C/2024/886

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Opinion of the European Economic and Social Committee on the 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

(COM(2023) 234 final — 2023/0135 (COD))

and the joint communication to the European Parliament, the Council and the European Economic and Social Committee on the fight against corruption

(JOIN(2023) 12 final)

(C/2024/886)

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Referral	European Commission, 29.6.2023
Legal basis	Articles 83(1), 83(2) and 82(1)(d) of the Treaty on the Functioning of the European Union
Section responsible	Section for Employment, Social Affairs and Citizenship
Adopted in section	4.10.2023
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Plenary session No	582
Outcome of vote (for/against/abstentions)	214/02/06

I. RECOMMENDATIONS

1. **In general**

1.1. Corruption is a serious problem that affects all EU Member States and democratic coexistence itself: the European Economic and Social Committee (EESC) therefore welcomes the Commission's initiative on the fight against corruption and supports the proposed measures, which represent an effort to ensure systematisation in this area.

THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

1.2. welcomes the Commission proposal for a Directive and takes note of the legal basis as indicated in the proposal and its exploratory memorandum. However, considering the need to achieve the aim of the Directive in a more effective way, it would be advisable to consider extending the legal basis of the EU's strategy to fight corruption for instance relating to the Directive, whether in addition to Articles 82 and 83 TFEU; reference should also be made to Article 84 TFEU because it includes preventive measures, and to Article 87 TFEU because of the need for police cooperation. It is logical to promote police cooperation and coordination on these issues to improve effectiveness;

1.3. believes that it should be discussed whether the proposal for an EU Directive could be accompanied by a parallel legal framework addressing in a binding way the Union legal system since the obligations deriving from the UN Convention against Corruption (UNCAC) apply to all contracting parties in the same way and to the same extent. This parallel framework should most likely be contained in a Council decision;

1.4. notes that according to Article 86(4) TFEU, the adoption of a Council Decision could be suggested, that would extend the competences of the European Public Prosecutor's Office to corruption, including where no prejudice to the financial interests of the Union is involved and in case of crimes with a cross-border dimension, even though they affect only one Member State;

1.5. believes that the definition of public officials should be formulated in as much detail as possible.

2. **Regarding preventive measures**

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2.1. believes that the Directive should contain much more precise rules regarding the obligations of the Member States regarding conflicts of interest, expressly introducing the obligation for all of them to adopt rules capable of limiting access to elected offices and government offices and keeping records of all accesses, establish a system of incompatibility, strengthen post-mandate bans to curb pantouflage, adopt codes of conduct, adopt a legal framework on lobbying and establish financial disclosures and registration of assets for public servants and for members of parliaments and governments and judges at all levels Similar rules should apply, where appropriate, to EU institutions, bodies, offices and agencies concerning conflicts of interest;

2.2. The EESC also takes note of the communication on the proposal for an interinstitutional ethics body ([1]). According to the communication, the task of the body is to develop common ethical minimum standards for the conduct of members of the institutions and advisory bodies listed in Article 13 TEU and, if it requests to take part, of the European Investment Bank;

2.3. suggests that, in Article 3(3), the phrase 'effective rules regulating the interaction between the private and the public sector are in place' be replaced with a more precise wording which obliges the Member States to adopt a legal framework on lobbying. Similar rules should apply, where appropriate, to EU institutions, bodies, offices and agencies;

2.4. underlines the importance that Member States, within the national legislative framework, have in place or adopt appropriate rules, procedures and practices for the recruitment of public servants and funding of political parties, based for example on the following premises:

(a) recruitment and promotion of public servants based on merit and objective criteria and transparency must be ensured;

(b) introduction of education programmes aimed at ensuring that public servants fully understand their duties and their role in the protection of the public interest;

(c) existence of strict processes for the selection of people appointed to positions that are particularly exposed to corruption;

(d) introduction of the notion of transparency in the funding of political parties and the mandatory disclosure of contributions above a certain amount;

2.5. notes that the Commission could have taken the opportunity to consider in the communication the adoption of a measure based on Article 197(2) TFEU and to present a proposal in this regard. In so doing the European Union could have created an independent corruption prevention authority for itself, so as to comply with Article 6 of the UNCAC.

