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STRENGTHS AND WEAKNESSES OF THE PROPOSAL FOR A EU DIRECTIVE ON COMBATING CORRUPTION (*)

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Abstract. *The anti-corruption package presented by the European Commission last May reaffirms the high political priority of combating corruption offences in the European Union. Concerning the proposal for a new EU directive on this matter, the existing significant disharmony and fragmentation of national legal systems calls for greater alignment at the European level, through the exercise of "non-exclusive" EU competence" in criminal matters, in order to combat serious crimes of corruption in a broader sense on a shared basis, taking into account their potential cross-border dimension as well. Nevertheless, various provisions included in the proposed directive raise serious doubts concerning the adherence to the principle of proportionality, specifically regarding what is necessary to achieve the objectives of the new EU instrument (Art. 5(4) TEU) and the unreasonable choice to largely equate responses to corruption in the public sector and in the private sector. Furthermore, concerns also arise with respect to the preservation of fundamental principles of criminal law, such as legality and the required degree of precision for criminal offences.*

1. Premise.

On the past May 3, 2023, the European Commission introduced a comprehensive anti-corruption package, encompassing a joint communication[1], a proposal for an anti-corruption directive, and the announcement of a new EU sanctions regulation regime with the specific aim of combating serious acts of corruption on a

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[1] European Commission/High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament, the Council and the European Economic and Social Committee on the fight against corruption*: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0012.

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global scale. This strategic initiative reflects the Commission's proactive response to corruption scandals, including prominent cases like Qatargate, and the recognition of shortcomings observed in anti-corruption efforts at both the EU and national levels. Through this multifaceted approach, the Commission seeks to strengthen the fight against corruption, addressing deficiencies identified, and promoting enhanced transparency, accountability, and integrity across all sectors and governance levels within the EU Member States.

In this contribution, we will focus solely on the **criminal law provisions** of the **Proposal for a Directive** of the European Parliament and of the Council on combating corruption (hereinafter, the "Proposal")[2], whose declared **main objective** is to update the EU legal framework in this field in order «to take into account the evolution of corruption threats and the legal obligations on the Union and Member States under international law, as well as the evolution of national criminal legal frameworks»[3].

The EU Commission has recognised that the Council Framework Decision 2003/568/JHA on combating corruption in the private sector and the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union are outdated and cover only specific acts of corruption, making them insufficiently comprehensive, especially considering the existing regulations in the EU Member States. As emphasized in a recent study published by the European Commission, «the lack of a coherent European framework including provisions for all corruption-related crimes identified by international standards constitutes a source for legislative and operational challenges in tackling cross-border corruption cases»[4].

Furthermore, the Commission has identified the emergence of enforcement gaps at the national level and obstacles in cooperation between competent authorities in different Member States. These include lengthy prosecution processes, short statutes of limitations, rules regarding immunity and privileges and limited availability of resources, training, and investigative powers, among others.

Consequently, the Proposal – whose legal bases have been identified by the Commission in Arts. 83(1), 83(2), and 82(1)(d) of the TFEU[5] – aims to update the EU

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[2] The full title is: "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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A234%3AFIN.

[3] *Explanatory Memorandum*, p. 2.

[4] European Commission, I. GAGLIO, J. GUZZON, K. BARTZ *et al.*, *Strengthening the fight against corruption. Assessing the EU legislative and policy framework: final report for acceptance*, Publications Office, 2023. In general, on the dual contrasting tendency towards eclecticism or convergence in international, regional, and domestic sources of anti-corruption law, see the recent volume edited by BISMUTH, R., DUNIN-WASOWICZ, J. and NICHOLS, P.M., *The Transnationalization of Anti-Corruption Law*, 2021, Oxon/New York, 2021, in particular Part I.

[5] In this contribution, we will not dwell on the issues regarding the legal basis of the provisions of the proposed directive and specifically those concerning corruption prevention measures. One may merely observe that, with regard to the latter, a more appropriate reference would have been Art. 84 of the TFEU,

legislative framework by incorporating international standards that are binding on the EU. Its goal is to ensure that all forms of corruption are **criminalised** in every Member State, including holding legal persons accountable for such offences. The Proposal also seeks to establish effective, proportionate, dissuasive penalties for these corruption-related crimes. Additionally, it includes relevant measures to **prevent corruption** in accordance with international standards and facilitate **cross-border cooperation**.

All these purposes are worthy of the utmost attention and they certainly bring forward the issue of fighting corruption at the European level. Nonetheless, the method followed by the Commission to achieve this goal raises greater concerns.

How does the directive proposal aim to accomplish the above-mentioned objectives?

Given that the EU is a party to the **United Nations Convention against Corruption** (UNCAC)[6], signed in Mérida (Mexico) in December 2003, which is the most comprehensive international legal instrument in the field of preventing and combating corruption, the Commission has chosen to largely integrate the provisions of the UNCAC into the Proposal. In particular, after evaluating four different approaches, the Commission opted for «A proposal **transposing the provisions of the UNCAC** while at the same time going beyond international obligations in certain aspects[7], by imposing minimum levels for the upper limit of sanctions, to facilitate prosecutions and increase awareness on ethics and integrity among public officials»[8].

The more ambitious option of independently defining the various conditions and elements of all possible corruption offences and requirements for preventive measures was not adopted.

The aim of this writing is to emphasize both the positive aspects and main potential shortcomings of the new EU anti-corruption proposed instrument. Given the limited space available, we will focus on a select few questions among the many topics that could be addressed.

2. Incriminations.

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which, however, does not appear explicitly mentioned in the preamble of the Proposal nor in the accompanying report. Moreover, the reference provision for coordinating the action of the police authorities of both Member States and the EU is Art. 87 TFEU, rather than solely Art. 82 TFEU, which pertains to the cooperation of authorities (both national and European) involved in the exercise of criminal proceedings: see PARISI, N. and RINOLDI, D.G., *(Proposta di) Direttiva UE anticorruzione: i problemi sono altri, non quelli segnalati dalla Commissione «Politiche dell'Unione europea» della Camera dei Deputati*, in *https://www.dem-e-tra.it*.

[6] See, in this regard, the EU Council Decision of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (2008/801/EC).

[7] The possibility for both the EU and the Member States of going beyond the minimum requirements set by the UNCAC is indisputable: see Art. 65(2) of the UNCAC «Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption».

[8] *Explanatory Memorandum*, p. 14.

First and foremost, we aim to examine the implications of the Commission's important decision to harmonise legislation in line with the provisions of the UNCAC.

Since the UNCAC is a 20-year-old piece of legislation, the draft directive appears to reflect both the strengths and criticisms associated with that global treaty.

