The Unfinished Repair

Germany's Dualism and the Implementation of the New EU Anti-Corruption Directive

Erol Pohlreich, Philippos-Georgios Kotsalis & Nastaran Tale Ismaili

21.07.2026 doi: 10.59704/19a43f9773c41828

The new Directive (EU) 2026/1021, adopted on 29 April 2026, is the most ambitious expression to date of the EU's anti-corruption architecture: unified definitions, minimum penalties and harmonised offences. Notably, the Directive declares that elected representatives stand under the same anti-corruption standard as civil servants. In substance, however, that promise fails twice. First, the Directive only enables, but does not require, this change. Secondly, the adopted harmonised definition of the "influence offence" fails to capture wrongdoing such as Germany's mask-contract scandal ("*Maskenaffäre*"), where the members of parliament monetised mandate-derived political access outside formal parliamentary proceedings – and were acquitted. The reason lies in a structural feature of German law that this article calls dualism: corruption by elected representatives and corruption by civil servants are governed by two separate sets of rules, and the rules for elected representatives are markedly narrower. That weakness, however, is also Germany's opening. Nothing prevents transposition beyond the minimum, and the June 2028 transposition deadline may serve as the first real occasion since the Federal Court of Justice's 2022 judgment to close the gap that the most recent reform merely redecorated: to this day, a member of parliament who is paid for exploiting the access and influence the mandate confers – outside parliament's formal proceedings – remains largely beyond the reach of German criminal law.

The Gap the Directive Inherits

In the "*Maskenaffäre*", two members of parliament received nearly two million euros for helping to arrange government mask-procurement contracts during the COVID-19 pandemic and were acquitted. Section 108e of the German Criminal Code (StGB), the special offence criminalising bribery involving elected representatives, as the Federal Court of Justice convincingly held (BGHSt 67, 107 = NJW 2022, 2856), covers only conduct "in the exercise of the mandate": activity within parliamentary chambers, committees, or faction proceedings. Extra-parliamentary dealings fell outside of it. The Court expressly identified the gap and called for legislative action. Since then, the gap can no longer be closed by interpretation, only by legislation.

In an August 2023 expert opinion, one of us proposed a broader solution: section 108e StGB should cover conduct "in connection with the exercise of the mandate", not only conduct "in the exercise" of it. That formula would have reached the mask-contract conduct without criminalising the content of parliamentary decision-making. Article 38(1), second sentence, of the Basic Law protects the free mandate against instructions and against judicial review of political positions; it does not protect the commercialisation of a mandate-derived position for private benefit.

The legislature did not follow this path. It enacted section 108f StGB, a new offence of inadmissible representation of interests, but in a form that reproduced the gap it was meant to fill. The central objection raised before the Bundestag's Legal Affairs Committee in March 2024 was that the new provision remained stuck between two concepts: section 108e StGB covers only formal parliamentary activity, while section 108f StGB was designed to cover activity outside the mandate. This left a grey zone for conduct that is mandate-related but not part of formal parliamentary activity – precisely the "Maskenaffäre" constellation. Together with its restriction to pecuniary advantages and its incomplete coverage of advisory activities,

section 108f StGB risked leaving that conduct outside criminal liability once again. The gap was not closed. Rather, it was redecorated.

The First Limit: Article 3 and the Permission to Diverge

The first limit is structural and follows from primary law: Article 83(1) TFEU authorises the EU to lay down minimum rules, not full harmonisation. Member States may go further, but the Directive cannot force them to. This matters particularly for Germany's dualism, which channels the corruption of elected representatives into the special offences of sections 108e and 108f StGB rather than the general bribery offences for public officials in sections 331 et seq. StGB.

Against this background, Article 3 of the new Directive (EU) 2026/1021 defines bribery as the receipt of an unjustified advantage of any kind for an act in the exercise of official duties. Article 2(4) extends the concept of public official to persons holding legislative office. Read together, the provisions appear to demand genuine equivalence between elected representatives and civil servants. But Article 2(4) qualifies this equivalence with the words "in accordance with national law", and Recital 30 requires account to be taken of the freedom of the mandate. What Article 3 appears to promise as equivalence, Article 2(4) and Recital 30 take back as room for mandate-sensitive implementation.

