WIRTSCHAFTSKAMMER ÖSTERREICH

Abteilung für Rechtspolitik
Wiedner Hauptstraße 63 | 1045 Wien
T 05 90 900DW | F 05 90 900114294
E rp@wko.at
W news.wko.at/rp

European Commission
DG HOME – HOME A4

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COM(2023) 234 May 3rd, 2023	Rp 60.1.2/23/AS/CG Dr. Artur Schuschnigg	4014	June 12th, 2023

The European Commission's proposal for a directive on combating corruption; Opinion

Dear Ladies and Gentlemen,

the Austrian Federal Economic Chamber is the legal representative of the entire Austrian business community and represents all Austrian businesses drawn from the areas of Crafts and Trade, Industry, Commerce, Banking and Insurance, Information and Consultancy, Tourism and Leisure, Transportation and Communication.

The Austrian Federal Economic Chamber comments on the Proposal for a Directive on combating corruption [COM(2023) 234] as follows:

There is no doubt that corruption harms society, our democracy, the economy and every individual. Individual cases of corruption, which are also widely reported in the red-top press, give the impression that corruption is widespread. On the one hand, Transparency International's Corruption Perceptions Index, for example, is a perception index that only should be interpreted with caution with regard to any corruption that actually exists. On the other hand, corruption is widely understood in everyday life to mean far more than is the case according to the various definitions of the relevant international treaties.

It is striking, for example, in the 2022 Eurobarometer survey Austria, that 57% of respondents believe that corruption is widespread in Austria, but only 20% of them said they were personally affected by corruption in their everyday lives, which in turn cannot be reconciled with the statement of 11% of respondents that they had been victims or witnesses of any case of corruption in the last twelve months.

In our view, such survey results should therefore be treated with particular caution. They have little or no potential to be used as a justification for action in this area.

If the present legislative proposal is intended to update the legal framework of the EU, for example by incorporating the UNCAC-standards (Proposal, 2), it must be stated that not only the Union, but also all Member States of the Union themselves are parties to this United Nations Convention.

It should be noted that the vast majority of EU-Member States are parties to the OECD-Convention against Bribery of Foreign Public Officials in International Business Transactions. It is also worth mentioning the Council of Europe's Criminal Law Convention on Corruption, to which all EU-Member States are parties. This means that far-reaching measures are already in place that affect all Member States (and beyond) equally.

As a result, it can be assumed that all Member States (in addition to the EU-requirements resulting from Framework Decision 2003/568JHA and Directive 2017/1371) have implemented the requirements of the various relevant treaties and the corresponding monitoring mechanisms (such as country visits and resulting recommendations) There is no need for action on the part of the EU in this respect, including in the light of the principle of subsidiarity.

It is therefore incorrect to assert in recital 37 of the Proposal that the objective of the Directive, which is to penalise corruption in all Member States by means of effective, proportionate and dissuasive sanctions, cannot be sufficiently achieved by the Member States.

Regarding the uniformity of the respective legal systems, esp. the absolutely necessary legal clarity of criminal corruption law, further fragmentation of the respective legal system, which may be associated with an additional legal act and its interactions with existing legal acts, should be avoided in any case.

The problem of corruption is by no means a lack of legislation but lies in the fact that these are so-called secrecy offences, the detection of which poses challenges for the authorities.

Excessive and over-fulfilling corruption offences represent a massive competitive disadvantage for an export-oriented economy because companies are at a disadvantage compared to other companies that are subject to less strict laws.

In principle, the fight against corruption is a task for law enforcement authorities, so that suitable attempts to curb corruption are in themselves to be welcomed. However, it must be resolutely demanded that our companies are not entrusted with this task again or have a duty to cooperate. The mood in the Austrian economy, also with regard to EU regulations, is very bad, because the EU has committed itself very one-sidedly to consumer protection and almost every Regulation and almost every Directive is associated with an additional (administrative) burden for our companies.

As much as an efficient anti-corruption system is to be welcomed it should be pointed out that Austria already has a comparatively very strict criminal law on corruption.

Nor will the Union's present project lead to a situation in which the highest standards apply worldwide. As a result, there are serious competitive disadvantages, especially for Austrian foreign trade.

