



EU ANTI-CORRUPTION POLICY



European Commission
Directorate General for Migration
and Home Affairs

Unit D3 (Fight against Organised Crime
and Drugs Policy)

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

Legal basis

+ **TFUE (entered into force in 2009):**

- the Union shall endeavour to ensure a **high level of security** through measures to prevent and combat crime (Art 67)

- **corruption** listed among the particularly serious crimes with a cross-border dimension for which minimum rules on the definition of criminal offences and sanctions may be established (Art. 83 (1);

- possibility to establish measures to promote and support the action of MS in the field of **crime prevention** (Art. 84)

+ **EU anti-corruption package:** Communication and Anti-corruption report (2014)

Anti-corruption instruments at EU level

- + **European Semester of economic governance:**
 - Country reports and country specific recommendations
- + **Mainstream AC provisions in relevant legal initiatives:**
 - Public Procurement Directives
 - 4th and 5th Anti-Money Laundering Directives
 - Proposed directive on the whistleblower protection
 - Measures to enable access for competent national authorities and exchange of financial and other information
 - Directive for the protection of the EU financial Interests and Regulation establishing the European Public Prosecutor's Office.
- + **Technical and financial support** (EU anti-corruption experience-sharing programme, ISF-Police, ESIF, Horizon 2020, 7th Framework Programme for Research and Technological Development, Structural Reforms Support Program)
- + **Participation in international fora active in the fight against corruption:** GRECO, UNCAC, G20, OECD.

I. ANTI-CORRUPTION CORE ACQUIS

Anti-corruption policy: the *core acquis*

- + 1997 Convention addressing corruption involving officials of the EU or officials of Member States**
- + Council Framework Decision (2003) on the fight against corruption in the private sector**
- + Directive on the Protection of EU financial interests (PIF Directive, 2017)**
- + Regulation on European Public Prosecutor's Office (2017)**

CONVENTION ON FIGHTING CORRUPTION INVOLVING OFFICIALS OF THE EU OR OFFICIALS OF MEMBER STATES (1997)

(entered into force on 28 September 2005)

- ✦ **General purpose:** criminalisation of acts of active and passive corruption, liability of heads of businesses, penalties including deprivation of liberty.
- ✦ **Definitions** of national and Community official
- ✦ **Passive corruption**= the deliberate action of an official, who, **directly or through an intermediary**, requests or receives **advantages** of any kind whatsoever, for himself or for a **third party**, or accepts a **promise of such an advantage**, to **act or refrain** from acting in accordance with his duty or in the exercise of his functions in breach of his official duties.
- ✦ **Active corruption**= the deliberate action of whosoever **promises** or gives, **directly or through an intermediary**, an advantage of any kind whatsoever to an official **for himself or for a third party** for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties.

CONVENTION ON FIGHTING CORRUPTION INVOLVING OFFICIALS OF THE EU OR OFFICIALS OF MEMBER STATES (1997)

(entered into force on 28 September 2005)

- ✚ **Instigating, aiding and abetting** should also be punishable
- ✚ Sanctions: **effective, proportionate and dissuasive criminal penalties**, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.
- ✚ **Criminal liability of heads of businesses or any persons having power to take decisions or exercise control** within a business for corruption offences committed by a person under their authority acting on behalf of the business.
- ✚ Clarification of **jurisdiction**
- ✚ If the offence concerns two MS, they should **cooperate effectively** in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of **mutual legal assistance**.

CORRUPTION IN THE PRIVATE SECTOR *FRAMEWORK DECISION 2003/568/JHA*

(entered into force 22 July 2005)

Objectives:

- + **Criminalizes** active and passive corruption in the private sector
- + Ensures **liability of legal persons**
- + Ensures **effective, dissuasive, proportionate** sanctions

Important elements:

- + **Definition of "legal person" and "breach of duty"**
- + **Active corruption=promising**, offering or giving, directly or through an **intermediary**, to a person who in any capacity directs or works for a private-sector entity **an undue advantage** of any kind, for that person or for a **third party**, in order that that person should perform or **refrain** from performing any act, in breach of that person's duties
- + **Passive corruption=** directly or through an **intermediary**, requesting or receiving an **undue advantage** of any kind, or accepting the promise of such an advantage, for oneself or for a **third party**, while in any capacity directing or working for a private-sector entity, in order to perform or **refrain** from performing any act, in breach of one's duties.

CORRUPTION IN THE PRIVATE SECTOR *FRAMEWORK DECISION 2003/568/JHA*

- ✚ Applies to **both profit and non-profit organisations**
- ✚ **Instigating, aiding and abetting** constitute criminal offences
- ✚ **Effective, proportionate and dissuasive** criminal penalties-
maximum of at least 1-3 years of imprisonment
- ✚ **Liability of legal persons**
- ✚ **Legal persons** could also be held liable for lack of supervision or control
- ✚ **Jurisdiction:** offence is committed in whole or in part within its territory; by one of its nationals; for the benefit of a legal person that has its head office in the territory of that Member State.
- ✚ **Most significant** articles – 2 (definition/elements of the offence), 5 (liability of legal persons), 6 (sanctions)
- ✚ 3rd implementation report under preparation.