This does not mean that Article 3 is irrelevant. It points to narrower elements of German law. Section 108e StGB still contains the restrictive "on behalf of or on instruction" requirement, and section 108f StGB is limited to pecuniary advantages, although the Directive speaks of unjustified advantages of any kind. Depending on how section 108f StGB is classified for the Directive's penalty rules, its maximum penalty may also require reconsideration. There are real implementation questions, but they are specific ones. The final text is also more sensitive to the free mandate than the Commission's 2023 proposal. It does not require an unjustified advantage, expressly takes account of immunities and the freedom of the mandate, and leaves room for constitutional principles. It exerts pressure without imposing a system change. The decisive question is therefore not settled in Brussels but in Berlin.

The Second Limit: Article 6 and the Misidentified Wrong

Article 6 of the new Directive (EU) 2026/1021 creates a different kind of pressure. It criminalises classic trading in influence: the promise or receipt of an unjustified advantage in exchange for exercising undue influence over a public official in order to obtain an unjustified advantage from that official. German law does not yet contain a general offence that maps neatly onto this triadic model. Section 108e StGB concerns benefits given to the elected representative for mandate-related conduct; section 108f StGB concerns the representative's own inadmissible representation of interests. Neither provision is designed for the intermediary model of Article 6. Article 6 creates a genuine transposition task. But it should not be mistaken for the answer to the "Maskenaffäre". At first glance, it looks close to that scenario: a parliamentarian leveraging political influence for private gain. Structurally, however, it addresses something different. The Commission's 2023 proposal already contained a comparable influence offence, then in Article 10. In an expert analysis of that draft, one of us rejected its potential to address cases such as the "Maskenaffäre". The objection was not that influence trading is irrelevant, but that the recipient side was framed as a general offence: anyone can be an influence broker. That misses the specific wrong of corruption involving elected representatives, which lies not simply in selling influence, but in commercialising a factual position of power acquired through the mandate itself.

El-Ghazi, *Wegner* and *Zimmermann* reached the same conclusion from a different angle. They characterised the three-person architecture – payer, influence broker, public official – as alien to the German corruption framework (wistra 2023, 353, 358, ZRP 2023, 211, 214). More importantly, they showed that the "Maskenaffäre" would not have fallen within it: the purchase of overpriced masks did not constitute an "unjustified advantage" obtained from a public official, because the procurement contracts were not unlawful.

The Directive preserved the triadic architecture. Germany must transpose it, but need not do so only as a general offence. It could pair a trading-in-influence offence with a status-based provision for elected representatives, attaching to the use of mandate-derived access or influence for private gain. That would exceed the Directive's minimum requirements and create a provision that genuinely reaches the mask-contract wrong. In essence: the draft section 108g StGB-E – a proposed status-based offence for elected representatives – given European imprimatur.

Is there really no alternative to dualism?

German dualism rests on a familiar argument. Public officials act within legally defined duties and are bound by legality, neutrality and objectivity. Elected representatives exercise a free mandate: they are not bound by instructions, are accountable primarily through democratic politics, and may legitimately represent particular political or social interests. Offences built around the breach or sale of official duties cannot simply be transferred to elected representatives, because their mandate has no comparable catalogue of official duties and criminal liability must not become judicial review of political choices. Conversely, simply absorbing section 108e StGB into sections 331 et seq. StGB would flatten the distinct wrong of parliamentary corruption: bribery of elected representatives protects the integrity of democratic representation and is a felony, whereas the corresponding bribery offences for public officials (sections 332 and 334 StGB) are misdemeanours.

