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Panel 2 – Daniëlle Goudriaan, Ivy Advocaten

Thank you for inviting me today to contribute to the panel on Anti-corruption legislation in Europe and Fundamental Rights.

As you probably have seen I am a newby to this profession of defense counsel. I have been a prosecutor for many long years, both in the Netherlands and in at the EPPO in Luxemburg. Next to that I am the Chair of the Working Group On Bribery of the OECD. I am not telling you to try to impress you as an audience with my cv, but to give you some background from which multiple points of view I look at the EU anticorruption legislation given this experiences. Like the former speaker I also want to go over the proposed EU directive and dive into some issues that, from my experience might need some more thought.

Firstly corruption is a crime that undermines democracy and trust in institutions, creates an uneven playing field and harms citizens and companies. I think no one will disagree with that. Combatting corruption is therefore an important task for both governments and civil society.

The European Commission's proposal for a new Directive on Combatting Corruption ("**EUD**") is a welcome development. Legislation to give legal force to the uniform implementation of international anti-corruption obligations and

standards across the Union is essential both to strengthening the fight against corruption and to ensuring a level playing field for EU member states.

From the enforcement side, this harmonization can ensure smoother and swifter international cooperation between Member States, but also for countries outside the EU this can make MLA with EU countries easier as the laws are more aligned. My experience in the EPPO have showed me that easier and more effective cooperation means cases can go quicker which is an improvement in cross border fraud cases where investigations and prosecutions can take a long time. This is not good for the trust of citizens in the authorities and, exceptions not taking into account, not for the accused.

Also from the point of view of citizens and companies harmonization can create more clarity on what is and isn't allowed, give more legal certainty and helps prevent this unwanted behavior.

The aim of the proposal is to transpose the provisions of the UNCAC, to which the EU is a signatory and to go even beyond some of the obligations in that instrument. Also due consideration should be given to the work of, among

others, the OECD in the field of fighting corruption according to the Commission.

Indeed the Directive should not be in conflict with provisions of other legally binding instruments and as aligned as possible. There are however some inconsistencies I would like to highlight, which, also in the light of Fundamental rights, need to be addressed in my view.

The EU directive does not only cover sanctioning and the repression of corruption, but also prevention. Article 1 of the Draft Directive states that the Directive “establishes minimum rules concerning the definition of criminal offences and sanctions in the area of corruption, as well as measures to better prevent and fight corruption” Repression is obviously a very important part of combatting corruption. Proper enforcement is essential as the stick. But criminal law should still be the ultimum remedium. So that is why it is a shame that the Directive does not include some important UNCAC standards on prevention.

For example, Article 3 of the draft Directive lists the following measures that member states should take to prevent corruption: raising public awareness (EUD

Art. 3.1); ensuring the highest degree of transparency and accountability in public administration and public decision-making (EUD Art. 3.2); and ensuring open access to information of public interest, effective rules for the disclosure and management of conflicts of interests in the public sector, effective rules for the disclosure and verification of assets of public officials and effective rules regulating the interaction between the private and the public sector (EUD Art. 3.3).

But the UNCAC also requires action to ensure: merit-based recruitment and promotion in the public sector (UNCAC, Art. 7); transparency of political financing (UNCAC, Art. 7); codes of conduct for all public officials (UNCAC, Art. 8); accountable and transparent management of public finances (UNCAC, Art. 9); a whole set of rules concerning prevention of corruption in the private sector (UNCAC, Art. 12); and the general promotion of active participation of civil society in the prevention and the fight against corruption (UNCAC, Art. 13), as has been standard practice for anti-corruption/governance initiatives EU member states participate in, for the past two decades.

These standards have been adopted by many countries in the world. It would therefore be extremely regrettable if the member states of the EU, were not legally bound to enforce this part of the UNCAC in full. The signal it would send to non-EU countries would potentially undermine UNCAC's implementation

elsewhere – in addition to undermining the moral authority of the Union when it seeks to encourage anti-corruption enforcement in other countries.

Another provision (4.3) requires EU Member States to ensure that specialized "preventive" and "repressive" anti-corruption bodies are "functionally independent from the government" (EUD Art. 4.3.a). UNCAC, however, requires the "necessary independence" of such specialized bodies (UNCAC, Art. 6.2 and UNCAC, Art. 36). This is essential to ensuring that anti-corruption bodies can indeed carry out their functions effectively and without any undue influence. To safeguard against any undue influence I would like see stronger wording in the Directive, like in the UNCAC. The experience in the EPPO have already shown in practice that their strong independence safeguards against outside(political) influence.

On sanctioning is see a missed chance: art 15 and 17 of the Directive prescribe that Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 7 to 14 are punishable by effective, proportionate and dissuasive criminal penalties or sanctions. Both the UNCAC and the OECD anti bribery convention also require effective, dissuasive and proportionate sanctions. However the 2021 Recommendation of the Council of

the OECD for Further Combating Bribery of Foreign Public Officials in International Business Transactions states in recommendation XV:

That member states should take appropriate steps, such as through providing guidance and/or training to law enforcement authorities and the judiciary without prejudice to the discretionary powers of judicial or other relevant authorities, to help ensure that sanctions against natural and legal persons for foreign bribery are transparent, effective, proportionate, and dissuasive in practice, including by taking into account the amounts of the bribe paid and the value of the profits or other benefits derived and other mitigating or aggravating factors;

In the article in the Directive on sanctions the word transparent is not found. Art 4 paragraph 3 under 3 states that the institutions specialized in the repression of corruption operate and take decisions in accordance with transparent procedures established by law, with the effect of ensuring integrity and accountability. But for the sake of trust and legality, transparency is an important element to be taking into account explicitly regarding sanctioning. This is a hot topic in discussions on negotiated settlements, but is of broader importance.

The use of clear penalizations and sanctions/measures (from the point of view of legality and legal certainty) is an important point of attention. An example of this is the proposal's a bit unclear scope of the criminalization of undue influence and undue enrichment. Further clarification would be important. Especially because unlike in for example the Dutch legislative process, in the EU process there is no background information or clarification what exactly is meant with certain terms and texts.

Another example is Art. 7.1.a of the draft EU Directive. It criminalizes “the promise, offer or giving, directly or through an intermediary, of an advantage of any kind to a public official for that official or for a third party in order for the public official to act or refrain from acting in accordance with his duty or in the exercise of that official’s functions”. Such a definition is problematic in that a public sector employer could be criminalised for offering or paying a salary to the public official. In recognition of this concern, both UNCAC (Arts. 15, 16) and the OECD Convention (Art. 1) use the term “undue advantage” when describing the benefits of a corrupt deal. It is important that the wording in the draft Directive is brought into line with that of UNCAC. There would be no obstacle to doing this: indeed, the qualified term (undue advantage) is employed

elsewhere in the draft Directive - for example when defining private sector corruption (EUD Art. 8), and Trading in Influence (EUD Art. 10).

Having clear criminalizations is not only important from the point of view of legality and legal certainty as such. It would also help to achieve the goal of the Directive to improve cross border cooperation. Within the EPPO I have seen that although the cross border cooperation is much more swift and easier within this supranational prosecution service, that acts as one office, the differences in law or explanation of the law still can complicate this cooperation. It will help enforcement authorities understand each other better and improve cooperation if there is more common ground, while there still is room for national legal and cultural differences. This would for example also make it easier for both prosecutors and defense counsel to assess whether there is an issue of ne bis in idem and therefore avoid duplication of investigation and prosecution in an early stage.

To wrap it up: the directive is a huge step in the right direction, but needs some more work, so I am very interested in any views there are today on how this could proceed.