Criminal Law Protection of the EU's Financial Interests in Croatia

Zlata Đurđević

eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

AUTHOR

Zlata Đurđević

CITATION SUGGESTION

Z. Đurđević, "Criminal Law Protection of the EU's Financial Interests in Croatia", 2007, Vol. 2(3), eucrim, pp120–127. DOI: https://doi.org/10.30709/eucrim-2007-008

Published in
2007, Vol. 2(3) eucrim pp 120 – 127
ISSN: 1862-6947
https://eucrim.eu

CC BY ND

I. Introduction

The accession negotiations between the Republic of Croatia and the European Union started on 3 October 2005, on the same day that the chief prosecutor of the ICTY Carla del Ponte confirmed that Croatia is fully cooperating with the Hague Tribunal. The main goal of the accession negotiations is the harmonization of Croatian legislation with the *acquis communautaire*. However, the duty of Croatia to adjust its legal system to the *acquis* dates from the earlier stage of the integration process. The association process for Croatia began on 29 October 2001 when it signed the Stabilization and Association Agreement with the European Union (EU). Thereupon, Croatia, on the one hand, obtained economic benefits and access to the EU's pre-accession funds and, on the other hand, undertook commitments to fulfil four criteria set at the summits of EU leaders in Copenhagen and Madrid (political, economical, legal and administrative). The process of alignment of the Croatian legislation with the *acquis* began since that agreement, i.e., four years before the beginning of the membership negotiations. It led to the development of administrative and judicial structures for effective implementation and enforcement of the *acquis*. This is important to mention because the substantial part of the *acquis* regarding the protection of the EU's financial interests was implemented by Croatia in this pre-negotiation phase.

The *acquis communautaire* is an ongoing development of a corpus of legal provisions and principles. The amount of rights and obligations that a candidate country as well as an EU Member State has to assume is growing with time. For this reason, the number of chapters which the *acquis* was divided into during the negotiations with Croatia was increased from 31 to 35 chapters compared to the previous round of accession negotiations In the first agenda that our negotiation team received from the European Commission, the PFI Convention and its protocols were placed in chapter 24 on "Justice, Freedom and Security", but afterwards these documents were transferred to chapter 32 on "Financial Control". However, this seemingly unimportant administrative shift indicates the "Janus nature" of the PFI instruments which show the Member States its criminal law face and the Commission its financial law face.

II. Accession Negotiations in the Acquis Chapter on Financial Control

The negotiation process in relation to the chapter on Financial Control has been running smoothly until now. The first phase of negotiations – explanatory and bilateral screenings giving an overview of the degree of harmonisation of Croatian legislation with the *acquis communautaire* under this chapter – took place in May and July 2006. In September 2006, the Commission recommended the opening of accession negotiations with Croatia without setting any benchmarks or additional criteria, and the European Council opened negotiations for this chapter in November 2006.

The *acquis* under the chapter on Financial Control encompasses four main policy areas: (1) public internal financial control (PIFC), (2) external audits, (3) protection of the Euro against counterfeiting, and (4) protection of the EU´s financial interests. With regard to the first two areas, the *acquis* does not consist of legislation but of international control and internal audit standards, as well as best practice measures of the EU[1] which a candidate country is expected to apply. In this context, Croatia already passed action plans in 2005 and, in 2006, implementing regulations; the code of ethics was adopted as well. Likewise, the ongoing training and certification process for internal auditors was established. In December 2006, a new law on the system of internal financial controls in the public sector was enacted,[2] the so-called PIFC Act, which has been described as an important milestone by the Commission.[3] Before closing the chapter, Croatia still has to

pass implementing legislation for the PIFC Act and safeguard the State Audit Institution's functional and financial independence.

The chapter on Financial Control in relation to the protection of the Euro against counterfeiting comprises only non-penal aspects, whereas the penal aspects in this area are dealt with in the chapter on "Justice, Freedom and Security". The first pillar aspects include several regulations and Council decisions.[4] In 2006, progress was made in relation to the legislative alignment because Croatia adopted new legislation for reporting of counterfeits to Europol and Interpol, and it introduced obligations for financial institutions to withdraw suspicious specimen of foreign currency as well as adequate sanctions in case of non-compliance. The National Analysis Centre for Banknotes and Coins will be established within the Croatian National Bank by the end of 2009.

The protection of the EU´s financial interests is divided or, more precisely, comprised of non-penal and penal aspects – due to its operational indivisibility. The non-penal aspects refer to the regulation on the protection of the European Communities' financial interests,[5] the regulation concerning on-the-spot checks and inspections carried out by the Commission,[6] and a set of regulations on reporting irregularities and the recovery of sums wrongly paid.[7] These regulations are directly applicable. They focus on establishing adequate institutional structures and administrative and operational capacities for its enforcement. In order to improve its administrative capacity, Croatia in 2006 appointed a so-called "Irregularity Officer" and established the Anti-Fraud Coordinating Structure (AFCOS) for coordination and cooperation with the EU in preventing fraud. In accordance with the PIFC Act, the Irregularity Officer is a person within the Ministry of Finance who is responsible for informing and reporting any irregularities and suspicions of fraud to the State Attorney's Office and the competent body in the Ministry of Finance.[8]

