt comprehensive and up-to-date~~ ensure that measures to prevent corruption in both the public and private sectors, are available and ~~adapted~~ **tailored** to the specific risks of an area of activity. Such measures shall at least include actions to strengthen integrity and to prevent opportunities for corruption among:
   (a) high level officials;
   (b) law enforcement and judicial authorities, including measures relating to their appointment and conduct~~,~~

(4b) Member States should consider taking appropriate measures to promote a public service culture, based on integrity, transparency and accountability, ensuring that national officials have the appropriate training and support to deal with both the increased professional standards and the tasks in implementing their mandate, and that they are aware of conflict of interest situations and of the risks of corruption and financial and economic crimes.

5. Member States shall when necessary perform an assessment to identify the sectors or occupations most at risk of corruption and develop measures to address the main risks in the sectors or occupations identified.

5a. ***Member States shall consider taking appropriate measures to promote transparency and accountability in the management of public finances***.

6. Following that assessment, Member States shall, as appropriate, **regularly** organize ~~at least once a year,~~ awareness-raising actions adapted to the specificities of the sectors or occupations identified in paragraph 5, including on ethics.

7. Where appropriate, Member States shall take measures to promote the participation of civil society, **academia,** non-governmental organizations and community-based organizations in anti-corruption activities.

- *Article 4*

The *Presidency* explained the position of the Council.

The *EP* expressed a certain understanding for some of the arguments of the Council but insisted on the need to ensure a degree of specialization and independence of authorities or bodies working on prevention of corruption. It also underlined the need to ensure that the responsibilities and tasks in the area of prevention are clear and transparent in each Member State. Finally, it questioned the deletion of "known to the public" as public awareness is important. The EP therefore sees a clear need to discuss Article 4 further, while being open in how to achieve its objectives in this these.

Question: Delegations are invited to reflect on how the concrete tasks highlighted by the EP in its version of Article 4 can be taken into account in the text in line with the possible drafting below, and on how to address the issue of specialization better and the point of publicity of these bodies/units better.

Tentative redraft on the basis of the discussions

Article 4

~~Specialised~~Anti-corruption bodies or organisational units

1. To advance the fight against corruption on a common basis, Member States shall ~~take the necessary measures to~~ ensure that one or several bodies, or ~~organization~~ organisational units ~~specialised in~~ tasked with the prevention of corruption is or are in place. **The tasks of such bodies or organizational units shall /may include:**

(a) the management of asset declarations of public officials;

(b) monitoring compliance with transparency rules applicable to public officials and public entities and to the financing of political parties,

(c) monitoring compliance with the statutory provisions and rules related to conflicts of interests in the public and private sectors,

(d) the issuing of warnings related to risks of corruption;

(e) cooperation with competent authorities, bodies or organizational units specialized in the repression of corruption.

2. Member States shall take the necessary measures to ensure that one or several bodies, or organisational units ~~specialised in~~ tasked with the repression and investigation of corruption is or are in place.
3. Member States shall take the necessary measures to ensure that ~~the body or~~ bodies, or an organisational ~~unit or~~ units as referred to in paragraph 1 and 2:

a) can operate without undue interference

b) are known to the public;

c) where relevant, operate and take decisions or make recommendations in accordance with transparent procedures established by law, regulations or administrative provisions.

- *Article 5*

The *co-legislators* noted that their positions are very close to each other. The EP explained that it wishes to ensure that sufficient resources are allocated to all relevant actors.

Tentative redraft on the basis of the discussions

Article 5

Resources

Member States shall ensure that bodies or organizational units [**national] competent authorities which detect, investigate, prosecute or adjudicate and/or are tasked with the prevention of corruption** referred to in Article 4 paragraphs 1 and 2 are provided with an adequate number of qualified staff and the financial, technical and technological resources necessary for the effective performance of their functions related to the implementation of this Directive.

- *Article 6*

  The *Presidency* defended the Council position.

  The *EP* insisted on the inclusion of at least parts of its wording in the final text, but again expressed flexibility on exactly which ones.

- **Articles 22-23b – Protection of persons, Investigative tools etc**

  The *Presidency* defended the position of the Council as laid down in the general approach and invited the EP to explain the detailed reasons behind its texts on these provsiions, in particular as regarding the new Articles proposed.

  - *Article 22:*

    The *co-legislators* defended their respective positions but expressed willingness to search for a compromise.

    Tentative redraft on the basis of the discussions

Article 22

Protection of persons who report offences or assist the investigation

1. Member States shall take the necessary measures to ensure that Directive (EU) 2019/1937[1] is applicable to the reporting of the offences referred to in Articles 7 to 14 of this Directive and to~~and~~ the protection of persons reporting such offences, under the conditions established therein.