These objections address mechanical equivalence, not monism as such. Inclusion is not assimilation. A monistic framework remains conceivable if it differentiates internally and applies a mandate-sensitive standard to elected representatives rather than subjecting them to rules designed for civil servants. Comparative law supports this. France and Austria follow monistic approaches, although the freedom of the parliamentary mandate is constitutionally protected there as well. At the same time, the Directive's legislative history revealed how little is known in Europe about how different models work in practice. An ongoing comparative research project at the European University Viadrina addresses this gap: experts from sixteen legal systems analyse how their jurisdictions regulate corruption involving elected representatives and reconcile anti-corruption law with the constitutional status of the mandate. German dualism is therefore not constitutionally self-evident. It is legal policy – and legal policy can be revisited.

Germany's Choice

Germany's choice follows from the preceding analysis. The Directive neither leaves Germany free to do nothing nor compels it to abandon dualism. It creates specific but real implementation duties: Germany will need a genuine trading-in-influence offence; it may have to adjust the benefit concept in section 108f StGB; it should reconsider the "on behalf of or on instruction" requirement in section 108e StGB; and, depending on the classification of section 108f StGB under the Directive's penalty rules, it will have to revisit that provision's sentencing range. But none of this answers the core question of this article. The Directive creates legal pressure; it does not decide whether Germany uses it merely for technical compliance or to close the mandate-specific gap exposed by the "Maskenaffäre".

Three paths are open: First, technical compliance: Germany introduces a general trading-in-influence offence and makes the necessary adjustments to sections 108e and 108f StGB, but leaves the architecture of elected-representative corruption essentially untouched. This may satisfy Article 2(4) and Recital 30, but it would not close the "Maskenaffäre" gap.

Second, reform within dualism: Germany preserves the separate track for elected representatives but broadens it, for example by adopting a "connection with the mandate" standard and by implementing Article 6 in a way that also captures mandate-derived access or influence for private gain.

Third, differentiated monism: Germany uses transposition to reconsider the separation itself and develops a single framework for public corruption, internally differentiated to protect the free mandate

and to reflect the distinct wrong of elected-representative corruption.

The history of German law in this field – systematic minimalism in 2014 with section 108e StGB, and again in 2024 with section 108f StGB – offers little cause for optimism. Yet at a time when trust in democratic institutions is under strain, a third round of minimalism would be more than a technical disappointment. The Directive makes genuine reform possible. It does not make it inevitable. Germany can patch the existing system, or it can finally address the zone where elected-representative corruption thrives: the commercialisation of political access by those whose own conduct the reform would govern.

ABOUT THE AUTHORS

Erol Pohlreich
Prof. Dr. Erol Pohlreich is Professor of Criminal Law, Criminal Procedure, Sanctions Law and Human Rights at the European University Viadrina Frankfurt (Oder) and Judge at the Berlin Higher Regional Court (Kammergericht).

Philippos-Georgios Kotsalis
Dr. Philippos-Georgios Kotsalis is a postdoctoral researcher and academic staff member at the Chair of Criminal Law, Criminal Procedure, Sanctions Law and Human Rights (Prof. Dr. Erol Pohlreich) at the European University Viadrina Frankfurt (Oder). He holds a doctorate from Humboldt University of Berlin and is admitted to the Greek Bar.

Nastaran Tale Ismaili
Nastaran Tale Ismaili is a Research Assistant at the Chair of Criminal Law, Criminal Procedure, Sanctions Law and Human Rights (Prof. Dr Erol Pohlreich) at the European University Viadrina Frankfurt (Oder).Nastaran Tale Ismaili is a Research Assistant at the Chair of Criminal Law, Criminal Procedure, Sentencing Law and Human Rights (Prof. Dr Erol Pohlreich) at the European University Viadrina Frankfurt (Oder).

SUGGESTED CITATION

Pohlreich, Erol; Kotsalis, Philippos-Georgios; Ismaili, Nastaran Tale: The Unfinished Repair: Germany's Dualism and the Implementation of the New EU Anti-Corruption Directive, Verfassungsblog, 21.07.2026, doi: 10.59704/19a43f9773c41828.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260721-190608-0.