Our focus will concentrate on criminal law aspects, primarily encompassing the following:

a) The **definitional issue**, taking into consideration the requirement to uphold the principle of legality, particularly the corollary represented by the principle of precision of the offence.

b) The risk of **over-criminalisation** (in some respects), in relation to the principle of proportionality and the impact assessment of the criminalisation process.

c) Some remaining potential **loopholes** in criminalisation and outdated provisions.

d) The backwardness of the EU **legal persons' liability regime** outlined in the proposed directive.

e) **Other provisions**: jurisdiction, statute of limitations, investigative tools, etc.

3. Problems of definition and the principle of legality in criminal law.

Corruption is a transnational phenomenon that affects all societies and economies. However, defining corruption is a perennial challenge in the legal context.

The *Explanatory Memorandum* of the proposed directive acknowledges that any comprehensive definition would overlook certain forms of corruption. Therefore, the Proposal takes the traditional approach, consisting in categorizing **specific manifestations of "corruption" in a broader sense**[9]: bribery, misappropriation, trading

[9] The concept of "corruption" is used internationally, particularly within the framework of the UN and other international organisations and institutions (OECD, Council of Europe, World Bank, etc.), by global civil society organisations like Transparency International and in criminological literature on the matter, in the wide sense of "abuse of entrusted power for private gain", a definition which encompasses both public and private sector and goes beyond bribery offences in the strict sense: OECD, *Corruption. A Glossary of International Criminal Standards*, Paris, 2007, p. 19; World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, 1997, p. 8; Transparency International, *The Anti-Corruption Plain Language Guide*, Berlin, 2009, p. 14 (corruption is «the abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs»; definition also followed by UN, Global Compact, *Principle Ten: Anti-Corruption*, *https://unglobalcompact.org/what-is-gc/mission/principles/principle-10*; UNODC-Grace, *Knowledge tools for academics and professionals. Module Series on Anti-Corruption, Module 1: What Is Corruption and Why Should We Care?*, *https://grace.unodc.org/grace/uploads/documents/academics/Anti-Corruption_Module_1_What_Is_Corruption_and_Why_Should_We_Care.*pdf; and lastly, in the same vein, the aforementioned Joint Communication to the European Parliament, the Council and the European Economic and Social Committee on the fight against corruption («Corruption is commonly referred to as the abuse of entrusted power for private gain»). In the literature, cfr. WILLIAMS, J.W. and BEARE, M.E., *The*

in influence, abuse of functions, obstruction of justice, enrichment from corruption offences, as well as the accessory conducts of incitement, aiding and abetting, and attempt[10].

In this context, the **major novelty** outlined in the proposed directive is the transformation of the **semi-mandatory** offences (namely, the obligation *to consider adopting* a certain criminal provision)[11] specified in the Convention into **mandatory** ones (the obligation *to adopt*). The offences considered non-mandatory by UNCAC include foreign passive bribery (Art. 16(2)), trading in influence (Art. 18), abuse of functions (Art. 19), bribery and embezzlement in the private sector (Arts. 21-22), and, «subject to its constitution and fundamental principles of its legal system», illicit enrichment (Art. 20).

But why were these offences categorised as non-mandatory in the UNCAC? The answer is straightforward: these are the cases where consensus was more challenging to reach, and disagreements regarding the precise wording were more pronounced. Nonetheless, the above mentioned "optional" criminalisation provisions were included in the text of the UN convention, leading to significant implementation problems in national legislations.

The *Explanatory Memorandum* highlights that all 25 countries that responded to the questionnaire have national legislation addressing embezzlement and abuse of functions, while 23 out of 25 also have provisions on trading in influence.

However, these data are not sufficiently reliable and precise. Among other aspects, the definitions of these corruption offences vary significantly across jurisdictions. One of the reasons for this lack of homogeneity is that many terms and expressions used in the UNCAC non-mandatory criminal provisions are extremely generic[12] and the definitions are too broad and vague. The proposed directive replicates these deficiencies.

3.1. Abuse of functions.

This is the description of the offence of abuse of public functions in the Proposal (Art. 11(1)): «The performance of or failure to perform an act, in violation of laws, by a public official in the exercise of his functions for the purpose of obtaining an undue advantage for that official or for a third party» (when committed intentionally).

Business of Bribery: Globalization, Economic Liberalization, and the 'Problem' of Corruption, in Beare, M.E. (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, Toronto, 2003, p. 117; in this sense, already SENTURIAN, J.J. («corruption is the misuse of public power for private profit», cited in BABU, R., *The United Nations Convention Against Corruption: A Critical Overview*, 2006, p. 5, *papers.ssrn.com*). Conversely, the term "bribery" refers specifically to corruption in a narrow sense: a corrupt exchange of mutual benefits or a unilateral act (offer, request) with such intent.

[10] The proposed directive does not require Member States to criminalise "attempts" of bribery and passive bribery (Art. 14(3)); anyway, Member States may go beyond this provision.

[11] The expression used in the UNCAC in that case is "shall consider adopting", not "shall adopt".

[12] E.g. the term "undue advantage" is not defined: whether the advantage is undue or not, depends on national law.

This formulation encompasses a wide range of official misconduct and complements other criminalisation provisions in the directive. It serves as a **catch-all provision** that can capture conduct that may not be provable under other forms of corruption, such as bribery or trading in influence. Amongst other matters, it has the potential to also cover actions such as «failure to disclose a conflict of interest in a contract or transaction in which the official participates in the course of his or her duties; illegal levying of rates, fees, or taxes; and the alteration or destruction of official documents»[13].

The EU text mirrors Art. 19 of the UNCAC which draws inspiration, in turn, from the 1996 Inter-American Convention against Corruption, as two of its Member States, Mexico and Colombia, were among the first to propose UN drafting texts on abuse of functions.

Art. 11(1) of the EU Proposal involves the "violation of laws" and the "exercise of official functions" in terms of the *actus reus*, while the *mens rea* focuses on the concept of "undue advantage".

The requirement that the act or omission is in "violation of laws" should ensure that discretionary actions or omissions by public officials that do not contravene any specific legal provisions are not considered relevant[14], but that restriction is not expressly stated as – for example – in the current Art. 323 of the Italian Criminal Code[15].

From another perspective, proving that an accused has acted with the purpose of obtaining an undue advantage (as requested by the Proposal) may be more feasible in certain cases than proving that an accused actually gained an undue advantage. This allows for a broader scope of prosecuting individuals who engage in conduct aimed at obtaining an improper benefit, even if the actual acceptance of it is not demonstrated.

However, there is **significant variation** in the definitions of abuse of functions among EU Member States that reflect the different cultural and legal traditions[16]. Enforcement levels also vary greatly, with some states having only a few prosecutions per year, while others have dozens or even hundreds of new cases annually[17].

Against this backdrop, the different legal approaches followed by Member States in defining the crime of abuse of functions can be broadly categorized into two

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[13] In this sense, ROSE, C., in Rose, C., Kubiciel, M. and Landwehr, O. (eds.), *The United Nations Convention Against Corruption. A Commentary*, 2019, Croydon, p. 210-211, with specific reference to the overlapping provision of abuse of functions in the public sector under Art. 19 of the UNCAC.

