

Protecting the EU's Financial Interests through Criminal Law: the Implementation of the "PIF Directive"

Wouter Van Ballegooij *



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Article

ABSTRACT

This article provides a summary of a recent Commission report on the implementation of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"). This Directive, which is part of the Commission's overall anti-fraud strategy, harmonises the definitions, sanctions, jurisdiction rules, and limitation periods related to fraud and other offences affecting the EU's financial interests. A proper transposition of the PIF Directive by the Member States is necessary to enable the European Public Prosecutor's Office (the "EPPO") to conduct effective investigations and prosecutions. The Commission's report contains a general and a specific article-by-article assessment of the transposition of the Directive. It concludes that, although all Member States have transposed the Directive, further action is needed to address outstanding compliance issues. These notably relate to the transposition of the definitions of criminal offences and the liability of – and sanctions for – legal persons and natural persons.

AUTHOR

Wouter Van Ballegooij

Legal and policy officer on criminal law

European Commission

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I. Introduction

Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") was adopted on 5 July 2017¹ as part of the Commission's overall anti-fraud strategy.² For the Member States bound by it,³ the PIF Directive replaces the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention").⁴

Based on Art. 83(2) TFEU, the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests. These criminal offences (the "PIF offences") are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least €10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation of standards also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO)⁵ because the EPPO's powers are defined by reference to the PIF Directive as implemented by national law.⁶

The deadline for transposition of the Directive into national law expired on 6 July 2019. Only 12 Member States had notified full transposition of the Directive by that date. Therefore, the Commission launched infringement procedures against the remaining 14 participating Member States by sending them letters of formal notice in September 2019. As of April 2021, the number of notified complete transpositions had gone up to 26, which means that all Member States bound by the Directive have now notified its full transposition into national law.

II. Implementation of the PIF Directive's Main Provisions

1. Scope and methodology

In accordance with Art. 18(1) of the PIF Directive, the Commission's implementation report of 6 September 2021⁷ assesses the extent to which Member States have taken the necessary measures to comply with the PIF Directive. In particular, the report assesses whether Member States have implemented the Directive and whether national legislation achieves the objectives and fulfils the requirements of the legal instrument. The report does not affect the powers of the Commission under Art. 258 TFEU to assess the compliance of individual national transposition measures.

The report is primarily based on the information that Member States provided to the Commission through notification of their national measures transposing the PIF Directive. This information was complemented by external research commissioned by DG JUST under one of its framework contracts. On the basis of this assessment, the Commission launched systematic exchanges with the Member States. The additional information and explanations provided by the Member States during these exchanges allowed the Commission to refine its analysis as regards the most pertinent conformity issues.

2. Conformity issues identified

A detailed assessment of notified transposition measures confirmed that all Member States have transposed the PIF Directive's main provisions. Outstanding conformity issues still need to be addressed,

however, including issues that must be dealt with in order to enable effective investigations and prosecutions by the EPPO. Conformity issues relate to (a) criminal definitions; (b) sanctions; (c) jurisdiction rules; and (d) limitation periods; they will be discussed in further detail in the following.

a) Criminal definitions

Fraud

Art. 3 of the PIF Directive states that Member States must take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally. For this purpose, it sets out four categories of conduct constituting fraud affecting the Union's financial interests. These four categories relate to acts or omissions concerning: (i) non-procurement-related expenditure (Art. 3(2)(a)); (ii) procurement-related expenditure (Art. 3(2)(b)); (iii) revenue other than revenue arising from VAT own resources (Art. 3(2)(c)); and (iv) revenue arising from VAT own resources (Art. 3(2)(d)).

With respect to fraud regarding non-procurement-related expenditure and procurement-related expenditure, the conformity issues identified include the narrower scope of national legislation on fraud related to non-procurement-related expenditure as such. Other compliance issues concern the following aspects of these offences:

- “The use of false, incorrect or incomplete statements”, with certain national legislation only covering written documents;
- “Assets from the Union budget or budgets managed by the Union, or on its behalf” not being covered by national legislation;
- The incrimination of “non-disclosure of information” for either not being transposed or for being transposed by a more limited legal notion;
- Narrower wording being used in national legislation to transpose “the misapplication of such funds or assets for purposes other than those for which they were originally granted”.

