The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law

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Article

ABSTRACT

The article presents the substantive criminal-law initiative against EU-fraud, which was adopted by the Commission on 11 July 2012. After giving an overview of the status quo of criminal law protection and its challenges, the author analysis in detail the Commission proposal for the so-called PIF Directive.

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The European Commission adopted on 11 July 2012 a proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the Union by criminal law.

In its 2011 Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, the Commission highlighted the need to adopt new legal instruments on criminal-law protection of the Union's financial interests. Based on an analysis of the current challenges and shortcomings in the practice of criminal-law protection by the judicial authorities in the Member States, this communication identified specific weaknesses which also include the applicable legal framework. Notwithstanding the 1995 Convention on the protection of the European Communities' financial interests and its (additional) protocols of 1996 and 1997, which have been ratified by nearly all the Member States, there is no common level playing field in criminal law. The communication in 2011 therefore concluded there was a need for strengthened legal instruments to protect the EU against fraud using the opportunities offered under the Lisbon Treaty and it mentioned 3 aspects:

- strengthened criminal and administrative procedures;
- strengthened substantive criminal law;
- a strengthened institutional framework.

The substantive criininal law initiative is the first of 3 legal initiatives for the criminal-law protection of the EU's financial interests which the Commission intends to adopt by 2013 and which will also include a proposal for the setting up of a European Public Prosecutor's Office (EPPO).

I. The Status Quo of Criminal-Law Protection and its Challenges

a) The 1995 Convention on (criminal law) protection of the European Communities' financial interests[1] and its (additional) protocols[2] have meanwhile been ratified by nearly all the Member States. Currently only the Czech Republic has not yet ratified the convention and its protocols. Because of the slow ratification of the third-pillar instruments and following the entry into force of the Amsterdam Treaty and the introduction of ex-Art. 280 EC into the Treaty, the Commission had submitted as early as 2001 a proposal for a Directive on the criminal-law protection of the Communities' financial interests.[3] Its content was based on the *acquis* of the convention. Following a first-reading report in the European Parliament (EP), however, the Council never adopted a common position, the stumbling block being a disagreement on the institutional powers of the EC to enact penal legislation under the EC-Treaty.

In 2004 and 2008, the Commission subsequently drew up two implementation reports to take stock of how Member States had fulfilled their obligations under the convention.[4] The Commission reports concluded that full implementation of the third-pillar instruments had not been achieved. Member States were invited to step up their efforts to implement the convention. Notwithstanding its ratification, not all Member States have taken specific measures to adapt their internal penal legislation to the binding legal terms of the convention. Concentrating on the EU-15 Member States, the Commission in its second report in 2008 concluded that there were serious shortcomings in the implementation of the convention with respect to the implementation in national legislation of the concept of fraud and its being punishable as a criminal offence.[5]

The Commission has not yet used dispute-settlement procedures under Art. 8 (2) of the convention which would comprise — if it proved impossible to settle a dispute through negotiation — a submission to the Court of Justice. But the implementation of the convention has indeed never been just a matter of legal principle

and formality. The Anti-Fraud Office (OLAF) and the Commission have gone to considerable lengths to show that the quality of implementation of the convention and its protocols may be at least partly responsible for the shortcomings in the practical implementation of national penal-law provisions by the authorities in the investigation, prosecution and bringing to judgment of cases of fraud and corruption involving EU interests. OLAF has highlighted the fact that the practice of national judicial authorities in the procedural handling of cases investigated and reported to them is not always effective, proportionate and dissuasive. The case record also does not support the conclusion that there is an equivalent level of criminal-law protection of financial interests throughout the EU.[6]

b) The proposal for a Directive on substantive criminal-law protection against fraud constitutes a stand-alone initiative. However, the initiatives which the Commission set out in its 2011 Communication on criminal-law protection of the financial interests of the Union also include a strengthened institutional framework, including the setting up of a European Public Prosecutor's Office (EPPO). The material scope of its future mandate to investigate and prosecute offences against the Union's financial interests requires a uniform definition of the offences which may be the subject of its investigations.