3. **Regarding repressive measures**

THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

3.1. observes that crimes against the public administration cause great social alarm because the public expects swift responses to corruption that harms general interests; a delayed judicial response damages democracy. At same time such crimes risk jeopardising both the reputation of the persons involved in criminal proceedings and certainty in the exercise of public functions, while also jeopardising competition at economic level; consequently, it believes that the Directive could suggest that the Member States provide special speed procedures in the administration of criminal justice for this type of crime and specific forms of mutual legal assistance such as transfer of evidence and direct enforcement of other Member States' court decisions concerning asset recovery;

([1]) Communication from the Commission to the European Parliament, the European Council, the Council, the European Court of Justice, the European Central Bank, the European Court of Auditors, the European Economic and Social Committee and the Committee of the Regions: Proposal for an interinstitutional ethics body (COM (2023) 311 final).

3.2. considers that the Directive could also suggest that the Member States create rules concerning the preventive seizure and freezing of assets, to guarantee the loss of advantage resulting from acts of corruption, including refunds and compensation for victims (for example, individuals or companies that could not access public contracts or tenders);

3.3. believes that, if the European Union wants to combat highly inappropriate private influence in public decision-making, it needs to very strictly define (in Article 10) trading in influence and to contemplate clear parameters for the corresponding offence, so as to distinguish it from lobbying;

3.4. suggests including in Article 11 on abuse of functions cases of abuse of functions for the purpose of causing harm and cases that breach the duty of abstention where there is a conflict of interest;

3.5. considers the presence of the case of 'possession' in Article 13 (enrichment from corruption offences) problematic and recommends its elimination;

3.6. points out that referring only to legal persons (Article 2(7)) excludes the possibility of legal liability for entities that have no legal personality.

II. EXPLANATORY NOTES / ELABORATION

4. **In general**

4.1. The EESC believes that the Commission should consider a broader legal basis than the one indicated for the Directive ([2]). First of all, the EESC wonders why the Commission has identified only Articles 82 and 83 TFEU as a legal basis for the proposed Directive: they cover repressive measures and those dealing with judicial cooperation between national authorities mutually and with Union agencies, but police cooperation (which is dealt with in Article 24 of the Directive) has its legal basis in Article 87 TFEU.

4.1.1. Furthermore, the provisions of the proposed Directive focusing on the prevention of corruption provide for measures that affect the administrative law of the Member States, not their criminal law: therefore, the EESC wonders why the Commission did not also identify Article 84 TFEU as a useful legal basis, according to which Parliament and Council 'establish measures to promote and support the action of Member States in the field of crime prevention': measures which can also have an extra-criminal scope precisely because they are aimed at prevention.

4.1.2. Articles 84 and 87(2) TFEU use the word 'measures', to be adopted by the co-legislators: this means that the Directive is an appropriate instrument and therefore the Commission's proposal for a Directive discussed here can be used.

4.1.3. The Directive should not contain any form of harmonisation of the laws and regulations of the Member States in the matter of preventive measures, since harmonisation is excluded by Article 84 TFEU. At the moment, Articles 3–6 of the proposed Directive do not provide for any form of harmonisation of the law of the Member States; they are limited to confirming the obligations on Member States set out in Chapter II of the UNCAC.

4.2. As also stated by the Commission, 'The very serious revelations and allegations surfacing at the end of last year have demonstrated that, no matter where they occur and the number of persons concerned, they have the effect of impacting all EU institutions'. Given the seriousness of the situation following Qatargate, the EESC underlines the importance of incisive and bold solutions to be proposed capable of giving an important signal to the citizens of the EU who vote on the European Parliament.