[14] In this sense, ROSE, C., in Rose, C., Kubiciel and M., Landwehr, O. (eds.), *The United Nations Convention Against Corruption. A Commentary*, 2019, Croydon, p. 217 (citing BACIO TERRACINO, J., *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption*, Intersentia, 2012, p. 127).

[15] «[I]n breach of specific rules of conduct expressly provided for by law or by acts having the force of law and allowing for no margin of discretion».

[16] In the Italian criminal law literature, one can read, for example, the legal comparison in MATTEVI, E., *L'abuso d'ufficio. Una questione aperta. Evoluzione e prospettive di una fattispecie discussa*, Napoli, 2002, p. 304ff.

[17] ROSE, C., in Rose, C., Kubiciel and M., Landwehr, O. (eds.), *The United Nations Convention Against Corruption. A Commentary*, 2019, Croydon, p. 217.

groups: general provisions with an "all-encompassing function" and specific criminalisation of particular forms of abuse of functions.

Traditionally, **Italy** appears as a leading example of comprehensive implementation of the offence of abuse of functions, at least until the legislative amendment of 2020 of Art. 323 of the Italian Criminal Code, already reformed in 1997 in order to reduce the scope of the offence, which had been found to be too extensive in the light of case law. The current formulation, however, has still retained the classic approach, based on two different scenarios integrated into a single offence: abuses involving harm to others or undue advantage for the perpetrator or a third party. Nonetheless, these alternative elements form part of the *actus reus* rather than being solely elements of the *mens rea* and this distinguishes the Italian approach from the EU directive or the UN Convention. Additionally, the Italian Criminal Code provides for specific types of abuse, such as extortion of a public official (in Italian criminal law named *concussione*: Art. 317 C.C.), disclosure of official secrets (art. 326 C.C.), omitting or delaying official acts (Art. 328 C.C.), etc.

On the opposite side of the spectrum is the traditional approach of the German legislator, consisting in forgoing a general offence of abuse of functions in order to avoid excessive judicial interference in administrative activities. In particular, the **German Criminal Code** – together with other particular criminal provisions – provides for a specific crime called *Rechtsbeugung* (judicial perversion of justice or law bending: § 339 C.C.)[18], which penalizes unjust decisions made by judges, other public officials or arbitrators, in the course of conducting or deciding a legal matter[19]. However, the vagueness of the provision and the challenges in establishing clear criteria for defining the offence have resulted in limited application of the provision[20].

Spain has primarily two offences that are relevant to our purposes. The first one is prevarication (*prevaricación administrativa*: Art. 404 C.C.)[21], which is a totally dissimilar offence from abuse of functions under the UNCAC model. It occurs when an authority or public official, being aware of the injustice involved, issues an arbitrary decision in an administrative matter. The punishment for this conduct is special debarment from public employment or office, as well as the right of passive suffrage, for a period of nine to fifteen years. In the case of a judge, additional penalties such as

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[18] For an overview of German legal literature on *Rechtsbeugung*, see UEBELE, M., § 339 *Rechtsbeugung*, in *Münchener Kommentar zum Strafgesetzbuch*, vol. VI, 4th edn., 2022, p. 1454ff.; KUHLEN, L., § 339, in *Nomos Kommentar, Strafgesetzbuch*, vol. III, 6th edn., 2023; STUTE, D.J., *Judging as Crime: A Transatlantic Perspective on Criminalizing Excesses of Judicial Discretion*, in *The American Journal of Comparative Law*, vol. 69, n. 3, 2021, p. 574ff., https://doi.org/10.1093/ajcl/avac003. A similar offence is also provided for in Denmark under § 146 C.C.

[19] Conversely, the prosecuting authorities are subject to the offence under § 344 ("prosecution of innocent persons").

[20] Additionally, in Germany a public officer may commit the broad offence of *Untreue* ("Embezzlement": § 266 C.C.) when, abusing his powers to dispose of public assets or violating his duties to safeguard the financial interests of the public administration, he causes economic harm to the public administration.

[21] HAVA GARCÍA, E., *Los delitos de prevaricación*, Cizur Menor, 2019, p. 52; CASAS HERVILLA, J., *Prevaricación administrativa de autoridades y funcionarios públicos: Análisis de sus fundamentos y revisión de sus límites*, Madrid, 2020, p. 57ff.

detention and a fine (Arts. 446 and 447) may apply[22]. The second offence is contemplated in Art. 405 C.C., and it can described as a form of favouritism, punishing «an authority or public official who, in the exercise of their office duties and being aware of its unlawfulness, proposes, appoints, or grants possession of a specific public position to an individual who does not meet the legal requirements for such appointment». The penalty for this offence is a fine of three to eight months and suspension from public employment or office for a period of one to three years. Similarly, anyone who accepts the proposal or appointment, or takes possession of a specific public position, knowing that he/she fails to fulfil the legally established requirements, may also be subject to a fine (Art. 406 C.C.). Moreover, specific forms of abuse in the public sector are those provided for by Arts. 439 (abuses committed in the negotiation of contracts or in other affairs), 441 (sanctioning the public official who carries out professional or consultancy activities in matters in which he must intervene or has intervened in due to his office), etc.

Under Art. 382 of the **Portuguese Criminal Code**, a public official may be punished if they «abuse their powers or breach their obligations inherent to their duties, with the intention of obtaining an unlawful benefit for themselves or a third party, or causing harm to another person». Therefore, the aim of the offence can be either causing harm or obtaining an unfair advantage. The prescribed penalty is imprisonment for a maximum of three years or a fine, unless a more severe penalty is applicable under another legal provision.

The **French Criminal Code** provides for a rather generic and rarely applied offence named "*échec à l'exécution de la loi*" (Art. 432-1 C.C.), which punishes the conduct of a person holding public authority who, in the discharge of his office, takes measures «designed to obstruct the implementation of a law»; the penalty is increased if the result is achieved (Art. 432-2 C.C.). Moreover, Art. 432-3 C.C. criminalises a public official who continues to act despite being informed of the termination of their functions, while other provisions punish specific abuses of authority, including Art. 432-7, concerning various forms of discriminatory conduct. On the other hand, Art. 432-12 punishes the *prise illégale d'intérêts*, namely the conduct, by a person holding public authority or entrusted with a mission of public service, or by a person invested with a public elective mandate, involving directly or indirectly taking, receiving, or retaining an interest that compromises their impartiality, independence, or objectivity in a business or operation for which they have, at the time of the act, full or partial responsibility for supervision, administration, liquidation, or payment. This is also an infrequently applied offence that has been strongly criticized by legal scholars for its lack of precision and was consequently reformed in 2021[23].

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[22] The judicial prevarication (*prevaricación judicial*), unlike administrative prevarication, is punishable both for intentional conduct (Art. 446) and for gross negligence (art. 447).