The Croatian AFCOS is**,** as in other Member States, a service for the coordination of cooperation between the relevant national bodies and OLAF or, in other words, an OLAF contact point in Croatia. It is set up as the "Office for the prevention of irregularities and fraud" within the framework of the Department of Budgetary Control of the Ministry of Finance.[9] Its general task is to coordinate legislative, administrative, and operational activities in order to protect the financial interests of the EU. AFCOS shall exchange information with OLAF, participate in OLAF´s inspections and investigations, submit reports to relevant Croatian authorities and play a role in the creation and implementation of a national strategy for the prevention of fraud and in the development of training programmes in this field. After the legal and administrative establishment, the EU now expects practical steps to be taken to render the Ministry of Finance an operational partner for OLAF.[10]

III. Criminal Law Protection of the EU´s Financial Interests in Croatia

The following considerations shall deal with the penal aspect of the EU´s financial interests in Croatia. The respective *acquis* consists of three conventions which are widely known as the PFI instruments: the Convention on the protection of the European Communities' financial interests (PFI Convention)[11] as well as its two Protocols – the anti-corruption[12] Protocol[13] ("first Protocol") and the Protocol dealing with the liability of legal persons and money laundering ("second Protocol").[14]

The distinctiveness of the *acquis* related to the criminal law protection of the EU´s financial interests is the legal nature of these instruments: They are "conventional" international treaties that have to be signed, ratified, and implemented according to the constitutional rules of each Member State. The PFI Convention and its protocols, as well as other third pillar conventions, are open to accession by any State that becomes a member of the EU.[15] However, due to the accession process, the implementation of these treaties in Croatia,

as was the case in all candidate countries, will be the reverse of the regular course of implementation of international treaties which is that implementation follows ratification. As they are part of the *acquis*, Croatia is obliged to already implement them during the negotiations for the accession, i.e., before officially signing and ratifying them.

The following assessment of the implementation measures in Croatia shall be divided into three main parts in line with the standard methodology for evaluation of the implementation of the PFI Convention and its protocols.[16] The first part on substantive criminal law shall deal with the offences and punishments prescribed in all three conventions (fraud, corruption, and money-laundering), the second part shall encompass the general concepts of substantive criminal law, such as the criminal liability of heads of businesses and legal persons, as well as issues of confiscation. Elements generally relating to criminal procedure, such as jurisdiction, extradition, and the *ne bis in idem* principle, shall be analysed in the third part.

1. Offences and Punishment for the Protection of the EU´s Financial Interests

a) EU Fraud

According to the screening report of the Commission[17] of 28 September 2006 and the Draft common position of the EU,[18] the alignment of the Criminal Code with the PFI Convention and its protocols is one of the benchmarks for the provisional closing of chapter 32 on "Financial Control". Croatia in its negotiating position expressed its intention to incriminate, by the end of 2007, all forms of actions to the detriment of the EU's financial interests. In order to fulfil this commitment, the Croatian Parliament adopted amendments to the Criminal Code in October 2007 (hereinafter: 2007 Amendments).[19] As in the majority of Member States, the Croatian legislation contains separate offences for the protection of expenditure and revenue from the EU budget. All offences are prescribed by the Croatian Criminal Code (CC).

Fraud in Respect of Expenditure

Fraud regarding expenditure is described in the 1st and 2nd indents of Art. 1(1)(a) of the PFI Convention as the use or presentation of false, incorrect, or incomplete statements of documents and non-disclosure of information in violation of a specific obligation. These acts are covered by the standard offences of *fraud* (Art. 224 CC) and *fraud in economic operations* (Art. 293 CC), as well as a new offence of *special cases of fraud to the detriment of the EU's financial interests* (Art. 224.b CC) introduced by the 2007 Amendments. The standard offences punish the conduct of a person who, with the aim to procure unlawful pecuniary gain for him- or herself or a third party (Art. 224), or for him- or herself or another legal entity (Art. 293), by false representation or concealment of facts, deceives another person by inducing him/her to thereby do or omit doing something to the detriment of his/her property or the property of another. The conduct of the perpetrator (*actus reus*), which consists of false representation or concealment of facts, corresponds to the conduct defined by the PFI Convention as false representation. According to the Croatian case law, this includes the written and oral[20] presentation of false, incorrect, or incomplete statements. The omission by failure to disclose information is covered by the description of the concealment of facts.[21] According to Croatian legal scholars and practitioners, the concealment of facts can be fraudulent only if the perpetrator has a legal or contractual obligation to inform someone of certain facts[22], i.e., the perpetrator has to act in violation of a specific obligation envisaged in the second indent of Art. 1(a) of the PFI Convention.

A new offence of *fraud to the detriment of the EU's financial interests* (EU fraud) prescribes that perpetration of the standard offence of fraud (Art. 224) shall include false representation or concealment of facts relevant for a decision on subsidy, aid or tax relief by which the EU's financial interests can be endangered. The word-

ing of the offence implies that the offence of EU fraud is just a form of the existing offence of fraud and therefore it contains the same normative elements as fraud.