4.2.1. This greater incisiveness could have led to the choice of proposing other initiatives and consequently entailing a greater number of Union acts to meet the needs expressed.

([2]) That the issue of the legal basis in the field of anti-corruption is important and also controversial is highlighted by M. Magri in 'The European directive on whistleblowing and its transposition into Italian law (Legislative Decree n. 24/2023)', Institutions of Federalism, Journal of legal and political studies, 2022, spec. 3, p. 555 ss., who states the following on whistleblowing: 'So I think I have made clear, at a level that did not aim to be satisfactory (but only to provide food for thought), the suspicion that Directive 1937/2019 is a legislative act which does not comply with the Treaty', due to the absence of a legal basis (p. 578).

4.2.2. Firstly, the EESC considers that the topics dealt with in the proposed Directive are the same as those in the UNCAC. Both the EU (which joined UNCAC in 2008) ([3]) and all Member States are contracting parties to UNCAC. The obligations deriving from UNCAC therefore apply to all contracting parties in the same way and to the same extent.

4.2.3. In addition, it should not be forgotten that the EU is subject to the UNCAC peer review mechanism, already underway for the first cycle, which will be followed by the second cycle dedicated to prevention (as well as asset recovery).

4.2.4. Consequently, the EESC wonders if the Commission should not have proposed an anti-corruption framework addressed to all 28 legal systems involved (that of the Union and those of the 27 Member States), and if the proposal for an EU Directive should be accompanied by a parallel regulatory framework addressing the Union legal order in a binding manner so that, for example, the definitions of corruption offences that the Directive requires States to include in their criminal law are the same ones that the European Public Prosecutor's Office (EPPO) will have to use when exercising its powers, but also about preventive measures. This parallel framework should probably be contained in a decision of the Council.

4.3. The absence in the communication of a more extensive role for the EPPO is surprising. The EESC considers it necessary to establish a European Prosecutor specialised in corruption.

4.3.1. This would have been an opportunity to urge the European Council to use the legal basis offered by Article 86(4) TFEU in order to extend the powers of the EPPO ([4]) to include corrupt conduct, even if without implications for the integrity of the financial interests of the Union.

4.3.2. Instead, the Prosecutor deals exclusively with Article 24 of the proposed Directive, to reaffirm the obligation of cooperation between the Member States and the agencies of the Union in the sectors administered by the Directive, as well as the obligation for European agencies to provide technical and operational assistance for the purpose of better coordination of investigations and prosecutions.

4.3.3. The proposed Directive is not a useful tool, since the TFEU foresees a decision of the European Council. Therefore, the Commission's strong push for the Member States to adopt this solution should find space in the communication.

4.4. Although the EESC recognises that it is difficult to provide an exhaustive list of people who are equated with public officials, the definition of public officials set out in Article 2(3)(a) and (b) is currently formulated so broadly and abstractly that it is not clear what kind of person can be equated with a public official. In addition, Article 2(3)(b) also defines a public official as any other person assigned and exercising a public service function in Member States or third countries, working for an international organisation or an international court. Such a definition does not create opportunities to individualise restrictions on a person's rights and freedoms, which enables this definition to be used too widely and unevenly.

4.5. By reporting breaches of Union law that are harmful to the public interest, people act as 'whistle-blowers' and thereby play a key role in exposing and preventing breaches and in safeguarding the welfare of society, including combating corruption. Therefore, the EESC considers that whistle-blower protection should be improved.

5. **Regarding preventive measures**

5.1. The EESC thinks that Article 3 is very important because its implementation, violation and interpretation are of European concern and involve the many competences of the Court of Justice of the European Union, helping to maintain the unity of European law. However, the EESC also observes that the task of this Directive is a 'minimal harmonisation' of the Member States' law. On the contrary, the standards established in Article 3 are not harmonising standards; the Article merely synthetically reproduces the conventional obligations contained in Chapter II of the UNCAC. Article 3 is a mere 'political manifesto': it declares the willingness of the European Union to collaborate with each Member State in implementing UNCAC Chapter II, reaffirming the obligations contained therein.