PROTECTION OF THE EU'S FINANCIAL INTERESTS

*Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive), 2017 - establishing minimum standards of protection against **fraud and related offences** affecting EU funds – entered into force on 5 July 2017 – transposition date: 6 July 2019*

MS are required to:

- ✓ Transpose **definitions** of criminal offences affecting the Union's financial interests, sanctions and limitation periods
- ✓ ensure liability of heads of **businesses** or any person having power to take decisions or exercise control within a business
- ✓ provide that MS have jurisdiction over offences which take place **completely or partially** within their territory or the offender is a national of the MS

PIF Directive

- ✓ General principles: **effective, proportionate and dissuasive criminal penalties** (including imprisonment in serious cases)
- ✓ MS obligation to criminalise corruption in **relation to the Union's financial interests**
- ✓ **definitions of active and passive corruption**, linking this to an act or omission which **damages or is likely to damage the Union's financial interests**
- ✓ Wide definition of a 'public official': covers officials of MS as defined by national legislation (including any person holding an executive, administrative or judicial office at national, regional or local level)

Definitions of corruption – PIF Directive

+ *Active corruption*

the action of the action of a person who **promises, offers or gives, directly or through an intermediary**, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which **damages or is likely to damage the Union's financial interests.**

+ *Passive corruption*

the action of a person who **promises, offers or gives, directly or through an intermediary**, an advantage of any kind to a public official for himself or for a third party for him **to act or to refrain** from acting in accordance with his duty or in the exercise of his functions in a way which **damages or is likely to damage the Union's financial interests.**

PIF Directive

- ✓ New offence: **misappropriation** (Article 4(3)).
- ✓ **Sanctions:** criminalisation threshold EUR 10,000.
- ✓ Criminal offences referred to in Articles 3 and 4 are punishable by a **maximum penalty of at least four years of imprisonment** when they involve considerable damage or advantage (> EUR 100,000).
- ✓ Serious cross-border VAT fraud (> EUR 10 Mln).
- ✓ **Limitation periods: general obligation** for Member States to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences *for a sufficient period of time* after the commission of the offences listed in Art. 3, 4 and 5.
- ✓ **Specific limitation period of 5 years** for serious offences punishable by a maximum sanction of at least four years of imprisonment.

European Public Prosecutor's Office

Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office – entered into force on 20 November 2017

- ✓ Independent and specialised Union body with 22 participating MS
- ✓ Central office in Luxembourg and European Delegated Prosecutors at MS level
- ✓ Competent for **investigating, prosecuting and bringing to judgment crimes as defined in the PIF Directive**, such as fraud, corruption, money laundering or serious cross-border VAT fraud
- ✓ **Jurisdiction:** a case is initiated and handled by the EDP where the focus of the criminal activity is, or in case of multiple offences, where the bulk of the offences has been committed (possibility for a case to be reallocated to EDP in another MS, to merge or split a case)
- ✓ Expected start date: end of 2020

II. LEGISLATION WITH ANTI-CORRUPTION INCIDENCE

Legislation with anti-corruption provisions

- **Anti-money laundering legislation** (4th and 5th AMLD)
- Council Decision concerning **cooperation between AROs** of the MS in the field of tracing and identification of proceeds from, or other property related to crime
- Directive on the **freezing and confiscation of the instrumentalities and proceeds of crime** in the European Union (political agreement)
- Proposal for a Regulation on the **mutual recognition of freezing and confiscation orders** (political agreement)
- Proposal for a Directive on **countering money laundering by criminal law** (political agreement)
- Proposal for a Directive laying down rules **facilitating the use of financial and other information** for the prevention, detection, investigation or prosecution of certain criminal offences (under negotiation)
- Proposal for a Directive on the **protection of persons reporting on breaches of Union law** (under negotiation)

Some detailed examples

- **4th AMLD**: makes the fight against money laundering and terrorism financing more effective; improves **transparency** and prevents **tax avoidance**; covers transactions and business relationships with **politically exposed persons**; sets clear transparency requirements about **beneficial ownership** for companies to be stored in a central register.
- **5th AMLD**: sets out measures to better counter the financing of terrorism and to ensure increased transparency of financial transactions; increases **transparency** about who really owns companies and trusts; improves the work of **FIUs** with better access to information through centralised bank account registers.
- **Decision concerning cooperation between AROs** - the purpose of AROs is to facilitate the tracing and identification of proceeds of crime which may become the subject of a freezing, seizure or confiscation order. EU countries are required to establish or designate at least one ARO in their territory. AROs are obliged to exchange information with each other irrespective of their status (law enforcement, judicial or administrative).

