



ECBA Statement on the new EU Commission

proposed

Directive on Combating Corruption

The European Criminal Bar Association (ECBA) welcomes the EU Commission's initiative to tackle corruption by drafting a new Directive of the European Parliament and of the Council on Combating Corruption (Proposal) as the phenomenon of corruption hampers the rule of law and the trust in institutions, and undermines democratic institutions and EU values, including the protection of fundamental rights.

The ECBA aims at *inter alia* promoting the administration of justice and human rights in the applicable jurisdiction of the Member States of the Council of Europe and the European Union.

The Commission states that the aim of the Proposal is to ensure that all forms of corruption are criminalised in all Member States, that legal persons may also be held responsible for such offences, and that offences incur effective, proportionate and dissuasive penalties. In addition, according to the Commission, the Proposal should positively contribute to the protection of some specific fundamental rights, such as the right to fair trial and freedom of expression.

The ECBA shares the view that the fight against corruption and the protection of fundamental rights are complementary, not conflicting objectives. At the same time, implementing and enforcing criminalisation of corruption has to be carried out in full respect of fundamental rights. As set out in Article 52(1) of the Charter of Fundamental Rights, any limitation on the exercise of fundamental rights and freedoms is subject to conditions, namely the compliance with the principle of proportionality with respect to the legitimate aim of genuinely meeting objectives of general interest or the need to protect the rights and freedoms of others, to be provided for by law and respect the essence of those rights and freedoms.

The UN Human Rights Council (UN HRC) underlines the direct link between the fight against corruption and the protection of human rights. Such links were also highlighted in detail in a report by the UN HRC's Advisory Committee and by various reports of the United Nations High Commissioner for Human Rights. The UN HRC specifically emphasizes that corruption undermines the functioning and legitimacy of state institutions and weakens the rule of law.

The EU is a party to the United Nations Convention against Corruption (UNCAC), which is the most comprehensive international legal instrument in this field, which combines within it a wide range of measures to prevent and fight corruption. The ECBA understands that the rationale behind the Proposal is to update the EU legislative framework, by incorporating international standards binding on the EU, such as the UNCAC.

In addition, from the text of the Proposal and from the position of the Commission, it appears that the Commission has decided to transpose provisions of the UNCAC while at the same time striving to go beyond the EU's international obligations in certain aspects (i.e. by imposing minimum levels for the upper limit of sanctions). This is also being promulgated, in order to facilitate judicial cooperation between Member States and the functioning of new institutions, like the European Public Prosecutor's Office (EPPO).

Conversely, the Proposal did not include the provisions on the protection of the rights of defence, which are included in the UNCAC: The UNCAC promulgates that each state party shall take appropriate measures, in accordance with its domestic law and *with due regard to the rights of the defence*, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal, take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings; and that it shall enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders *in a manner not prejudicial to the rights of the defence*.

The ECBA notes that, when reference to the protection of procedural and fundamental rights is addressed, such is being regarded in a rather general manner and solely in the Recitals of the Proposal. The manner appears to be similar to the recent Regulation on establishment of the European Public Prosecutor's Office (EPPO), but what is more concerning is that the main text of the Proposal does not deal with these important matters at all.

The ECBA is particularly concerned with the manner by which the crucial issue of fundamental and procedural rights stemming from the Article 82 of the Treaty on the Functioning of the European Union (TFEU), which is dealt with in the Proposal, is being mentioned only in the recitals.

The Recitals only state, in a rather general way, that all measures adopted by the Union and its Member States on the criminalisation of corruption, must be subject to the principle of legality and proportionality of criminal offences and penalties, the presumption of innocence and the rights of defence, and should exclude any forms or arbitrariness. Recitals further emphasise the respect for fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to liberty and security, the protection of personal data, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of the legality and proportionality of criminal offences and sanctions, as well as the principle of *ne bis in idem*.

The ECBA notes that this vague formulation itself opens the door for arbitrariness, particularly in those countries which still did not fully transpose the so-called "Roadmap" i.e. the Procedural Rights Directives, not to mention EU candidate countries which are even further from these standards.

Furthermore, the Recitals state that sanctions that cannot be equated to criminal sanctions (which are outside the scope of the Proposal), and which are imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence defined by the Proposal, but fail to explain in detail further whether and how this can be done. Such a general affirmation may also not be in line with the *ne bis in idem* principle which is contradictory with the principles set in the recitals.

Moreover, a general tendency to reverse the burden of proof in certain anti-corruption proceedings – thus prejudicing the innocence of the defendants – might now be even amplified, especially through the establishment of a new offence of enrichment through corruption offences. While the ECBA knows the argument, that in theory the reverse burden of proof would lessen the burden on prosecutors and possibly increase the efficiency of investigation and prosecution, this would have an enormous impact on the fundamental and defence rights and could also lead to legislative inconsistencies with national provisions, including inconsistencies of a constitutional nature. The ECBA shares the view of certain member states that mechanical transposition of this offence as defined in the UNCAC might be contrary to the presumption of innocence (as also implemented in European Law) and their constitutional traditions. The ECBA thus opposes it.

Additionally, this automatic and mechanical transposition of UNCAC provisions is likely to be outside of the powers vested by the Article 83 of the TFEU on establishment of the minimum rules concerning the definition of criminal offences and sanctions.

The establishment of minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime as corruption needs to be accomplished with respect for fundamental rights and the different legal systems and traditions of the Member States as stated by the Article 67 of the TFEU.