([3]) Council Decision 2008/801/EC of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (OJ L 287, 29.10.2008, p. 1).

([4]) See Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) (OJ C 170, 5.6.2014, p. 85).

5.1.1. The EESC believes that in order to qualify the contents of this Article as a minimum harmonisation standard, it should contain more stringent and precise rules regarding the obligations of the Member States relating to conflicts of interest, expressly introducing the obligation for all of them to adopt rules capable of limiting access to elected and government offices, establish a system of incompatibilities, strengthen post-term bans to curb pantouflage, adopt codes of conduct, adopt a legal framework on lobbying, and so on.

5.1.2. In addition, the EESC asks if a general parallel regulatory framework should be established, bindingly addressing the Union legal order. The EESC is aware that in the communication, the Commission underlines the existence of numerous tools with which each institution, body, office and agency of the Union has equipped itself in the field of corruption prevention. However, Qatargate has shown that they were not sufficient to prevent the establishment of corrupt practices. The EESC takes note of the communication on the proposal for an interinstitutional ethics body ([5]). According to the communication, the task of the body is to develop common ethical minimum standards for the conduct of members of the institutions and advisory bodies listed in Article 13 TEU and, if it requests to take part, of the European Investment Bank. Furthermore, the EESC considers that, in order to give greater effectiveness to the system of combating corruption especially in the prevention phase, it is more appropriate and useful to have a set of general rules, common to all the institutions of the Union and shared with the Member States.

5.2. The regulation of lobbying achieves two objectives: (a) it helps to better distinguish between licit activity and illicit trading of influence; (b) it helps to identify cases of conflict of interest. These two objectives are fundamental for the purposes of combating corruption.

5.2.1. For this reason, the Committee suggests making Article 3(3) clearer: the phrase 'effective rules regulating the interaction between the private and the public sector are in place' could be replaced with a more precise wording which obliges the Member States to adopt a legal framework on lobbying. Similar rules should apply, where appropriate, to EU institutions, bodies, offices and agencies.

5.3. The EESC thinks it would be very useful to set up an EU network against corruption, building on the experiences shared since 2015, extending and deepening this work through a tool that is able 'to act as a catalyst for corruption prevention efforts across the EU. It will be tasked to develop best practices and practical guidance in various areas of common interest. It will also support a more systematic gathering of data and evidence that can serve as a solid basis for anti-corruption actions and for monitoring the success of these actions. The network will build on experience of working not only with law enforcement and public authorities, and bring together all relevant stakeholders, including practitioners, experts and researchers, as well as representatives of civil society and international organisations' ([6]).

5.3.1. However, the EESC does not consider this solution satisfactory because it seems to be inconsistent with Article 6 of the UNCAC. This rule requires the State parties (including the EU) to 'ensure the existence of a body or bodies, as appropriate, that prevent corruption […]. Each State Party shall grant the body or bodies […] the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided' ([7]). The EU must equip itself with its own prevention apparatus capable of guaranteeing its own independence.

5.3.2. Secondly, the European Commission explains that this network 'will be tasked to develop best practices and practical guidance in various areas of common interest. It will also support a more systematic gathering of data and evidence that can serve as a solid basis for anti-corruption actions and for monitoring the success of these actions' ([8]). The tasks of this network do not seem to meet the requirements that the UNCAC sets for the State parties. The Commission's communication does not address the main question, which is that of an institutional framework to 'develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability' ([9]).

([5]) Communication from the Commission to the European Parliament, the European Council, the Council, the European Court of Justice, the European Central Bank, the European Court of Auditors, the European Economic and Social Committee and the Committee of the Regions: Proposal for an interinstitutional ethics body (COM(2023) 311 final).
([6]) JOIN(2023) 12 final.
([7]) UNCAC, Article 6(1) and (2).
([8]) JOIN(2023) 12 final.
([9]) UNCAC, Article 5(1).

