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NOTE

From:	General Secretariat of the Council
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 - Non-paper by Germany, Spain and France

Delegations will find below a non-paper with a proposal from Germany, Spain and France regarding Article 13 and Recital 16 of the Proposal for a Directive on combating corruption.

Brussels, 30/04/2024

Joint proposal by France, Germany and Spain on the offence of illicit enrichment

Following the latest discussions in COPEN, and with the aim of helping to find a compromise on Art. 13 and the related recital 16, DE, ES, and FR propose a concrete drafting proposal:

Article 13 – Enrichment for corruption offences

Member States shall take the necessary measures to ensure that the intentional acquisition, possession or use by a public official of property that that official knows, at the time of receipt, that the property is derived from the commission ***by another public official*** *of any of the offences set out in Articles 7 to 10, 12 and 14, is punishable as a criminal offence.*

Recital 16:

(16) The criminal offence of enrichment ~~builds upon the rules on the criminal offence of money laundering laid down in Directive (EU) 2018/1673 of the European Parliament and of the Council~~. ~~It~~ is meant to address those cases where the court is fully satisfied that the property derives from one of the offences set out in Article 7 to 10, 12 and 14 committed by a different public official, and the perpetrator knows that the property is derived from such an offence ~~but where the public official cannot be convicted for that.~~ ***~~The competent authorities are therefore not required to convict someone for both the corruption offence and the enrichment that derived from committing that offence. Member States may nevertheless provide that the offender can be prosecuted and convicted for both the corruption offence and the enrichment that derived from committing that offence.~~*** ***The offence of illicit enrichment is without prejudice to the conduct provided for in Article 3 of the Directive (EU) 2018/1673 of the European Parliament and of the Council on combating money laundering by criminal law, and in particular paragraph 5 thereof, where applicable.*** *When considering whether property is derived from any kind of criminal involvement in a corruption offence and whether the person had knowledge of that, the specific circumstances of each case should be taken into account, such as the fact that the value of the property is disproportionate to the lawful income of the accused person and that the criminal activity and acquisition of property occurred within the same time frame. It should not be necessary to establish knowledge of all the factual elements or all circumstances relating to the criminal involvement, including the identity of the perpetrator. In addition, the proceeds obtained from corruption offences can be confiscated on the basis of Directive (EU) 2024/… of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation.*

Rationale:

Regardless of the fact that conduct giving rise to the offence under Art. 13 is most likely already covered by the criminal codes of the Member States, either through the ordinary offence of receiving or through the offence of money laundering, when the perpetrator is a person different to the perpetrator of the offence that generates illicit profits. However, the question arises as to the criminal significance of benefiting of the proceeds of crime by the same person who committed the offence that gave rise to them.

In this latter case, two scenarios exist:

- The perpetrator directly benefits of the proceeds of the corruption offence, or enriches with them, even in a concealed manner. Such conduct, in principle, does not constitute, nor can it constitute, a new offence, since it simply "exhausts" the previous criminal conduct. In most legal orders, no separate offence exists for such enrichment, without prejudice, of course, to the confiscation of such proceeds as being derived from the corruption offence.

- Profiting from the proceeds of crime constitutes an offence of "self-money laundering". However, this offence requires something more than the perpetrator directly enjoying the proceeds of crime, since it requires more complex conducts of introduction of the profits into the legal economic circuit with concealment of its criminal origin (see recital 11 of the Directive 2018/1673.

In this light, it seems appropriate to limit the wording of Art. 13 to the enrichment by criminal assets of an official other than the one who committed the predicate corruption offence, and to mention in the recital that this goes without prejudice to the Directive on combating money laundering by criminal law, in particular the offence of self-laundering. In this way, coherence of Union's penal instruments is preserved, and the principle of minimum harmonisation is respected.

DE, ES, FR hope that this proposal may be an acceptable way forward.