The statutory requirements for all three fraud offences fall short in so far as the following three additional factual and mental elements are required: (1) the requirement of a specific aim of fraudulent behaviour, (2) the requirement of a subjective effect of "deceiving another", and (3) the condition of an objective effect as regards the detriment of property. According to the Croatian law, the aim of an offender must be to acquire unlawful pecuniary gain for him-/ herself or a third party or a legal person. Such an intention on the part of the offender is not envisaged by the Convention. Hence, it represents an additional subjective element. It can be compared with the requirement of enrichment in Austria,[23] Italy, and the Netherlands.[24] That the offence of EU fraud also requires this element is confirmed in the explanatory report of the 2007 Amendment where it is stated that the offender aims to acquire gain.[25]

A further superfluous element of fraudulent conduct in view of the PFI Convention is the requirement of deceiving another person. The element of fraud in Croatia refers to the participation of the victim who is often considered as being naïve or greedy.[26] It has to be proven that the victim was deceived[27] and, so to say, had a false idea of the relevant facts induced by the perpetrator's conduct.[28] This requirement of deception on the part of victims also exists in some other countries.[29] Such a psychological element is contrary to the Convention because the establishment of EU fraud does not require any participation of the victim; likewise, the victim's idea about the perpetrator's acts should be irrelevant. According to the PFI Convention, only the behaviour of a perpetrator is relevant.

The required objective effect of deception is that the deceived person does something to the detriment of his/her property.[30] Therefore, fraud in Croatian law is a material, concrete offence which is committed only if its consequence happens, i.e., detriment occurs. As far as subsidies are concerned, this means that the subsidy is indeed given to the perpetrator. According to the PFI Convention, the only effect of a fraudulent act should be "the misappropriation or wrongful retention of funds", whereas the appearance of a pecuniary detriment is not required.[31] The offence of EU fraud also requires the occurrence of pecuniary detriment as § 2 of Art. 224.b CC states that a person shall not be punished for fraud if s/he voluntarily prevents the occurrence of detriment. The establishment of additional constituent elements of fraudulent offences in Croatian law narrows its application and fails to satisfy the minimal standards set up by the Convention.

Lastly, as regards the third indent of Art. 1(1)(a) of the PFI Convention (fraud committed through the misapplication of funds), Croatian law covers this alternative by the new offence of the *abuse of authority with regard to the EU funds* (Art. 292.a CC) which was introduced in 2007. This article targets anyone who uses the EU subsidy or aid entrusted to him/her contrary to their specific purpose. Contrary to the standard offence of the abuse of authority (Art. 292 CC), the new offence is not limited to a responsible person in a legal person but it can be committed solely by a natural person too. Furthermore, the basic form of offence does not require the aim of acquiring unlawful pecuniary gain. The shortcoming of this offence definition is that it envisages in § 5 that a perpetrator shall not be punished if s/he voluntarily prevents the occurrence of detriment for the EU's financial interest; that means that the element of detriment is introduced. The non-compliance of the Croatian law in this regard is particularly visible as the PFI Convention for the commitment of fraud through the misapplication of funds (3rd indent of Art. 1(1)(a)) does not even require the effects of misappropriation and wrongful retention (only the 1st and 2nd indents of Art. 1(1)(a) do so). This is due to the fact that misapplication consists of the misuse of funds which, although legally obtained, may have been subsequently wasted or used for purposes other than those for which they were granted.[32] Additional problems regarding this offence are attempt and penalty which are not punishable (see below).

Fraud in Respect of Revenue

The act of fraud against the revenue of the EU budget is prescribed in the 1st and 2nd indents of Art. 1(1)(b) of the PFI Convention and is equivalent to the forms of conduct of fraud against expenditure. However, it requires the effect of illegal diminution of the resources of the EU budget. Revenue fraud was covered in Croatia prior to October 2006 by the offence of *avoiding customs control* (Art. 298 CC). The offence could be committed by a person who carried a large quantity of goods or an object of great value across the customs line, thus avoiding measures of customs control. "Avoiding" could have meant the concealment of goods, but also the failure to declare goods subject to customs controls in accordance with a specific obligation to declare goods at the customs border (as prescribed by the Customs Act). According to the Croatian case law, this offence could be committed regardless of whether the border was crossed at the official border crossing, whether goods had been concealed or not, and whether the customs officer had asked the perpetrator to declare goods or carried out measures of customs control.[33] Therefore, the offence included smuggling as well as the evasion of customs duties. It was required that the goods had to be of a great value. The Supreme Court, in alignment with Art. 2(2) of the PFI Convention, set the threshold value at 4.000 Euros (30.000 kuna).[34] In addition, this offence could also be committed if the value of goods was less than 4.000 Euros, but a large quantity of goods was involved. The criteria for the quantity of goods was that they could not possibly be intended for use in everyday life (e.g., a tenfold amount of the same trousers, thousands of cigarette boxes, etc.).[35] In 2006, Croatia aligned its Customs Act with the *acquis communautaire* and therefore customs duties now include EU duties.

This was the state of play at the time of the first and second screening in Brussels. However, in October 2006, an amendment of the Criminal Code came into force which limited the aforementioned offence to the carrying of goods whose manufacture or distribution are *limited* or *forbidden* across the customs line. The aim of the amendment was the decriminalisation of avoiding domestic customs duties and taxes, and such behaviour was dealt with as a misdemeanour, which fails to satisfy the level of protection of EU revenue required by the PFI Convention.