2. In addition to the measures referred to in paragraph 1, Member States shall [**take the necessary measures to]** ensure that ~~persons~~any person reporting offences referred to in this Directive~~ and~~ providing evidence or otherwise cooperating with ~~the investigation, prosecution or adjudication of such offences are provided the necessary~~competent authorities has access to protection, support and assistance measures in the context of criminal proceedings,in accordance with national law.

2a. Member States shall take the necessary measures to facilitate the anonymous disclosure, by any person, of information related to offences covered by this Directive.[1]

- *Article 23:*

The EP is ready to withdraw most of its proposals regarding investigative techniques, if it can be confirmed that the EIO will be applicable to the future anti-corruption Directive. In practice, it appeared that the EP wishes to ensure that investigation techniques on interception of communications, such a phone tapping, can be used in all serious corruption cases.

The EP considers that the rule on asset recovery and confiscation (line 208a), drafted with inspiration from the counterterrorism Directive, would add value, in that it would ensure that authorities are obliged to freeze and confiscate assets in corruption cases, instead of being "enabled" to do so.

The *co-legislators* agreed that the added value of this provision (proposed by EP) in terms of the possibility to confiscate assets need to be analysed at technical level.

Tentative redraft on the basis of the discussions

Article 23

Investigative tools

1. Member States shall take the necessary measures to ensure that effective and proportionate investigative tools, ~~such as those used in countering organised crime or other serious crimes,~~ are available~~ to persons, units or services responsible~~ for investigating or prosecuting the criminal offences referred to in this Directive.
Where appropriate, those tools shall include special investigative tools, such as those used in countering organised crime or in other serious crime cases**, *including those listed in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.***

[1] The legally appropriate wording of a provision such as this one will be analysed further in relation to other provisions of EU law, for example in the whistle blower Directive.

2. ***Member States shall take the necessary measures to ensure that their competent authorities freeze or confiscate, as appropriate, in accordance with Directive [OJ: Please insert in the text the number of the Directive in PE-CONS 3/4 (2022/0167 (COD)) and insert the number, date, title and OJ reference of that Directive in the footnote - Directive on asset recovery and confiscation COM(2022) 245 final] , the proceeds derived from the commission or contribution to the commission of any of the offences referred to in this Directive.***

- *Article 23a:*

  The Presidency indicated that, if included, this provision should only be limited to law enforcement authorities. The EP took inspiration from Article 9(5) of the Asset recovery and confiscation directive.

Tentative redraft on the basis of the discussions

Article 23a

Exchange of information

Member States shall take the necessary measures to ensure that specialised bodies or units referred to in Article 4 paragraph 2, have direct access to SIENA and use the SIENA system for exchanging information in cross-border investigations.

- *Article 23b:*
  The *EP* reiterated that they wish to expand the rules on victim protection to legal persons as regards this crime type.

Question: Delegations are invited to reflect on the state of play in the discussions on Articles 22-23b.

2. The ITMs of 24 and 29 April

The agendas of these meeting remains to be set, but are likely to include the following:

a) ITM of 24 April:

The ITM will with all likelihood continue with the examination of the Articles following Article 23b through to Article 31. The Presidency will ask the Parliament to clarify its positions, in particular on the new Articles proposed by it.

Further, the ITM will continue with an examination of chapter 2 of the Directive – in particular Article 10 – and, if time allows, of Articles 15-21. The position of the Council has already been prepared in COPEN of 4 April as well as through written contributions. The Presidency will present the Council thus defined and explore the room for package compromises, which may also include other chapters of the Directive.

b) ITM of 29 April:

The agenda of the ITM on 29 April will most probably depend on the outcome of the ITM of 24 April. It would appear likely that at least the discussions on Articles 7-21 will continue on the basis of preliminary achievements in the previous weeks.

Given the little time between holidays, weekends and meetings in April, the Presidency will not be in a position to formally consult delegations between these meetings, but only come back to them with a debrief on 30 April. In this light, the pre-consultation can unfortunately only take the form of the following general question:

Question: Delegations are invited to reflect on the issues likely to be debated in the ITMs scheduled for 24 and 29 April, with a view to identify red lines, possible concession to and compromises with the EP.

Proposed basis of discussions as regards Article 10

Trading in influence

1. Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally:

(a) the promise, offering or giving, directly or through an intermediary, of an undue advantage of any kind to any person to exert **improper** ~~illicit~~ influence over **the actions** ~~a decision or measure to be taken by~~**of** a public official in the exercise of that official's functions with a view to obtaining an undue advantage from a public official;

(b) the request or receipt, directly or through an intermediary, of an undue advantage of any kind, or the acceptance of an offer or a promise of such an advantage, ~~to~~ by any ~~a~~ person to exert illicit influenceover a decision or measure to be taken by a public official in the exercise of that official's functions with a view to obtaining an undue advantage from a public official.

2. In order for the conduct referred to in paragraph 1 to be punishable as a criminal offence, it shall be irrelevant whether or not the influence is exerted or whether or not the **claimed** influence leads to the intended results.