5.3.3. Thirdly, the involvement in this network of stakeholders, who also have very strong economic interests, and the absence of people outside the European institutions who are competent and independent could undermine its credibility.

5.3.4. In this regard, the EESC suggests that the Commission evaluate the legal basis established by Article 197(2) TFEU in relation to the need to provide the Union with an agency responsible for the preservation of ethics and integrity (i.e. an anti-corruption agency) which will design an integrated EU-national form of administration modelled on what has already been done in other strategic areas of shared competence between the Union and the Member States (competition, privacy, electronic communication, anti-money laundering).

5.3.5. Such an organic apparatus would also be able to fulfil Article 5(4) of the UNCAC. It would be the technical operational arm of the Union in external action. Such a European authority would have to engage in dialogue with the corresponding authorities that the EU Member States have established to fulfil Article 6 of the UNCAC, as recognised in Article 4 of the proposal for a Directive, and with foreign authorities at international level.

6. **Regarding repressive measures**

6.1. The EESC believes that the choice to intervene for the same type of crime against conduct perpetrated in both the public and private sectors is excellent: this approach makes it clear that both parties to illicit trade hold the same liability within the bribery agreement. The solution of dealing with single cases of the corruption phenomenon is also excellent, identifying different cases according to the structure of the criminally relevant offence: this work of harmonisation has significant value in terms of integrating the legal systems of the Member States because it ensures security and justice throughout the EU for the same criminal cases, some of which are unknown in some countries (for example, influence peddling is unknown in Germany).

6.1.1. However, specifically with regard to Article 11 (Abuse of functions), the EESC has some critical remarks. The rule contained in Article 11 represents a major extension of the scope of the case. However, the experience of some Member States (in particular Italy) shows that the abuse of functions in the private sphere is not easily prosecuted due to evidential difficulties.

6.1.2. Furthermore, the same crime, if committed in the public sphere, causes serious problems of balance with respect for the rights of the defendant, who is involved in criminal proceedings which also jeopardises, together with his reputation, the exercise of function: the Italian practice clearly shows this criticality.

6.1.3. Consequently and more generally, it would seem useful for the Directive to suggest to the Member States that rapid channels of resolution of the judgment be set up for crimes against the public administration, so as to deal with both critical issues expressed.

6.2. The Directive could also suggest that the Member States create rules concerning the preventive seizure and freezing of assets, to guarantee the loss of advantage resulting from acts of corruption, including refunds and compensation for victims (for example, individuals or companies that could not access public contracts or tenders).

6.3. The minimum harmonisation technique imposed by Article 83 TFEU requires the types of crime to be clearly identified so as to allow each Member State to transpose the EU standard into its own criminal legislation in an appropriate manner, achieving, thanks to this transposition, precisely the desired minimum harmonisation. If, on the other hand, the types of crime established by the EU standard are not clear, no harmonisation is being pursued. This is the case in particular with Article 10: if the EU wants to combat highly inappropriate private influence in public decision-making, it needs to very strictly define trading in influence and to contemplate clear parameters for the corresponding offence, so as to distinguish it from lobbying.

6.4. Considering the variety of legal definitions of abuse of functions used in different Member States and the need to be effective, the EESC thinks it would be very useful to include in Article 11 on abuse of functions cases of abuse of functions for the purpose of causing harm and cases that breach the duty of abstention where there is a conflict of interest.

6.5. The case of 'possession' in Article 13 (enrichment from corruption offences) poses issues from the perspective of respecting the '*ne bis in idem*' principle, so the EESC recommends its elimination.

6.6. The concept of 'legal person' used in Article 2(7) excludes the possibility that the EU rules to combat corruption set out in this proposal for a Directive could apply to entities that have no legal personality. Yet in domestic and international practice there are many cases of corruption conducted by entities without legal status.

Brussels, 25 October 2023.

The President
of the European Economic and Social Committee

Oliver RÖPKE