[23] The legislative amendment aimed to specifically clarify the concept of "any interest" (*intérêt quelconque*), which was previously used. Nevertheless, on the concerns also arising from the new formulation, with respect to the principle of precision, see, for example, CLÉRY-MELIN, M. and BOUÉ-DIACQUENOD J.-B., *Prise illégale d'intérêts: une nouvelle définition du délit mais toujours autant d'incertitudes sur son champ d'application*,

To give one last example, in **Austria**, public officials may be criminally liable if they act with the intention of causing harm to another person or entity, but they do not need to act with the aim of obtaining an undue advantage (Arts. 302-303 C.C.).

In the face of such a wide variety of criminal provisions at the national level, Art. 11(1) of the EU Proposal, despite its generic scope, does not take into account the abuse of functions for the purpose of causing harm (typically, the most serious abuse cases) nor does it consider the breach of a duty of abstention in the presence of a conflict of interests, such as for example in Art. 323 of the Italian Criminal Code. Furthermore, as already mentioned, it considers undue advantage as a purpose rather than an event that must necessarily occur, stressing the *mens rea* of the offence.

3.2. Trading in influence.

Equally problematic is the description of the crime of active and passive trading in influence in the UN Convention (Art. 18) and its mirror provision contained in the proposed directive (Art. 10). It revolves around the interaction between a private individual and an intermediary, aiming to obtain an undue advantage from a public official through influence. This influence can be real or supposed, and it does not matter whether it is actually exerted or leads to the desired results[24].

The UN Office on Drugs and Crime classifies over two-thirds of states which are party to UNCAC as having criminal statutes on trading in influence "to some extent"[25].

However, there is a lack of consensus regarding the precise definition of this offence, the extent to which such activities should be considered criminal and how this differs from other forms of corruption[26]. Not surprisingly, this lack of conceptual clarity and agreement contributed to Art. 18 of the UNCAC having only a semi-mandatory status. Consequently, the incorporation of this offence into national legislation has so far been inconsistent and differs significantly among countries.

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in *La lettre juridique*, November 2021; AMRAOUI, N., *Sur l'appréciation de l'intérêt, la nouvelle rédaction du délit de prise illégale d'intérêts ne diffère guère de sa rédaction antérieure*, in *https://www.actu-juridique.fr*, 20 July 2023.

[24] This is the description of the offence of trading in influence in the Proposal: «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, offer or giving, directly or through an intermediary, of an undue advantage of any kind to a person or a third party in order for that person to exert real or supposed influence 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 promise of such an advantage to a person or a third party in order for that person to exert real or supposed influence 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 supposed influence leads to the intended results».

[25] UNODC, *State of implementation of the United Nations Convention against Corruption Criminalization, law enforcement and international cooperation*, Second edition, 2107, p. 42.

[26] See LLAMZON, A., in Rose, C., Kubiciel, M., and Landwehr, O. (eds.), *The United Nations Convention Against Corruption. A Commentary*, 2019, Croydon, p. 193.

Some States, such as Belgium, punish only trading in influence committed by a public official (art. 247, § 4, C.C.). Very few countries (e.g. Italy: art. 346-*bis* C.C.) also punish international trading in influence.

Other EU Member States, such as Germany, Denmark, Netherlands, and others, have fully rejected the implementation of Art. 18 of the UNCAC and Art. 12 of 1999 Council of Europe Criminal Law Convention on Corruption.

Their **reasons for rejecting it** include:

1. Concerns about **overbreadth** and **vagueness**: the concept of trading in influence was considered overly vague and not in line with the level of clarity and predictability required in criminal law. The legislators found it difficult to define and determine the boundaries of this offence precisely.

2. Difficulty in distinguishing from acceptable forms of exerting pressure, such as **lobbying** by representatives of interest groups.

3. **General complexity and technical difficulties**: implementing and transposing this crime into national legislation presents inherent complications and involves technical and methodological challenges.

Consequently, the rejecting States have «decided to focus on the most dangerous acts, especially those that undermine confidence in public administration, justice and the authorities in general, preferring the path of prevention and establishing rules of professional ethics for the conduct in question»[27].

To effectively combat improper private influence in public decision-making, it would be crucial to achieve a greater consensus on the definition and parameters of the corresponding offence.

It is also worth mentioning the importance of first regulating lobbying activity and potential conflicts of interest (preventive measures) before establishing the outlines of the criminal offence of trading in influence, as is also revealed by the legislative shortcomings of some Member States (for example: Italy – art. 346-*bis* C.C.[28] and Spain, Arts. 428-430 C.C.[29]) and the serious uncertainties consequently engendered by the introduction of the crime at issue. In this regard, Recital 3 of the EU Proposal explains that, according to the constituent elements of this offence, the undue advantage has to be provided or promised by the instigator «for exerting **unlawful influence** over an outcome or a process that is subject to decision-making». The adjective "unlawful" is not present in the text of Art. 11(1); in any case, in order to establish when influence can be considered in these terms, and thus for the incrimination to work coherently in judicial practice, an analytical lobbying regulation would be needed upstream, capable

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[27] UNODC, *State of implementation of the United Nations Convention against Corruption Criminalization, law enforcement and international cooperation*, Second edition, 2107, p. 43.

[28] See GIAVAZZI, S., MONGILLO, V. and PETRILLO, P.L. (eds.), *Lobbying e traffico di influenze illecite. Regolamentazione amministrativa e diritto penale*, Torino, 2019; MONGILLO, V., *Il traffico di influenze illecite nell'ordinamento italiano. Crisi e vitalità di una fattispecie a tipicità impalpabile,* in *Diritto pubblico comparato ed europeo*, vol. XXIV, 2022, n. 3, p. 497-530 (also in *Sistema penale*, 2 November 2022).

[29] VÁZQUEZ-PORTOMEÑE SEIJAS, F., *Los delitos de ejercicio y ofrecimiento de influencias en el Código Penal Español (Arts. 428, 429 y 430)*, Valencia, 2020, p. 69ff.; CUGAT MAURI, M. and AGUILAR JUNCOSA, I.M., Lobbying *e traffico d'influenze illecite in Spagna*, in *Diritto pubblico comparato ed europeo*, vol. XXIV, 2022, n. 3, p. 497-530.

of establishing the modalities and limits of a lawful activity of interest representation in public decision-making processes.

Nevertheless, the Proposal does not refer to the necessary implementation by Member States of rules on lobbying and conflicts of interest, but it merely calls for the adoption of «effective rules regulating the interaction between the private and the public sector» (Art. 3(3)).

4. Risk of over-criminalisation and the principle of proportionality in criminal law.

It would be reductive to address the issues discussed so far solely from the perspective of the principle of precision of criminal offences.

Problems of over-criminalisation also arise in respect of the principle of proportionality in criminal law.