Explicit care should therefore be taken not to unnecessarily criminalise European import/export companies in an international comparison. In this sense, it should be possible to respond

to country-specific needs in foreign trade, e.g. in the case of gifts, but also invitations. Each country has different customs and business partners are expected to take national traditions into account, depending on the position of the person concerned. For example, in several cultures around the world, inferior gifts are often perceived as an insult. This culturally determined expectation is tobe influenced by the provisions of Art. 10 on unauthorized influence by means of an explicit extension of the definition remain unaffected.

For EU foreign trade firms, it is often not obvious abroad whether they are public officials. Especially because the ownership of many areas is not clear and the ownership structure is not apparent. It would therefore be necessary to restrict the concept of public officials to European public officials.

Furthermore, in the light of the applicable international standards (UN, OECD etc.), the proportionality of the provisions of Art. 17 listed sanctions against legal persons has to be taken into account.

The provisions in detail:

To Art. 2 (Definitions):

It seems wrong to classify documents proving ownership or other rights in other assets as property within the meaning of the Directive. If such documents themselves embody property in the narrower sense, they may be the object of embezzlement (Art. 9) or enrichment (Art. 13). In addition, it is not clear why they should constitute an asset.

The concept of 'public servant' should be defined narrowly and, contrary to Recital 9 (which does not appear to have been reflected in the definition), should in no way include persons working in state-owned or state-controlled undertakings. On the one hand, there is no objective justification for special treatment of companies organised under private law just because they are state-owned or state-controlled – especially if these companies are competitors on the market. This approach by the public sector is somewhat reminiscent of "cherry-picking". If the state wants to claim the advantages of a legal entity under private law, he has also handle the disadvantages. Even according to the OECD, there should be no public official status if the person acts for a company that operates on a general economic basis on the relevant market, i.e., comparable to a private company without preferential subsidies or other privileges (see OECD: Commentaries on the OECD Convention on Combating Bribery, point 15).

On the other hand, this approach would be associated with significant legal uncertainty. If a person enters a court or an official building, he can assume with relative certainty that the persons employed there are national officials. In the case of the myriad of companies that are state-owned or state-controlled, the person can by no means recognize with legal certainty that it is such a company and that its contact persons are to be regarded as national officials within the meaning of the criminal provisions on corruption (see also *Schuschnigg*, Korruptionsstrafrecht, Rz 70 et seq.).

The definition of breach of duty is unclear in several respects. This starts with the fact that a breach of duty includes *at least* any disloyal behavior ... . Can any other conduct therefore be a breach of duty under the directive?

Is a violation of a legally prescribed obligation, etc. per se unfaithful or does a moment have to be added for the breach of trust? If so, which one? In any case, failure to comply with an unlawful instruction should not be a breach of duty.

For a definition relevant in criminal law, that of the "high-ranking official" is too vague.

To Art. 8 (Bribery in the private sector)

The Proposal does not define what constitutes a "private sector enterprise". An obvious reverse conclusion would lead to the conclusion that there should also be companies in the public sector. The same applies to other criminal offences.

Any obligation resulting from this provision to further tighten the already very strict Austrian criminal law on corruption is rejected.

To Art. 11 (Abuse of functions)

Since a person who works for a company does not hold an office, he or she cannot abuse that function that does not exist.

The fact that the directive expressly seeks to be based on Article 82(1)(d) and Article 83(1) and (2) TFEU must be expressly criticized. Abuse of office (nor misappropriation and enrichment) mentioned in the catalogue of Article 83(1) TFEU. Therefore, for example, the definition of 'abuse of functions as a criminal offence by the Union is inadmissible.

From this point of view, the question may also be asked as to what the Union is basing its competence to provide the Member States with rules on the prevention of corruption or specialized bodies etc. - regardless of the fact that such approaches are quite reasonable.

To Art. 15 (Penalties and measures for natural persons)

There is no doubt that there are still details to be discussed in the forthcoming discussion, but the first impression is that the sanctions often appear to be excessive. The same applies to limitation periods (Art. 21).

To Art. 17 (Sanctions against legal persons)

A tightening of the sanction possibilities against companies compared to the existing Austrian Verbandsverantwortlichkeitsgesetz (VbVG) is emphatically rejected.

We kindly ask to take our comments into account.

Yours sincerely

Dr. Rosemarie Schön
Head of Department