Legislative proposals

- Proposal for a Regulation on the **mutual recognition of freezing and confiscation orders**- facilitates cross-border recovery of criminal assets and lead to more **efficient freezing and confiscation of funds from illicit origin** in the EU without cumbersome formalities.
- Proposal for a Directive on **countering money laundering by criminal law** - establishes minimum rules on the definition of offences and sanctions related to money laundering. It establishes a list of “predicate offences” (the underlying criminal activities generating the proceeds which are then laundered).
- Proposal for a Directive to facilitate **access and exchange financial and other information** in a timely manner. The measures aim to grant law enforcement authorities, AROs and Anti-Corruption authorities with direct access to the information contained in the centralised bank account registries
- Proposal for a Directive on **the protection of whistleblowers**- aims to guarantee a high level of protection for persons who report breaches of EU law by setting **EU-wide standards**. It establishes **safe reporting channels** and requires national authorities to inform citizens and provide training for public authorities on how to deal with whistleblowers.

III. INTERNATIONAL INSTRUMENTS

1. Council of Europe

Criminal Law Convention on Corruption and Additional Protocol

Civil Law Convention on Corruption

2. OECD

Convention on combating bribery of foreign public officials in international business transactions

3. United Nations

Convention against Corruption

Convention against Transnational Organised Crime

CoE Criminal Law Convention on Corruption and Additional Protocol (1999)

Chapters including:

- ✚ measures to be taken at national level
- ✚ monitoring (GRECO)
- ✚ international cooperation

Provisions

- ✚ develops **common standards** concerning: certain corruption offences (i.e. active/passive bribery in public and private sector); trading in influence; money laundering the proceeds of corruption offences; account offences
- ✚ corporate liability for legal persons with a power of representation, an authority to take decisions or an authority to exercise control within the legal person. This includes aiding and abetting.
- ✚ penalties have to be **effective, proportionate and dissuasive**

CoE Civil Law Convention on Corruption (1999)

- + Enables persons who have suffered damage as a result of corruption to receive **fair compensation**. The act of corruption is not confined to the public sector
- + **Liability** arises **even if all parties to it are in the private sector**
- + Provisions on **compensation for damage**
- + **No sanction taken** against an employee who **reports suspicions** of corruption in good faith and on reasonable grounds and annual accounts of companies are drawn up clearly and give a true and fair view of the company's financial position.

Other Council of Europe Instruments

- + 20 Guiding Principles
- + Recommendation on Codes of Conducts for public officials
- + Recommendation on common rules against corruption in the funding of political parties and electoral campaigns

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- ✚ Signed on 17 December 1997, entered into force on 15 February 1999; 44 Signatories
- ✚ **Active bribery** of foreign officials and officials of international organisations is made a criminal offence
- ✚ Covers also **money laundering** and **accounting crimes**
- ✚ Establishes **liability of legal persons**
- ✚ Effective, proportionate and dissuasive **criminal penalties**
- ✚ **Thorough evaluation mechanism** through the **Working Group on Bribery** (three phases: adequacy of legislation, effectiveness of implementation, enforcement).

UN Convention against transnational organised crime (UNTOC)

- ✦ Adopted in November 2000 and entered into force in September 2003; **concluded on behalf of the EU** in April 2004
- ✦ Aims to enable law enforcement authorities to **cooperate effectively in combating organised crime** by eliminating differences and different definitions of crimes among national legal systems
- ✦ States parties to ensure that **four serious types of crime** are regarded as a crime in their domestic laws: participation in an organised criminal group, money laundering, corruption, and the obstruction of justice
- ✦ UNTOC only deals with organised crime and public sector corruption
- ✦ Improves **co-operation on extradition**, mutual legal assistance, transfer of proceedings and joint investigations; provisions for victim and witness protection, shielding legal markets from infiltration by organised criminal groups.

UN Convention against Corruption (UNCAC)

- ✚ Adopted in October 2003 and entered into force on 14 December 2005
- ✚ Ever first global instrument tackling fighting corruption.
- ✚ Covers four main strands: **prevention, criminalisation and law enforcement, international cooperation and asset recovery.**
- ✚ **EU accession in September 2008** by Council Decision 2008/801/JHA.
- ✚ **Review mechanism** set up in 2009 and divided in two review cycles (first covering criminalisation, law enforcement and international cooperation; second cycle on prevention and asset recovery).

UN Convention against Corruption (UNCAC)

- + Complemented by Resolutions- non mandatory

Examples:

- + Resolution 7/5 from 2017 - calls upon States parties to ensure that **anti-corruption bodies** have the necessary **independence** and **competence**; to adopt, maintain and strengthen systems that **promote transparency and prevent conflicts of interest**.
- + Resolution 7/6 from 2017: encourages States parties to develop, revise and update **national anti-corruption strategies** and/or action plans; to take measures to enhance **integrity, transparency, accountability and the rule of law in public administration**.

Conclusions

- ✦ **Adoption of legislation** is a first step
- ✦ **Effective implementation** is equally important
- ✦ **Political will** to pursue the reforms is a precondition for any success in the fight against corruption
- ✦ **Strong institutions** with clear competences and adequate resources- other enablers.

Questions?

THANK YOU!