However, by means of the 2007 Amendments, a new provision for the criminal law protection of EU revenues was introduced in the offence of avoiding customs control (Art. 298 § 4 CC). It incriminates a person who in the import-export business, also with EU countries, falsely represents quantity, quality, type, and purpose of goods. The main flaw of this provision is that the lawmaker of the 2007 Amendments overlooked the fact that the offence of avoiding customs control was no longer suitable for the protection of customs duties. Other weaknesses of the provision are that the origin of goods, which is often a basis for preferential customs duties, is left out and its perpetrator must aim to acquire unlawful pecuniary gain.

The third form of fraud in respect of revenue, described as the misapplication of a legally obtained benefit with the effect of illegal diminution of the resources of the EU budget (3rd indent of Art. 1(1)(b) of the PFI Convention), which deals with situations where the benefit was legally obtained (e.g., preferential customs duty based on a specific purpose of goods), but the perpetrator subsequently having decided to change the purpose of goods and thus violating the condition for obtaining preferential customs duty, was not provided for in the 2007 Amendments. However, this form of fraud can be partly covered by the already existing offence of *abuse of authority in economic business operations* (Art. 292 CC) which is committed by a responsible person in a legal entity who, with the aim of acquiring illegal pecuniary gain in fulfilling obligations towards budgets and funds, withholds funds due to these ostensible obligations. Beyond the fact that this offence comprises the superfluous element of aim and can be committed only by a responsible person in a legal entity, it is doubtful whether Croatian courts will interpret it in the sense of the third form of revenue fraud. Therefore, it is necessary to prescribe anew an offence for this form of EU fraud.

Intentional Preparation or Supply of False, Incorrect, or Incomplete Statements or Documents

The provision of Art. 1(3) of the PFI Convention, which requires the incrimination of preparatory acts for EU fraud, has been implemented in Croatia in a twofold way: first, through the offence of *document forgery* and, second, through the incrimination of preparatory acts of offences against the protection of the EU's financial interests. On the one hand, forgery of a document (Art. 311 CC) and forgery of an official or business document (Art. 312 CC) are prescribed as principle offences which cover intentional preparation or supply of false, incorrect of incomplete statements or documents. These offences can be concurrently adjudicated with the offence of EU fraud. On the other hand, participation in (Art. 36 CC), instigation of (Art. 37 CC), and aiding and abetting (Art. 38 CC) of the offences applicable to Art. 1 of the PFI Convention are punishable. The instigator of a criminal offence shall be punished as if he/she committed it on his/her own. The same is true for a person charged with aiding and abetting, but the punishment may be mitigated.

However, the incrimination of attempt became unsatisfactory after the 2007 Amendments. The attempt of every intentional offence, which foresees a punishment of at least five years of imprisonment, is punishable, while the attempt of other criminal offences is punishable only if the law expressly provides for the punishment of an attempt (Art. 33 CC). For two offences, namely the basic form of fraud of the Croation criminal code and the offence of avoiding of customs control, which are punishable by imprisonment of three years, there is an express provision that an attempt of these offences is punishable. Paradoxically, there is no such provision for the new offences of EU fraud and abuse of authority with regard to EU funds although they are also punishable by imprisonment of up to three years. This means that, contrary to the requirement of the PFI Convention, their attempt is not punishable.

Penalties

Penalties provided for in the Croatian criminal law for all offences applicable to EU fraud are prison sentences of up to at least three years. Since the threshold for surrender under the European Arrest Warrant is punishment of three years, once the European Arrest Warrant is implemented, the commission of any of these offences could give rise to the surrender of persons without the need to verify double criminality. Concerning the severity of the penalties, Croatia has laid down effective, proportionate, and dissuasive penalties in line with Art. 2 of the PFI Convention. However, the 2007 Amendment prescribed lower penalties for the abuse of authority with regard to EU funds (up to three years of imprisonment) than for the abuse of Croatian budgetary funds (up to five years of imprisonment). This is not in line with the principle of assimilation which requires that Member States must ensure "that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance".[36]

b) Corruption

Corruption which damages or is likely to damage the European Communities' financial interests has been criminalized in Croatia by the general offences of passive and active bribery. Passive corruption comprises the offences of *accepting a bribe* (Art. 347 CC), *receiving a bribe in economic transactions* (Art. 294a CC) and *unlawful intercession* (Art. 343 CC). Active corruption is criminalised by the offences of *offering a bribe* (Art. 348 CC), *offering a bribe in economic or other transaction* (Art. 294b CC), and *unlawful intercession* (Art. 343 CC). The offences of receiving and offering a bribe in economic transactions were introduced in 2004 in order to extend the criminal zone of passive and active corruption to the private sector. As a result, responsible persons and heads of businesses in domestic and foreign legal persons were included. The conduct to be punished with these offences comprises requesting, accepting, and receiving an advantage of any kind, either directly or through an intermediary. Although there is no requirement that any of these offences should

have damaged or were likely to damage the EU's financial interests, the offences are fully applicable to such acts, too.

In 2004, the notion of "official" (Art. 89 § 3 CC) was expanded to cover all categories of persons who are considered officials according to foreign or international law. It includes: (1) civil servants, representatives, and officials of another state or international organization of which Croatia is a member, (2) judges or officials of an international court whose judicial competence Croatia has recognised, and (3) foreign lay judges and foreign arbitrators. Although the Croatian law does not explicitly refer to Community officials, but only to officials of other international organisations, it cannot be interpreted differently to the effect that members of European institutions (Commission, European Parliament, and Court of Justice) are assimilated to their Croatian counterparts once Croatia becomes an EU Member State.