In the *Explanatory Memorandum*, the Commission explains that since the Directive incorporates international obligations and standards, there is limited room for alternative courses of action. As a result, «this proposal is exceptionally presented without an accompanying **impact assessment**. Moreover, the initiative is not likely to have significant economic, environmental or social impacts and costs, or those entailing significant spending. At the same time, it should benefit the economy and society as a whole»[30]. However, the impact of criminal repression extends beyond investigative, judicial, and enforcement costs: the criminal law almost always carries some degree of social costs.

(*a*) Especially until the 2020 reform, the Italian experience regarding a catch-all provision such as the criminal offence of **abuse of functions in the public sector** (art. 323 C.C.) demonstrates the serious impact that overly broad and unclear criminalisation can have on the efficiency of administration, leading to what is commonly known as a "**chilling effect**". Uncertainty surrounding the criminalisation of certain actions may cause public officials to act cautiously and refrain from making decisions. In the worst case-scenario, this can bring essential sectors within the administration to a standstill. The issue at hand not only relates to convictions but also to the mere commencement of criminal proceedings. In 2021, in Italy out of 5500 criminal proceedings only 40 ended in convictions or plea agreements. For public officials, especially those in elected positions, being subject to criminal proceeding can result in severe reputational damage, regardless of the eventual outcome of the case, which may take months or even years to be conclusively resolved.

(*b*) The Proposal extends the approach consisting in substantially equating corruption in the public sector and in the private sector, well beyond the (mandatory or semi-mandatory) provisions of the UNCAC and in particular the bribery offences (see about these crimes – at the national level – for example the UK Bribery Act 2010), including abuse of functions and misappropriation in the private sector.

[30] *Explanatory Memorandum*, p. 13-14.

In line with the UNCAC, the proposed offence of **bribery in the private sector** (Art. 8) does not make any reference to the protection of competition, whereas the Council Framework Decision 2003/568/JHA allowed Member States to «limit the scope of [the offence] to such conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services» (Art. 2(3)).

With reference to **abuse of functions in the private sector** (art. 11(2)), the only explanation provided in the *Explanatory Memorandum* for its criminalisation appears to be rather tautological: «In order to comprehensively fight corruption, this Directive should also cover» this offence. Regrettably, the proposed description appears overly broad, which may not only hamper legal certainty but also have a detrimental impact on the business climate. Additionally, it seems unreasonable to punish conduct characterized by varying levels of harmfulness with the same level of severity. Lastly, the experience of several Member States, including Italy, indicates that prosecuting abuse of functions in the private sector is not easily accomplished due to evidential challenges. Consequently, it would be appropriate at least to limit incrimination to the most serious cases of "breach of duty". More precisely, a realistic suggestion could be to limit the scope of application of the provision to cases in which the conduct entailing breach of duty causes damage to an entity's assets or to limit the relevant "breach of duty" to cases of conflict of interest involving directors.

(*c*) The inclusion of **passive bribery of foreign public officials** – encompassing public officials of non-EU Member States[31] – as an offence seems problematic and not as clearly indispensable.

This crime is already covered – beyond the EU dimension[32] – by the Council of Europe Criminal Law Convention on Corruption, albeit allowing for reservations (Art. 37(1)), and by the UNCAC, but as a semi-mandatory offence. Moreover, the imposition of a duty to criminalise passive international bribery goes beyond the requirements of the OECD Convention on combating bribery of foreign public officials in international business transactions of 1997, which only focuses on the demand side of bribery (Art. 1)[33]. Punishing international passive bribery may encounter challenges related to diplomacy, jurisdiction, extradition, and the immunity of the public officials involved, particularly in the case of high-ranking government officials. In essence, it risks becoming a **symbolic offence** with limited practical implications.

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[31] The proposed directive is based on a broad notion of "public officials", covering not only EU officials, but also officials of Member States, third country and international organisations and courts (Art. 2, n. 3).

[32] The "EU acquis" already covers passive bribery of public officials of the EU or officials of Member States of the EU (Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Official Journal C 195, 25/06/1997 P. 0002 - 0011) and of national officials of a third country (only) in case of bribery affecting the Union's financial interests (Art. 4(4) of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law).

[33] Cfr. ZERBES, I., *Article 1: The Offence of Bribery of Foreign Public Officials*, in Pieth, M., Low, L.A. and Bonucci, N. (eds.), *The OECD Convention on Bribery: A Commentary*, 2nd edn., Cambridge, 2013, 59ff

(*d*) With reference to the offence of **trading in influence** (Art. 10), beyond the already highlighted issues concerning the necessary adherence to the principle of legality, it should be noted that, at least in some national legal systems, the punishment of the private individual deceived by an intermediary who falsely claims to have influence over a public official (we are referring to influence that is merely "supposed") may raise conflicts with fundamental principles of criminal law of constitutional relevance, such as the principle of offensiveness (or harm principle) of the crime.

(*e*) The crime of **illicit enrichment from corruption offences** (Art. 13), which differs significantly from the conduct described in Art. 20 of the UNCAC, is somewhat problematic. Even taking into account that the UNCAC provided for a "compatibility clause" for this crime with the legal traditions of the State Parties («within its means and in accordance with fundamental principles of its domestic law»), the necessity of introducing this criminal offence as a minimum harmonisation requirement in the first place raises many doubts. To date, after all, only eight countries have such an offence[34]. The most problematic hypothesis from the point of view of the constitutional principles of the Member States, however, concerns the incrimination of the mere "possession" of an asset derived from an offence when the same public official who holds it is the perpetrator of the predicate crime. Such a scenario is contrary to the substantive principle of *ne bis in idem*: imagine the case of a public official punished twice for the same facts, in particular on the one hand for passive bribery and on the other hand for unlawful possession of the bribe obtained.

In order to avoid this inconvenience, we recommend removing the clause that refers to the official's involvement in the offence or – even better – the term "possession", maintaining only the words "acquisition" (similar to receiving stolen goods) and "use" (conduct that can be encompassed within the scope of money laundering or self-laundering offences, already established in many EU countries[35]).

5. Potential residual loopholes in incriminations and outdated provisions.

While the proposed directive makes it necessary to prosecute offences that still lack large consensus, it overlooks other crimes of corruption (or some of their modalities) that have already gained widespread international recognition. This conflicts with the assumption that the Proposal aims to update the existing EU legal framework on combating corruption in order «to take into account the evolution of

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[34] *Explanatory Memorandum*, p. 12.

[35] Therefore, the novelty compared to Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law consists in the fact that the Proposal also obliges Member States to criminalise "self-laundering" conduct through the offence of "enrichment from corruption"; consequently, for this latter offence, «the prosecution would only have to prove a link between the property and the involvement in corruption, just as they would have to prove corruption as a predicate offence for the purpose of money laundering».

corruption threats and the legal obligations on the Union and Member States under international law, as well as the evolution of national criminal legal frameworks».

The public bribery offences described in the Proposal do not specifically relate to an act (or omission) by a public official that is illegal in itself or committed in breach of that official's duties, which means that the offence covers facilitation payments. Moreover, Art. 7 encompasses any conduct of bribery committed «in order for the public official to act or to refrain from acting in accordance with his duty or in the exercise of that official's functions», encompassing both corruption committed by public officials and corruption perpetrated by elected public officials[36]. Additionally, the Proposal also criminalises unilateral offers or requests and not just corrupt agreements between the briber and the official.