The question that then arises is whether a uniform criminal investigative mandate of an EU body may be limited to the adoption of minimum rules concerning the definition of the criminal offences, so as to achieve an advanced degree of approximation of national substantive criminal laws, or alternatively, whether it requires the adoption of a set of directly applicable common EU offences. Both approaches present advantages and disadvantages. The adoption of minimum rules for the approximation of national criminal offences presents the disadvantage that the minimum rules are not directly applicable, creating a risk of their being implemented by Member States in a way which is not fully equivalent. This could lead to disparities between Member States and national legal systems in the way the mandate of an EPPO to investigate and bring to judgment the offences under its mandate is implemented. On the other hand, a mandate which relies on criminal offences adopted under the laws of the Member States is much more in line with current legal traditions in the EU and can rely on the full set of substantive criminal rules available in the Member States. It also avoids creating a risk of conflicts between national and European offences at the trial stage.

II. The New Proposal for a Directive against Fraud

The proposal for a Directive adopted by the Commission on 11 July 2012[7] reflects a balanced policy choice which takes into account a comprehensive analysis of the needs and of the impact of enhanced criminal-law protection against fraud (a). The initiative is based on the special legal basis under the Treaty on combating fraud (b). In accordance with its scope, the proposed Directive comprises definitions for the approximation of criminal law offences (c), general provisions on liability and sanctions (d) and minimum rules on jurisdiction and time limitation (e).

a) The Commission's proposal reflects a balanced policy choice which takes into account a debate it held with the stakeholders. On this basis, technical consultations have been conducted inside the Commission by the lead services OLAF and DG JUST, together with the other Commission services, about the needs and the approach to achieve an effective and dissuasive criminal-law protection against fraud and other criminal illegal conduct. As a result, it has been decided that punishable offences should comprise only conduct which is committed intentionally.

The measures adopted by the Member States must be proportionate and satisfy the objectives of deterrence in Art. 325 TFEU. This may require the introduction of more severe penalties for serious offences while at the same time leaving proper scope for administrative measures and sanctions in minor cases, so as to avoid over-criminalisation of conduct which, in the light of the nature of the facts and the scale of their financial

impact, can more effectively be sanctioned using measures under administrative law. Although the EU needs to employ the necessary means to protect its own interests, thus justifying particular criminal-law instruments in the specific area of combating fraud, penal-law protection remains an instrument which should be used in strict compliance with fundamental rights, defence guarantees and general principles of law. Its application should be proportionate when compared to the other protective legal instruments available, options which may sometimes permit more efficient and faster action or prove less stigmatising for the persons concerned.

The Commission has evaluated the results of an external impact-assessment study on the legal framework for protecting financial interests through criminal law and on the basis of this it has drawn up its own impact assessment, taking into account the results of the stakeholder consultations. The proposal is submitted against the background of the economic and financial crisis. This context, combined with the situation of an enlarged EU facing greater challenges to ensuring equivalent protection throughout Europe, requires and justifies reinforced measures under criminal law to protect the EU's specific interests. It is indeed necessary to do more against criminal conduct which may jeopardise the tax-payers' money and prevent the EU's financial support from being a facilitator of growth and employment throughout Europe.

b) Making use of the new framework put in place under the Lisbon Treaty, the proposal is based on Art. 325 TFEU. The legal basis has been decided in accordance with the specific objectives of the proposal. The protection of a specific solidarity interest through measures which may act as a deterrent against fraud is the very purpose which Art. 325 TFEU envisages. The special legal basis under the Lisbon Treaty has been slightly clarified as compared to its precursor in ex-Art. 280 EC-Treaty, deleting a sentence in paragraph 4 which restricted the scope of the measures to be taken by excluding from the scope measures comprising the administration of justice and the application of national criminal law.

Given that the objective of the proposal is fully in line with Art. 325 TFEU, the proposed Directive will be adopted in accordance with the ordinary legislative procedure and in consultation with the Court of Auditors. It will not, however, be subject to specific rules on opt in and opt out, as is the case for those minimum rules whose adoption is foreseen under the chapter on cooperation in criminal matters under the TFEU and more specifically under Art. 83 TFEU. Art. 83 includes the definition of minimum rules concerning criminal offences but it does not mention fraud amongst the areas of criminal conduct to which it applies, at least not in the absence of a specific Council decision, taken by unanimity and with the consent of the EP, to extend the scope of Art. 83.