The Croatian law penalises passive and active corruption differently. In 2006, the Croatian Parliament endorsed much more severe penalties for bribery offences, especially regarding passive corruption. Punishment for passive corruption ranges from six months to very severe eight years of imprisonment for serious corruption, whereas the penalty for active corruption ranges from six months to three years. Once the European Arrest Warrant is implemented in Croatia, all offences could give rise to the surrender of the perpetrator without verification of double criminality, except the offence of offering a bribe in an economic transaction in a less serious form; nonetheless, the latter does not exclude extradition.

In conclusion, although Croatia is not prescribing separate bribery offences for the protection of the EU's financial interests, the existing offences comply with the anti-corruption Protocol as the Croatian law comprises Community officials and officials of Member States, covers corruption in the private sector, and prescribes effective, proportionate, and dissuasive criminal penalties.

c) Money Laundering

Since 2000, money laundering is prescribed as a criminal offence that considers as predicate offences all possible offences (Art. 279 CC). Thus, it includes the proceeds of fraud offences, including tax evasion and active and passive corruption, as required by the second PFI Protocol. The penalty for this offence is imprisonment from six months to five years and, if it has been committed by a member of a group or a criminal organization, the range of punishment is increased to one to ten years of imprisonment. However, the wording of the offence contains a gap which still remains to be closed in order to ensure compliance with EU requirements. The offence criminalises a person who "conceals the true source of *money*, objects or rights procured by *money* which s/he knows to be acquired by a criminal offence" which implies that the proceeds of the crime always have to be money. This is not in line with the EU framework decisions which lay down that proceeds of crime may consist of any form of property, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property (Framework Decisions 2003/577/JHA and 2005/212/JHA).[37]

2. General Concepts of Substantive Criminal Law

a) Criminal Liability of Heads of Businesses

The PFI instruments require establishing the criminal liability of heads of businesses or any persons having power to take decisions or exercise control if offences affecting the European Community's financial interests were committed by a person under their authority. It covers the criminal liability of heads of businesses, not only on the basis of their personal action (perpetrator, associate, instigator, or participant), but also on the basis of failure to fulfil a duty of supervision or control (*culpa in vigilando*).[38] Member States are to introduce the criminal liability of heads of businesses in accordance with the principles defined by their re-

spective national law (cf. Art. 3. of the PFI Convention). This means that the implementation can be satisfied by an assimilation clause.[39] Criminal liability of heads of business for offences affecting the EU budget has to be assimilated to the rules for comparable offences against national financial interests. Such an obligation leaves Member States considerable freedom to establish the basis for the criminal liability of decision-makers and heads of businesses.[40]

Apart from the general rules on perpetration, instigation, and other forms of participation in criminal offences, the basis for the decision-makers' criminal liability in Croatia is the notion of "responsible person" and the offence of *negligent performance of a duty* (Art. 339 CC). A responsible person is defined in the general part of the Criminal Code as a person who is entrusted with particular tasks in the field of activities of a legal entity, a government body, a body of local self-government and administration, or a local self-government body (Art. 89 CC). Although the provision makes no difference between decision-makers and controllers, according to Croatian theory and practice, the element of "tasks in the field of activities of a legal entity" also applies to heads of businesses as well as supervision bodies. Almost all Croatian offences against the EU budget prescribe that its perpetrator is a responsible person (*delicta propria*). Where this is not the case, such as in the offence of *unlawful intercession* (Art. 343 CC), a head of business can also be responsible for the offence of his/her subordinate according to the general criminal law rule of omission (Art. 25. CC).[41]

The offence of *negligent performance of a duty* (Art. 339 CC) can be committed by an official or responsible person who violates regulations, fails to perform mandatory supervision, or, in any other way, negligently performs his/her duty. However, the effect of this behaviour has to be a serious violation of the rights of a third person or a considerable damage to property, which is a redundant element according to PFI instruments. Although the Croatian law does not provide for an explicit provision to ensure the criminal liability of heads of businesses for offences affecting the financial interests of the EU, it implements Art. 3 of the PFI Convention, assimilating it with the responsibility of heads of businesses for offences affecting national financial interests.

b) Criminal Liability of Legal Persons

The criminal liability of legal persons was introduced in 2003 in Croatia by the Act on the Liability of Legal Persons for Criminal Offences. The main characteristic of the approach is that the criminal liability of a legal person is to be derived from the culpability of the responsible person. According to the meaning of the Act, the responsible person is a natural person who is the head of the business of a legal person or is entrusted with particular tasks in the field of activities of that legal person. As a consequence, it includes a person who has a leading position within the legal person, who represents a legal person, or has decision-making or control powers. A legal person shall be punished for a criminal offence committed by a responsible person if it breaches the duty of a legal person or if the legal person acquired or should have acquired illegal pecuniary gain for him-/herself or for another person. The liability of a legal person is also ensured in cases where a responsible person is liable for an attempt or as an accessory or instigator. Under the requirements prescribed by law, a legal person can be responsible for any criminal offence prescribed by the Criminal Code and any other statutes which prescribe criminal offences, including fraud, active corruption, and money laundering. The punishments for the legal persons are fines and judicial winding-up orders. In addition to these penalties, the Act provides for four security measures: (1) exclusion from the practice of certain activities or affairs; (2) exclusion from entitlement to permits, authority, concessions, and subsidies; (3) exclusion from contracts with beneficiaries of state and local budgets, and (4) forfeiture; as well as confiscation of pecuniary gain as *sui generis* measure. It can be concluded that the Croatian criminal law on the criminal responsibility of legal persons is in compliance with Art. 3 and 4 of the 2nd Protocol: It ensures the criminal liability of legal persons for fraud, active corruption, and money laundering committed by decision-makers as well as employees