However, two potential gaps in the criminalisation of **bribery in the public sector** (Art. 7) appear less justifiable today than they were 20 years ago.

First, the Proposal's provisions do not address ***ex post facto* payments**. The expression "in order that" points towards a future act or omission by the official.

Second, they do not consider so called "**investive bribes**"[37], namely benefits which are linked to the general exercise of an office rather than a specific act or omission in the performance of a public official's duties (like – albeit with different nuances – in Italy - Arts. 318 and 321 C.C.; Germany - §§ 331 (*Vorteilsannahme*) e 333 (*Vorteilsgewaehrung*) C.C.; Spain - Arts. 422 and 424 C.C.; Portugal - Art. 372 C.C.; Austria - §§ 306 (*Vorteilsannahme zur Beeinflussung*) and 307b (*Vorteilszuwendung zur Beeinflussung*) C.C.; Greece - Art. 235(3), etc.; outside the EU but within the Council of Europe area: Switzerland - Arts. 322-*quinquies* and 322-*sexies* C.C.; UK Bribery Act 2010)[38].

Regarding **abuse of function in the public sector**, the distinction between a public official's abuse for personal advantage and abuse to the detriment of a third party (prevarication) is important to consider. The former involves acting in self-interest or in the interest of others, while the latter entails intending to cause an unjust harm to someone. The UN Convention focuses only on abuse of functions committed

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[36] On the contrary, the German Criminal Code includes special requirements for proving bribery of elected public officials and special forms of justifications (§ 108e).

[37] On this concept, regarding the UNCAC bribery of national public officials offence (Art. 15), see KUBICIEL, M., in Rose, C., Kubiciel, M. and Landwehr, O. (eds.), *The United Nations Convention Against Corruption. A Commentary*, 2019, Croydon, p. 172; UNODC, *State of implementation of the United Nations Convention against Corruption Criminalization, law enforcement and international cooperation*, Second edition, 2107, p. 26, where so-called "investive" corruption practices are defined as concerning benefits that «are not directed at any particular favour at that particular time, but are offered in order to establish, maintain or improve a relationship between the parties to the transaction, in anticipation of future situations when a favour may be required», observing that «the criminalization of such behaviour has been identified as a good practice».

[38] More details in MONGILLO, V., *La corruzione tra sfera interna e dimensione internazionale*, Napoli, 2012, p. 162-172. See also SCALIA, V. *La corruzione:* a never ending story. *Strumenti di contrasto e modelli di tipizzazione nel panorama comparato e sovrannazionale*, Torino, 2020, p. 458ff., noting that the Greek, Portuguese and UK criminal provisions also waive the minimum requirement of a link between the (generic) exercise of a public office and the undue advantage offered/given or requested/accepted.

for the purpose of obtaining an undue advantage. Similarly, the directive Proposal seems merely to encompass instances of "business favoritism" or "private exploitation of office", while – as previously noted – it fails to address serious forms of public officials' prevarication, such as extortion or other arbitrary official acts, which go beyond the classic concept of corruption as the abuse of entrusted power for a private gain. This gap would hardly be justifiable in a democratic State.

6. Backwardness of the legal persons' liability regime as outlined in the proposed directive.

The introduction of corporate criminal liability in almost all civil law countries has been a major development in criminal justice systems over the past 20 years[39].

There are two significant reasons why this represents important progress: a) It aids in the prevention and punishment of serious offences in key policy areas within the EU; b) It facilitates the effective addressing of cross-border crimes and prevents the potential for forum shopping among Member States with more lenient sanctioning systems.

However, the legal context and regulations of corporate criminal (or administrative) liability may vary from country to country.

A harmonised system of protection implies some level of uniformity in terms of the nature of sanctions and the liability regime, including for legal entities.

In this regard, the directive does not explicitly state the "criminal" nature of corporate liability, and that can be considered as reasonable[40].

The concept of a "legal person" (Art. 2, n. 7) does not include entities without legal personality. On the contrary, this does not appear convincing, since entities without legal status can also committee crimes.

Regarding the **structure of liability**, the Proposal follows the traditional EU model based: 1) on the commission of the crime by a person in a leading position in the organisation; 2) or his/her failure to supervise criminal conduct engaged in by an employee.

This appears as an **outdated model** of corporate liability: the central element is rooted in the leading position of the individual offender who directly commits the crime or fails to supervise the crime perpetrated by an employee.

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[39] Cfr. PIETH M. and IVORY R. (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk*, Dordrecht, 2011, p. 9ff.; FIORELLA, A. (ed.), *Corporate Criminal Liability and Compliance Program*s, vol. 1: *Liability "Ex Crimine" of Legal Entities in Member States*, Napoli, 2012; vol. 2: *Towards a Common Model in the European Union*, Napoli, 2012; VERMEULEN, G., De BONDT, W. and RYCKMAN, C., *Liability of legal persons for offences in the EU*, Antwerp, 2012; OECD, *The Liability of Legal Persons*, cit.; COUNCIL OF EUROPE, *Liability of Legal Persons for Corruption Offences*, 2020, p. 19ff.; MONGILLO, V., La *responsabilità penale tra individuo ed ente collettivo*, Torino, 2018, 176ff.

[40] On this issue, MONGILLO, V., *The Nature of Corporate Liability for Criminal Offences: Theoretical Models and European Union Member States' Laws*, in Fiorella, A. (ed.), *Corporate Criminal Liability and Compliance Programs*, vol. II, *Towards a Common Model in the European Union*, Naples, 2012, p. 55-120.

In recent years an **alternative model** of corporate liability has gained prominence, which emphasizes the compliance efforts undertaken by the organisation involved in the crime. This mechanism of attributing liability to legal persons is based on the organisation's specific contribution to the commission of the offence in terms of **organisational failure** or lack of adequate preventive systems. Countries such as Italy, Spain, Czech Republic, Austria, Poland and UK (under section 7 of the Bribery Act 2010) have already adopted this approach. Unlike a system of pure strict or vicarious corporate liability or a model of corporate liability based on the UK identification doctrine[41], the latter test of liability recognises organisational systems as the source of corporate fault, aligning with international corporate standards in preventing corruption.

On closer inspection, the Proposal does not ignore the importance of effective internal controls, ethics awareness, and compliance programs in order to prevent corruption prior to the possible offence, but considers them only as a **mitigating factor**. However, the incentive for implementing compliance programs before the offence may be insufficient if the penalty reduction for compliance programs after the offence is the same (Art. 18(2)a). Against such a background, corporations could be induced to adopt a mere reactive approach rather than a proactive one, in the rare instances where a crime is detected and enforced. Moreover, in the future, might EU institutions challenge the above mentioned countries for non-compliance with the directive, in particular for having provided for the adoption and effective implementation of the anti-corruption model as a ground for exemption from corporate liability rather than just as mere mitigation? Indeed, this would be an undesirable outcome in our view.