Even if the proposal might in practice be of relevance to the future EPPO, and squarely describes the material scope of the EPPO's future competences, its main purpose is not limited to enabling an EPPO to perform its functions. Therefore, Art. 86 TFEU is also not used as the special basis for the adoption of the proposed Directive on substantive law protection against fraud.

c) The proposal contains under its Title II certain provisions which may to some extent be qualified as mere *Lisbonisation* of criminal law concepts already currently covered under the convention and its protocols. This is mainly the case for the offence of fraud. Fraud affecting the Union's financial interests needs to be punishable as a criminal offence in the Member States. It is defined in line with the incriminatory elements as set out in Art. 1 of the convention distinguishing between fraud in respect of expenditure and revenue (Art. 3 of the proposal), with some very slight drafting changes. The financial interests of the Union are defined in Art. 2 of the proposed directive and cover the Union budget as well as the budgets of the institutions established under the Treaties and the budgets managed and monitored by them.

In addition to fraud, which requires the effect of causing damage, the proposal however adds a new fraud-related criminal offence currently not covered under the *acquis* of the third-pillar instruments. According to

Art. 4 (1), fraud in public procurement must be made punishable as a criminal offence. Public-procurement fraud consists of the provision of information to contracting or grant-awarding entities, or authorities in a relevant procedure, by candidates, tenderers or the responsible persons when committed with the aim of circumventing or skewing the application of the eligibility and award criteria. As compared for instance with the offence of market-rigging contained in Art. 2 of the Corpus Juris 2000, the offence does not require an agreement calculated to restrict competition. Its main constitutive element is the provision of information, including by third persons involved in the preparation of the reply to a call or in a grant application, with the aim of circumventing the application of the award criteria irrespective of its harmful effects on the EU budget.

The proposal also includes the offences of money laundering and active and passive corruption as already currently covered under the third-pillar *acquis*. Money laundering as defined in Directive 2005/60/EC needs to be made a punishable offence if it involves the proceeds of any of the offences covered under the directive (Art. 4 (2) of the proposal).

The offences of passive and active corruption are comprised under Art. 4 (3) of the proposal in terms which are nearly identical to those used in Articles 2 and 3 of the 1996 protocol to the convention. For conduct to be criminal, an advantage must be requested, received or promised to make the official perform an action in the exercise of his functions. This conduct needs to be carried out intentionally in a way which damages or is likely to damage the EU's finances. A main difference with respect to the wording of the protocol is that the corruption offences under Art. 4 (3) of the proposal do not refer to a *breach of (the) official duties* of the public official.

A definition of *public official* is included in Art. 4 (5). It includes persons exercising a public-service function, irrespective of whether or not they hold a legislative, administrative or judicial function, and those working under a private-law status who despite not holding such an office nevertheless participate in the management of specific EU financial interests.

A newly added offence of *misappropriation* is set out in Art. 4 (4) of the proposal. Member States need to punish as a criminal offence any intentional act by a public official to commit or disburse funds contrary to the purposes for which they were intended and with the intent to cause damage to the EU. The proposal accordingly requires a decision to have been taken that is contrary to the legal objectives for which the relevant advantage is foreseen. The proposal does not — as did the Corpus Juris 2000 in its Art. 6 — explicitly refer to either illicit *private interest* decision-making in favour of another person who has no right to be awarded a subsidy, or to intervene in the award of grants in relation to a business in which the public official has a personal interest. All of these alternatives are of course covered but the text in Art. 4 (4) of the proposed directive may include other circumstances of misappropriation as well, without there being necessarily a specific personal interest involved.

On the other hand, no specific offence of *abuse of office* has been added to the proposal. This has been considered a superfluous addition to the offence of *misappropriation*. Similarly, an offence of *breach of professional secrecy* has not been included in the proposal as the conduct is already covered under the disciplinary-law measures of the EU Staff Regulations.

d) Title III of the proposal contains general provisions applicable to the criminal offences set out under Title II.

All forms of participation are to be made punishable as a criminal offence (Art. 5 (1) of the proposal) but an attempt to commit the criminal offences referred to in Arts. 3 and 4 is only to be made specifically

punishable for those offences (fraud and misappropriation) which do not already include within their main definition specific alternatives relating to preparatory conduct (see Art. 5 (2) of the proposal).