in accordance with the requirements of the 2nd Protocol and prescribes all criminal sanctions and security measures envisaged in the 2nd Protocol.[42]

c) Confiscation

The confiscation of instruments and proceeds is provided for by the security measure of *forfeiture* (Art. 80 CC) and the measure of *confiscation of pecuniary gain acquired by a criminal offence* (Art. 82 CC). *Instrumenta sceleris* and *producta sceleris* as well as proceeds of crime and property, the value of which corresponds to such proceeds, shall be confiscated by a court decision according to the procedure prescribed by the Criminal Procedure Act (CPA). The seizure of the instruments and proceeds of offences is ensured in some cases in the pre-investigatory proceedings. The temporary seizure of objects is one of the investigative measures (Art. 218-221 CPA) which can be carried out in the course of the criminal proceedings, or as an urgent investigation measure before the institution of the criminal proceedings (Art. 184-185 CPA). The Act on the Office for the Suppression of Corruption and Organised Crime provides for the seizure of proceeds, instrumentalities, and property acquired by a criminal offence prior to the institution of the criminal proceedings according to provisions of distraint law. As a result, the aforementioned Croatian criminal law provisions satisfy Art. 5 of the 2nd Protocol as they enable the confiscation of instrumentalities and proceeds of property, the value of which corresponds to such proceeds for all possible criminal offences.

3. Elements of Criminal Procedure

a) Jurisdiction

The Croatian law recognises the territoriality principle and the principle of active personality in line with the requirements of the PFI instruments. The Croatian criminal legislation applies to anyone who commits a criminal offence within the Croatian territory (Art. 13 CC). A criminal offence is committed both at the place the perpetrator acts or ought to have acted and the place where the result fully or partially occurs and, in a case of punishable attempt, ought to have occurred according to the perpetrator's expectation (Art. 27 § 1 CC). The determination of *locus delicti comissi* according to the so-called "theory of ubiquity", which combines jurisdiction based on the place of commission and the place where the effects occur, covers fraud for which benefit was obtained in the Croatian territory, as required by Art. 4(1) of the PFI Convention. Jurisdiction over the participation and instigation to the offence committed on the territory of another Member State or third country is also ensured as the offence is also committed at the place where the accomplice or instigator acts or ought to have acted or the consequence ought to have occurred according to the expectation of the accomplice (Art. 27 § 2 CC).

The Croatian law also provides for extra-territorial jurisdiction on the basis of the active and passive personality principle. A Croatian national shall be prosecuted and judged for the commission of all criminal offences irrespective of where the offence was committed under the condition of double criminality (Art. 14 § 2 CC). Art. 6(1b) of the 1st Protocol differentiates jurisdiction based on the offender who is a national and the offender who is an official. The situation in which an offender is a Croatian official but not a Croatian national is not covered by the active personality principle. Likewise, the Croatian law does not provide for jurisdiction if the offender is a Community official who is working for a Community institution with headquarters in Croatia (Art. 6 of the 1st Protocol).

Extra-territorial jurisdiction based on the passive personality principle is laid down only for Croatian nationals under the condition of double criminality, but not if the offence is committed against a Community official or a member of a Community institution who is not a Croatian national. It should be emphasised that, in all

cases in which Croatian law does not provide for jurisdiction required by the PFI instruments, it is possible for Croatia to opt-out and declare that it will not apply these rules.

b) Extradition

The Croatian law on extradition enacted by the Act on Mutual Legal Assistance in Criminal Matters[43] aligns with the 1995 Convention on simplified extradition procedure and the 1996 Convention on Extradition between the Member States of the EU as it introduces rules for simplified extradition, the request for extradition no longer being transmitted through diplomatic channels, i.e., through the Ministry of Foreign Affairs, and it provides for the securing of evidence and confiscation of property as forms of mutual legal assistance in criminal matters. However, Croatia's legislation is not in compliance with the Framework Decision on the European Arrest Warrant for the following reasons: the Constitution prohibits the extradition of Croatian citizens; the dual criminality principle is not limited and applies to all offences; the extradition procedure is judicial and governmental as it is conducted through the Ministry of Justice and the Minister of Justice ultimately decides whether extradition is granted or denied. The grounds for refusing extradition are: fiscal offences, political offences, offence against a Croatian national, and lack of evidence. However, as mentioned above, penalties for offences against the financial interests of the EU are high enough to give rise to extradition or surrender according to the Framework Decision on the European Arrest Warrant.

c) Ne bis in idem

In contrast to the issue of extradition, the Croatian law is aligned with the *ne bis in idem principle* as laid down in Art. 54 and 55 of the 1990 Convention implementing the Schengen Agreement of 14 June 1985 and taken over in Art. 7 of the PFI Convention, apart from the exception to the principle of territoriality provided for in Art. 7 § 2a of the Convention. This provision requires the application of the *ne bis in idem* rule or prohibits prosecution if the acts took place in part in the territory of the state where the judgement was delivered. In such a case, before the 2007 Amendment, it was possible for a State Attorney to decide to apply the principle of territoriality and to put such an offender on trial in Croatia (Art. 15 § 1 CC).