Conversely, the introduction of an independent mitigating circumstance linked to the disclosure and **voluntary self-reporting** of the offence to the competent authorities, along with the implementation of remedial measures (as stated in Art. 18(2)c), is undoubtedly a positive new development. It acknowledges the importance of encouraging organisations to proactively come forward, cooperate, and take corrective actions when they discover instances of corruption within their ranks, reflecting a general international trend to encourage legal entities to inform prosecuting authorities of criminal offences committed in its corporate context.

About the **sanctions** applicable to legal persons, the novel method of quantifying fines based on total **worldwide turnover** (Art. 17(2)a), including related corporate entities, is interesting and aligns with the method already outlined in other EU directives and regulations, such as those addressing market abuse, money laundering, personal data protection, digital services, etc. Yet, it could be appropriate to consider different maximum penalty levels based on the size of the entity. For example, a fine of 500,000 euros could have a significantly different impact on a small company with a turnover of 10 million euros compared to a larger corporation or a multinational giant. Imposing a fine that could potentially lead to the closure of a small

[41] WELLS, C., *Corporations and Criminal Responsibility*, 2nd edn., Oxford, 2001, p. 93ff.

company would need to be carefully assessed and balanced against the legal purpose of effective deterrence and proportionate punishment.

Another critical aspect concerns the **remaining list of sanctions** applicable to legal persons[42]. The range is quite wide and diverse and includes measures such as the permanent disqualification of that legal person from carrying on commercial activities, or even the judicial winding-up of that legal person, without distinguishing those cases in which the most severe sanction could be applied. A concise formulation such as that adopted in the Proposal could be interpreted as implying that all the stated measures and penalties should be mandatory for any corporate corruption offence, which would clearly contradict the principle of proportionality of punishment. It is different if the list is to be understood as a mere compilation of sanctions and measures from which the national legislator, responsible for implementing the directive, could draw without being obliged to adopt a specific sanction/measure or even the entire catalogue (for any corruption offence). This interpretation appears more reasonable, especially in light of the principle of proportionality of sanctions, which, in accordance with established tradition, is enshrined in Art. 17 alongside effectiveness and dissuasiveness[43].

7. Other provisions: jurisdiction, statute of limitations and investigative tools.

[42] Further possible sanctions include the exclusion from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures; temporary or permanent disqualification of that legal person from the exercise of commercial activities; the withdrawal of permits or authorizations to pursue activities in the context of which the offence was committed; the possibility for public authorities to annul or rescind a contract with the legal entity in the context of which the offence was committed; the placing of that legal person under judicial supervision; the judicial winding-up of that legal person; or the temporary or permanent closure of establishments which have been used for committing the offence.

[43] A similar issue arises with the list of penalties and measures (not necessarily of a criminal nature) concerning natural persons to be introduced under Art. 15 of the Proposal, which includes, among others, the deprivation of the right to stand for elections, «proportionate to the seriousness of the offence», against a person convicted of committing one of the criminal offences referred to in Arts. 7 to 14. On June 21, 2023, the Swedish Parliament (*Riksdag*) issued a reasoned opinion in the context of the subsidiarity control exercised under Art. 6 of Protocol No. 2 attached to the TEU and the TFEU, stating the above mentioned provision goes far beyond what is necessary to achieve the objective pursued by the measure. The Swedish Parliament also contests that the EU's competence in criminal law can extend to influencing the exercise of democracy in national elections in the Member States. Moreover, the *Riksdag* has expressed similar doubts regarding the sanctions of cessation or debarment from public employment. A similar opinion, on this matter, was expressed by the XIV Standing Committee (EU Policies) of the Italian Chamber of Deputies, on July 19, 2023, which however went as far as to radically contest the respect for the principle of subsidiarity, rather than the proportionality of individual provisions (see also footnote 47 below); on July 26, 2023, the Italian Chamber of Deputies approved the opinion of the XIV Commission by a large majority. Nonetheless, see the view of SALAZAR, L. and CLEMENTUCCI, M., in their article titled *Per una nuova anti corruzione europea: EU-rbi et orbi*, in *Sistema penale*, 19 July 2023, according to which the catalogue of sanctions mentioned in Art. 15(4) is not entirely binding and nor exhaustive, providing Member States with a sort of shopping list of penalties and measures.

Our last considerations are dedicated to other proposal provisions that reveal significant elements of weakness or unreasonableness, which could cause undesirable problems in the implementation or application phase of the rules to be introduced into Member States' legal systems.

About **jurisdiction**, the inclusion of a new jurisdictional criterion based on the commission of the offence for the benefit of a legal person established in the territory of a Member State (Art. 20(1)b), alongside the criterion of territoriality and the principle of nationality or active personality[44], can be considered a positive development, consistent with the current international trends for a more effective fight against cross-border corporate crime[45]. Nevertheless, a strong extension of extraterritorial jurisdiction can increase conflicts of jurisdiction between Member States or between them and non-EU states, and the proliferation of parallel criminal proceedings, potentially resulting in violations of the principle of *ne bis in idem* (namely the principle that a person cannot be tried or punished twice for the same facts: Art. 50 EU Charter of Fundamental Rights). Balancing the need for effective prosecution with ensuring the protection of fundamental rights and avoiding overlapping proceedings is crucial in establishing a fair and efficient system of jurisdiction at the European level. With regard to conflicts of jurisdiction between Member States, a possible remedy could be to provide for the referral of the matter to Eurojust regardless of whether the requirements of Art. 12 of Framework Decision 2009/48/JHA are met.

As regards **limitation periods** (Art. 21), it seems, in general, unreasonable to provide for *ad hoc* minimum limits for certain offences in the absence of a reason justifying unequal treatment with other offences punishable by the same sentence. On the other hand, it is extremely problematic to provide for the same limitation periods for offences characterized by a very different degree of seriousness: for example, embezzlement in public and private sector.

Regarding **investigative tools**, Art. 23 states that «Member States shall take the necessary measures to ensure that effective 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

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[44] In more details, the Proposal envisages jurisdiction of the Member States over crimes of corruption if one of the following alternative conditions apply: a) The offence is committed in whole or in part in the territory of a Member State; b) The offender is a national of or has his or her habitual residence in a Member State; or c) The offence is committed for the benefit of a legal person established in the territory of a Member State.