The provisions on the liability of, and minimum sanction types for, legal persons in Arts. 6 and 9 of the proposal are mainly a *Lisbonisation* of the obligations contained in Arts. 3 and 4 of the Second Protocol to the Convention on the protection of the EU's financial interests. Member States need to take the necessary measures to ensure that legal persons can be held liable for the listed offences but the proposal does not require these measures to include criminal liability of legal entities.

For natural persons, however, the proposal contains specific provisions on the criminal penalties which Member States need to enact in their legislation. As a general rule, the criminal penalties need to be effective, proportionate and dissuasive. In accordance with the principle of proportionality, the proposal refers in Art. 7 (2) to minor cases where the damage or advantage is less than € 10 000; in these cases, Member States may opt for sanctions other than criminal ones. For specific cases in which the damage or the advantage involved exceed a threshold of € 100 000, Member States need to provide for criminal sanctions including a minimum penalty of at least 6 months' imprisonment and a maximum penalty of at least 5 years' imprisonment. In cases of money laundering and corruption, this threshold is € 30 000. The objective is to achieve more consistency in the level of sanctions across the EU and to increase the deterrence of the measures in place. The required sanctions of imprisonment are considered proportionate and justified, thus ensuring that a European Arrest Warrant can be issued and executed for any of the relevant offences.

e) Member States shall establish their jurisdiction over the criminal offences of the directive based on the principles of territoriality and active personality. As opposed to the convention (Art. 4 (2)) and its protocol (Art. 6 (2)), Art. 11 of the proposal for a directive does not allow for a declaration made by Member States in order not to apply their jurisdiction in cases based on the personality principle.

Very importantly, the proposal contains in Art. 12 specific provisions on prescription (time limitation) for the investigation, prosecution, trial and judicial decision concerning the offences within the scope of the directive. The proposal refers to a minimum prescription period of 5 years from the time when the offence was committed (Art. 12 (1)) and requires the prescription to be interrupted upon any act of investigation or prosecution until a total of at least 10 years has elapsed from the time when the offence was committed (Art. 12 (2)). The enforcement of a penalty imposed following a final conviction needs to be possible for at least 10 years (Art. 12 (3) of the proposal).

The proposal also contains specific provisions on the interaction between criminal-law proceedings initiated on the basis of national provisions implementing the directive and the proper and effective application of administrative measures, penalties and fines in the exercise of disciplinary powers by competent authorities against public officials (see Art. 7 (3) of the proposal) or the application of administrative measures within the meaning of Council Regulation No 2988/ 95 on the protection of the European Communities' financial interests (see Art. 14 of the proposal).

The directive when adopted will replace the convention and its protocols. They will be repealed (Art. 16 of the proposal). A provision on cooperation between the Commission (OLAF) and the competent criminal-law authorities of the Member States has been included in Art. 5 of the proposal, which mirrors the provision in Art. 7 of the Second Protocol to the Convention on protection of the European Communities' financial interests, such as to preserve the *acquis* of the third-pillar instruments.

III. Conclusion

Against the background of a change in the scale of the challenges facing the criminal investigation and prosecution of offences against the EU budget, the European Commission has put forward a proposal for a directive to step up substantive criminal-law protection against fraud. The proposal is to some extent innovative but it is not revolutionary and represents a balanced policy line. It responds to the needs for more effective deterrence in the fight against fraud and for a fully equivalent legal framework throughout the Member States. It suggests matching the level of criminal-law protection to the seriousness of the conduct in question and using synergies with administrative measures for the protection of the EU's financial interests.

1. O.J. C 316, 1995, p.48.↩
2. O.J. C 313, 1996, p.1 and O.J. C 221, 1997, p.11.↩
3. COM(2001) 272, 23.5. 2001, as amended by COM(2002) 577, 16.10.2002.↩
4. COM(2004) 709, 25.10 2004 as completed by SEC(2004) 1299 and COM(2008) 77, 14.02.2008 as completed by SEC(2008) 188.↩
5. See COM(2008) 77, 14.02.2008, point 3.↩
6. See OLAF report 2011, Table 6 Overview of progress on judicial actions in actions created between 2006 and 2011; see also statistics reported in SEC(2011) 621, 26.05.2011.↩
7. COM(2012) 363, 11.07.2012.↩

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