In order to close this gap, the 2007 Amendment introduced in Art. 15. of the Criminal Code a provision which prohibits the institution of criminal proceedings if the state on whose territory the offence in part took place has delivered final judgement and the penalty is served or is being served or serving of the imprisonment is not possible. The flaw of the provision is that it applies the *ne bis in idem* rule only if the judgement of conviction is delivered pronouncing sentence of imprisonment, but not when another type of judgement is delivered. That is contrary to the Convention which, in Art. 7 § 1, includes any type of final disposal of the trial. It is also contrary to the case law of the European Court of Justice which decided in the *Gözütok* and *Brügge case*[44] that the *ne bis in idem* rule applies even when the prosecutor discontinues criminal proceedings without the involvement of a court, once the accused has fulfilled certain obligations and, in the *van Straaten* case,[45] that *ne bis in idem* applies to the judicial decision by which the accused is finally acquitted for lack of evidence.

IV. Conslusion

The analysis of the 2007 Amendment of the Croatian Criminal Code that should have been the implementing act of the PFI Convention in Croatia, indicates that it did not completely fulfil its purpose. Although improvement has been made and Croatia has partly implemented the provisions of the PFI *acquis*, remaining gaps and loopholes holds no promise that the criminal law protection in Croatia satisfies all requirements of the PFI instruments. The reason for this legislative failure lies in the solely political purpose of the Amendment which is to satisfy the promise given to Brussels to implement the PFI instruments by the end of 2007, even

if this means a formal fulfilment – without proper content. The Amendment was passed urgently and the customary steps in the legislative procedure for criminal law acts were disregarded.

However, since the beginning of the association process, Croatia has considerably increased its level of criminal law protection of the EU's financial interests. As, according to the European Commission report "none of the Member States under scrutiny appears to have taken all the measures needed to comply fully with the PFI instruments",[46] it remains to be seen whether the European Commission will consider that the improvements which have been made are sufficient for closing the negotiating chapter 32 on Financial Control. Perhaps, the Commission takes into account the overall level of the protection of the EU's financial interests in the EU Member States. Bearing this in mind, one cannot say that Croatia did not meet its benchmarks.

---

1. Such as: INTOSAI Internal Control Standards, Lima Declaration Of Guidelines On Auditing Precepts, INTOSAI – Auditing Standards, INTOSAI Code of Ethics.↩
2. Official Gazette of the Republic of Croatia No 141/ December 27, 2006.↩
3. European Commission, Accession negotiations, Croatia, Draft Common Position, Brussels, 31 May 2007, 4.↩
4. Council Regulations (EC) No 1338/2001, 1339/2001, 2182/2004, 2183/2004, Council Decisions 2001/923/EC, 2001/924/EC, 2003/861/EC, 2003/862/EC, Commission Decision 2005/37/EC.↩
5. Council Regulation (EC, Euratom) No 2988/95.↩
6. Council Regulation (Euratom, EC) No 2185/96.↩
7. Council Regulation (EEC) No 595/91, Commission Regulation (EC) No 1681/94, Commission Regulation (EC) No 2035/2005, Commission Regulation (EC) No 1831/94, Commission Regulation (EC) No 2168/2005↩
8. Art. 5 § 12 and Art. 36 of the PIFC Act.↩
9. Art. 3. of the Regulation amending Regulation on Internal Structure of the Ministry of finance, Official Gazette of the Republic of Croatia, No 138/ December 20, 2006.↩
10. European Commission, Accession negotiations, Croatia, Draft Common Position, Brussels, 31 May 2007, 6.↩
11. OJ C 316 from 27.11.1995, 49-57.↩
12. Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313 from 23.10.1996, 2-10).↩
13. See also *Pradel, Jean / Corstens, Geert* (2002) Droit pénal européen, Paris: Dalloz, p. 516.↩
14. Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 221 from 19.7.1997, 12-22).↩
15. Cf. Art. 12 of the PFI Convention, Art. 10 of the first Protocol, and Art. 17 of the second Protocol.↩
16. See for example Commission Staff Working Paper, Annex to the Report from the Commission "Implementation of the Convention on the Protection of the European Communities´ financial interests and its protocols", Brussels, 25. Oct. 2004, SEC(2004) 1299.↩
17. http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_32_hr_internet_en.pdf.↩
18. European Commission, Enlargement Directorate-General, Draft Common Position, Accession Negotiations Croatia, Negotiating chapter 32: Financial Control, Brussels, 31 May 2007, p. 7.(attached to the Council of the European Union, Brussels, 31 May 2007, 10291/07, Limite, ELARG 52)↩
19. Official Gazette of the Republic of Croatia No 110/ October 25, 2007.↩
20. See decision of the Supreme Court of the Republic of Croatia – VSRH Kzz 39/04-2, www.vsrh.hr.↩
21. County Court decision – ŽS Kc Kž 132/1998.↩
22. *Novoselec, Petar*, Kazneno pravo: opći dio, Zagreb: Pravni fakultet u Zagrebu 2006, 235.↩
23. See *Kert, Robert*, Straftaten gegen das Gemeinschaftsbudget und ihre Sanktionen nach dem österreichischen Recht, in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 29.↩
24. Annex to the Report from the Commission "Implementation of the Convention on the Protection of the European Communities´ financial interests and its protocols", Brussels, 25 Oct. 2004, SEC(2004) 1299, p. 19.↩
25. Ministry of Justice, Draft proposal on the Amendment Act on the Criminal Code, August 2007.↩
26. *Novoselec*, endnote 22, 234.↩
27. VSRH KZZ 25/04-2.↩
28. In Croatian case law, the proof that a victim was mislead requires the establishment of facts such as whether the official bodies were required to check over the presented facts or whether they have had such possibility. In some cases, like if a victim did not have any idea of relevant facts or was indifferent, the obligation on the part of the „victim" can exculpate the offender. VSRH Kzz 20/06-2; VSRH KZZ 25/04-2; Novoselec, endnote 22, 236.↩
29. Compare with the general offence of fraud in Germany (§ 263 dStGB) and in Austria (§ 149 öStGB). See *Zeder*, *Fritz,* Umsetzung des Übereinkommens über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften im allgemeinen Strafrecht, in: Finanzstrafrecht 1996-2002, Wien 2006, S. 951.↩
30. See *Novoselec*, endnote 22, 237-238.↩
31. See *Novoselec*, *Petar*, Der "EU-Betrug" und das kroatische Strafrecht, in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 19; *Zieschang*, *Frank,* Das Übereinkommen zum Schutz der finanziellen Interessen der EG und seine Auswirkungen auf das deutsche Strafrecht, EuZW 1997, S. 78-83 (80).↩