The approximation of rules regarding criminal offences and sanctions needs consequently to be pursued without excessive encroachment on sovereignty of member states and always respecting proportionality and the *extrema seu ultima ratio* principles.

Furthermore, the proposal contains provisions establishing very long periods of statute limitation of eight to fifteen years. The ECBA shares the Commission's objective to ensure that authorities have sufficient time to conduct complex investigations and prosecutions but consider fundamental to balance this goal with the right to a trial within reasonable time as enshrined under Article 6 ECHR and Article 47 of the Charter and to take into account the correlation between the temporal distance of the sanction from the offence and the preventive effectiveness of that sanction.

Finally, while the ECBA acknowledges the efforts made by the EU Commission in trying to regulate criminal liability of legal persons, we are of the opinion that the introduction of certain safeguards for legal entities in the Proposal would help fight corruption in a more efficient manner, while bringing legal certainty.

In reviewing the mitigating circumstances regulated under article 18.2 of the Proposal, it can be seen, that the intensity of the actions that trigger the application of mitigating circumstances varies significantly from the perspective of the exposure (not only legal) it generates for legal persons. Indeed, in accordance with the Proposal, mitigating circumstances may be obtained by legal persons through three different actions: (i) by self-reporting and adoption of remedial measures; (ii) by providing the authorities with relevant and incriminatory information; and (iii) by implementing an effective corporate compliance programme, before or after the offence takes place.

The ECBA is of the opinion that, as currently drafted, there is no real incentive for legal persons to undergo the most intense actions, which will result in their inapplicability in practice, especially considering that several of them entail the waiver of a fundamental right such as the right against self-incrimination, which has been undoubtedly recognised to legal persons. For this reason, it may be useful to include in the Proposal a broader catalogue of legal avenues that may incentivise legal persons to conduct the actions described above. In this regard, it may be advisable to consider the possibility of recognising an exemption of criminal liability for legal persons when the most intense actions are carried out (self-reporting and adoption of remedial measures). Additionally, having implemented an efficient corporate compliance programme prior to the perpetration of the offence should trigger greater benefits than doing it thereafter.

The ECBA thus concludes that the need, and the immense public interest, to tackle corruption should not jeopardise the application of the most basic fundamental and procedural rights.

For these reasons, the ECBA proposes that a new article is added to the Proposed Directive dealing specifically with fundamental rights protection, in particular defence and procedural rights, whereby specifying:

- Each member state will maintain the level of procedural rights protection, meeting at least the minimum standards established in the Roadmap Directives
- Reversal of burden of proof cannot lead to the detriment of the fundamental rights particularly cannot not prejudice the presumption of innocence
- Ensure application of the above safeguards to legal entities (and their representatives)
- Further clarify whether and how sanctions that cannot be equated to criminal sanctions (i.e. some administrative sanctions), which are imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence defined by the Proposal. And clearly establish that multiple prosecution cannot take place where the administrative sanctions are criminal in nature for the purposes of Article 6 ECHR and Articles 47 and 48 of the Charter.
- The respect of proportionality and subsidiarity principles imposing to opt for sanctions that resort to deprivation of liberty only as *extrema seu ultima ratio*.

The ECBA furthermore proposes to include a broader catalogue of legal remedies that may incentivise legal persons to conduct the actions described above helping to tackle corruption in a more efficient manner, while bringing legal certainty. Said catalogue should be introduced through a new article which sets out:

- Member States where corporate criminal liability exists will introduce the possibility of applying an exemption of criminal liability for legal persons when they are able to demonstrate that, at the time when the criminal offence took place, they had in place effective corporate compliance protocols. Said effectiveness will be assessed considering, amongst other circumstances, the existence of a fraudulent elusion of the preventive measures by the offender, the cooperation of the legal person with the authorities and the adoption of remedial measures.

- Member States where corporate criminal liability exists will make sure that the exclusion of criminal liability of legal persons and the recognition of mitigating circumstances in their favour match the effectiveness of the corporate compliance programs in place and the intensity of the cooperation with the authorities.

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The ECBA was founded in 1997 and is an association of independent specialist defence lawyers. The association is wholly independent. It aims to shape future EU legislation with a view to ensuring that the rights of European citizens in criminal proceedings are protected and enhanced in practice. The ECBA acts through conferences, committees, working-groups, and provides up-to-date information via its website and newsletters and through the work of its board, and committees (e.g. the Human Rights Committee and the Committee on EU Legislation). It also facilitates networking and practical cooperation between its members. The ECBA represents over 40 different European countries including all EU Member States so it is uniquely positioned to make submissions on these issues.

The ECBA created a working group on anti-corruption and bribery in Europe (ACE). The purpose of ACE working group is to improve knowledge and awareness among defence practitioners of various anti-corruption instruments, and procedural and other ECHR and Charter safeguards in anti-corruption proceedings (where such safeguards are usually lower due to big public interest of fight against corruption, i.e. confiscation), in order to provide effective advice and representation.

So far, the group has initiated several knowledge-sharing activities, issued 9 country reports on the topic and established a European-wide network of contacts with experience in corruption cases.

In addition, the group also aims to inform and advocate on procedural and other ECHR and Charter safeguards in cases of corporate criminal liability (application of these safeguards to legal entities i.e. their representatives).

Due to the new EU legislative initiatives, the group plans to be included in the consultations during the relevant legislative processes, and to publish statements in response to the proposed measures.

The ACE working group will be working closely with the ECBA's EPPO working group due to the proximity with the material scope of the EPPO regulation.

The group is being co-chaired by Amedeo Barletta and Vladimir Hrlje.