[45] See, also for a law comparative analysis, MONGILLO, V., *The Jurisdictional Reach of Corporate Criminal Offences in a Globalised Economy: Effectiveness and Guarantees 'Taken Seriously'*, in Ó Floinn, M., Farmer, L., Hörnle J. and Ormerod, D. (eds.), *Transformations in Criminal Jurisdiction. Extraterritoriality and Enforcement*, 2023, ch. 4. In particular, on the French experience with regard to the expansion of extraterritorial jurisdiction in the fight against corruption (*LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*), see BOURGUIGNON, J., *France's New Approach Towards Extraterritoriality in Anti-Corruption Law: Paving the Way for a Protective Principle in Economic Matters?*, in BISMUTH, R., DUNIN-WASOWICZ, J. and NICHOLS, P.M., *The Transnationalization of Anti-Corruption Law*, 2021, Oxon/New York, 2021, p. 155ff.; D'AMBROSIO, L. *L'implication des acteurs privés dans la lutte contre la corruption: un bilan en demi-teinte de la loi Sapin 2*, in *Rev. sc. crim. dr. pen. comp.*, 2019, p. 15f.

this Directive». The techniques that enforcement agencies often use to counter organised crime or other serious crimes include telephone or telematic wiretapping, so called "trojan horse malware" or spyware, undercover agents, data analysis, etc.

However, the provision stated in Art. 23 is overly broad and generic. It appears unreasonable to apply the same investigative tools used for organised crime to all corruption offences, including minor cases such as, for example, private embezzlement. The enforcement authorities' limited resources should be focused on combating the most serious acts of corruption through such intrusive investigative mechanisms.

A valid differentiation criterion could be based on the level of the maximum penalty that can be imposed for a certain corruption offence, and/or on the public vs. private nature of the crime of corruption considered, or on the commission of such crime in an organised form.

8. Conclusion.

The anti-corruption package presented by the European Commission confirms that the fight against corruption offences is a high political priority in the EU[46]. If approved by the EU Council and the EU Parliament, the impact of the new directive on national legislations will be quite significant.

However, the proposed strategy presents not only lights but also many serious shadows.

From the perspective of the **principles of subsidiarity** and **proportionality** governing the use of EU competences (Art. 5 TEU), on the one hand, the need for greater harmonisation at the European level – through the exercise of the Union's non-exclusive competence in criminal matters – seems unquestionable in order to combat serious crimes of corruption in a broader sense on a common basis, taking into account their potential cross-border dimension and the negative effect that the current significant disharmony and fragmentation of national legal systems may have on judicial cooperation, the protection of the internal market and European values (rule of law, democracy, etc.)[47]. On the other hand, various provisions in the Proposal raise

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[46] AIOSSA, N., MARTINI, M., FEVOLA, I., REITMAIER, A. and HUTER, M., *An update of the European Union's anti-corruption legal framework: how can civil society contribute?*, 23 June 2023, in https://uncaccoalition.org/eu-anti-corruption-legal-framework.

[47] Conversely, the XIV Standing Committee (EU Policies) of the Italian *Camera dei Deputati*, on July 19, 2023, expressed a reasoned opinion (which was later approved by the Chamber of Deputies) in accordance with Art. 6 of Protocol No. 2 to the TEU and the TFEU, in which it contested the cross-border nature of the criminal phenomenon addressed in the proposed directive, particularly concerning certain offences beyond corruption in the strict sense (bribery). Specifically, the Committee referred to offences like obstruction of justice and abuse of functions, arguing that «the EU does not have the competence to adopt harmonisation rules». The argument is highly debatable, both due to the broad mean of the concept of "corruption" (that, and not "bribery", is also the term used in Art. 83 TFEU; see footnote 9 above) and the cross-border character that other offences against public administration may assume, apart from bribery

strong doubts concerning the respect of the principle of proportionality (with regard to what is necessary in order to achieve the objectives of the new proposed directive: Art. 5(4) TFEU) and certain fundamental principles of criminal law, including the precision of criminal offences and/or predictability of criminal conduct, and, in general, the principle of reasonableness/proportionality, with reference especially to the excessive levelling between the public and private sectors.

Summarizing the previous considerations, the analysis of the "ancillary" offences of abuse of functions and trading in influence leads to the conclusion that overly broad offences run the risk of conflicting with the principle of legality in criminal law. Probably, these provisions do not uphold the principle of precision of criminal offences, which not only requires that they be defined by law, but also demands sufficient intelligibility. Without clarity, the fundamental principle of legality (Art. 7 ECHR; Art. 49(1) EU Charter of Fundamental Rights) is upheld in form but violated in substance.

The Proposal solemnly affirms that «the fight against corruption and the protection of fundamental rights are complementary, not conflicting, objectives» (p. 15), but this assertion may not hold true in practice and could lack credibility. Unfortunately, without **consensus and clarity** on what is intended to be prohibited and prosecuted, any criminalisation becomes uncertain, incapable of guiding behaviour, and ultimately ineffective.

If the requirements are overly broad, countries that must transpose them face a dilemma[48]: either they compromise the constitutional principle of legality/precision to fully comply with the EU relevant instrument, or they narrow down the implementation, risking non-compliance and generating further disharmony at the European level. This misses the goal of **harmonising** definitions of criminal offences.

In conclusion, attempting to achieve efficiency and effectiveness in criminal control without respecting the fundamental principle of legality, particularly without clearly defining punishable conduct, is nothing more than an illusion. It merely creates the false impression of effective criminal control.

Furthermore, various provisions of the Proposal appear to be tainted by over-criminalisation. The substantial equalization of all types of corruption in the public and private sector, including for example abuse of functions and misappropriation, is not convincing and various aspects (including investigative tools) appear to be unreasonable. The diversity of assets at stake in the public sector (good performance and impartiality of administrative activity) and in the private sector is evident.

Also the **penalties** should be more distinct for corruption offences. Under the Proposal, for instance, the minimum maximum penalty is currently 6 years for public bribery and 5 years for private bribery: there should be a larger difference between

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crimes (consider, in particular, international influence-peddling or abuse of functions committed by a public official of a Member State to the detriment or benefit of a non-national company in a public procurement, etc.). Other remarks about the violation of the principle of proportionality of certain provisions formulated in the provision, for example, concerning accessory penalties or limitation periods, appear to be more agreeable.

[48] EU Member States would have to transpose the EU directive into national law within 18 months.

these two offences. Furthermore, both public and private abuse of functions carry the same penalty limit of 5 years, which is not proportionate considering the varying severity of the two crimes. Similar concerns apply to obstruction of justice, where the minimum of the maximum penalty is equal to that of public bribery.

In conclusion, if the objective of the Proposal is to establish a **common "minimum" standard** applicable to all Member States (Art. 83(1)(2), TFEU), greater consensus, balance, precision and proportionality is necessary in framing the rules, also in light of the difficulties encountered by State Parties in the implementation of the semi-mandatory provisions of the UNCAC, which the EU would now like to make binding.

It's insufficient to adopt a simple copy-paste approach from the UNCAC, although some additions in the text of the Proposal also appear problematic.

The drafting of the directive represents a significant opportunity to revive and rationalize the fight against corruption at the European level. Participative democracy, including the positive role of ONGs and the fundamental contribution of the academic research should also play its role in the ascending phase of the EU legislation.

Let's not waste this opportunity!