32. Explanatory Report on the Convention on the protection of the European Communities' financial interests, OJ C 191, 23 June 1997. Art. 1, § 1.↩
33. VSRH IV Kz-79/98.↩
34. VSRH Su-726-IV/97 from January 19, 2001.↩
35. County Court decision Bjelovar Kž-235/01-3.↩
36. Judgement of the ECJ of 21 September 1989, Case 68/88, *Commission v. Greece*, ECR I-2965, ,para. 24-25.↩
37. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 from 2.8.2003, 45-55 and Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ L 68 from 15.3.2005, 49-51.↩
38. See Explanatory Report on the Convention on the protection of the European Communities' financial interests, OJ C 191, 23 June 1997. Art. 3.↩
39. See *Tiegs, Heiko W.A.,* Betrugsbekämpfung in der Europäischen Gemeinschaft, Berlin 2006, S. 349.↩
40. Explanatory Report, as cited.↩
41. Article 25 prescribing the manner of perpetrating a criminal offence reads as follows: (1) A criminal offence can be committed by an act or an omission to act; (2) A criminal offense is committed by omission when the perpetrator, who is legally obligated to avert the consequence of a criminal offence defined by law, has failed to do so, and such a failure to act is tantamount in its effect and significance to the perpetration of such an offence committed by an act; (3) The punishment of a perpetrator who has committed a criminal offence by omission can be mitigated, except in the case of a criminal offence which can be committed only by failure to act.↩
42. More details on the criminal liability of legal persons in Croatia see *Đurđević, Zlata,* Criminal Liability of Legal Persons in: *Zlata Đurđević* (ed.) Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb 2006: Sveučilišna tiskara, p. 73-89.↩
43. Official Gazette No. 178/04.↩
44. Judgment of the Court of Justice of 11 February 2003, Case C-187/01 i C-385/01, *Hüseyin Gözütok and Klaus Brügge,* ECR 2003, I-5689.↩
45. Judgment of the Court of Justice of 28 September 2006, Case C-150/05, *Van Straaten v Staat der Nederlanden*, *Republiek Italië*. Full text of the judgment available via eucrim 3-4/2006, p. 64.↩
46. Report from the Commission Implementation by Member States of the Convention on the Protection of the European Communities´ financial interests and its protocols, Brussels, 25. 10. 2004, COM(2004) 709 final, 7.↩

COPYRIGHT/DISCLAIMER
© 2026 The Author(s). Published by the Max Planck Institute for the Study of Crime, Security and Law. This is an open access article published under the terms of the Creative Commons Attribution-NoDerivatives 4.0 International (CC BY-ND 4.0) licence. This permits users to share (copy and redistribute) the material in any medium or format for any purpose, even commercially, provided that appropriate credit is given, a link to the license is provided, and changes are indicated. If users remix, transform, or build upon the material, they may not distribute the modified material. For details, see https://creativecommons.org/licenses/by-nd/4.0/.
Views and opinions expressed in the material contained in eucrim are those of the author(s) only and do not necessarily reflect those of the editors, the editorial board, the publisher, the European Union, the European Commission, or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the European Commission are not responsible for any use that may be made of the information contained therein.

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and “criministrative” law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU’s financial interests – a key driver of European integration in “criministrative” justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union