For revenue fraud (both revenue arising from VAT own resources and revenue not arising from it), the Commission also identified conformity issues, again due to the narrower scope of national legislation. Other issues relate to the following aspects of these offences:

- “The use of false, incorrect or incomplete [VAT-related] statements or documents” not covered by national legislation;
- Certain national legislation not (fully) covering “resources of the Union budget” and “budgets managed by the Union, or on its behalf”;
- The “non-disclosure of [VAT-related] information” as either not being transposed or as being transposed by a more limited legal notion;
- Narrower wording transposing the “misapplication of a legally obtained benefit”;
- The “presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds” as either not being transposed or as being transposed by a more limited legal notion.

Other offences (money laundering, corruption, misappropriation)

Art. 4(1) of the PIF Directive states that Member States must take the necessary measures to ensure that money laundering involving property derived from the criminal offences covered by the Directive constitutes a criminal offence as described in Art. 1(3) of Directive (EU) 2015/849.⁸ In several Member States, this provision has not yet been fully transposed, due either to some deficiencies in the definition of money laundering itself or to the lack of a criminal offence covered by the PIF Directive among the predicate offences.

Moreover, under Art. 4(2) of the PIF Directive, Member States must take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences. In several Member States, an additional aspect – “breach of duties” – is required for both active and passive corruption. This additional aspect significantly narrows the scope of the PIF Directive’s definitions of corruption and makes its prosecution dependent on proving such a breach of duty.

For the offence of “passive corruption,” a conformity issue concerns the aspect of “refrain[ing] from acting in accordance with his duty.” In a small number of Member States, this aspect is not covered by national legislation. As for “active corruption,” a specific conformity issue concerns the scope of the criminal definition, as some of the aspects (“promises, offers or gives, directly or through an intermediary, an advantage,” and “for a third party”) are missing or have not been correctly transposed in some Member States.

Art. 4(3) of the PIF Directive states that Member States must take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence. Conformity issues concern a narrower transposition of this offence or a lack of transposition altogether.

Art. 4(4) of the PIF Directive provides a definition of “public official” with a view to protecting Union funds adequately from corruption and misappropriation. Some aspects of the definition of “public official” have not been transposed into the legislation of about half of the Member States. The following conformity issues have been identified:

- The obligation to extend criminalization to a “national official of another Member State and any national official of a third country,” has not been implemented in general or as regards the offence of misappropriation;
- The definition of “Union official” does not include: (i) persons “seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants”; or (ii) the “Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies”;
- The definition of “national official” was made subject to additional conditions, only covering public officials of other Member States when the crime has been committed within the territory of that Member State,⁹ and not covering “any person holding an executive, administrative ... office” generally or in relation to the offence of misappropriation only.

Lastly, some Member States have not transposed Art. 4(4)(b) referring to “any other person assigned and exercising a public service function.”

Art. 5 of the PIF Directive states that: (i) Member States must take the necessary measures to ensure that inciting, and aiding and abetting, the commission of any of the criminal offences referred to in Arts. 3 and 4 of the Directive are punishable as criminal offences (Art. 5(1)); and (ii) any attempt to commit any of the criminal offences referred to in Art. 3 and Art. 4(3) of the Directive is punishable as a criminal offence (Art.

5(2)). In a number of Member States, the Commission identified non-conformity issues as regards Art. 5(2). These issues concern the failure to make the following a punishable criminal offence: (i) an attempt to commit subsidy abuse; (ii) some specific customs offences; and (iii) misappropriation.

b) Sanctions

Member States must provide for the liability of and sanctions for legal persons: (i) for any of the criminal offences referred to in Arts. 3, 4, and 5 committed for their benefit by other persons having a leading position within the legal person; or (ii) for the lack of supervision or control of these other persons, by any person under their authority (Art. 6 of the PIF Directive). Art. 9 of the PIF Directive obliges Member States to provide certain sanctions (fines and other sanctions) for the legal persons held liable, but the sanctions must be “effective, proportionate and dissuasive.” In a quarter of the Member States, a number of conformity issues have been identified in this regard. These include:

- A lack of transposition of Art. 6(1) related to criminal offences committed by persons having a leading position within the legal person;
- Only covering the criminal acts of persons committed within the scope of the activities of the legal person;
- The exclusion of corporate criminal liability in case of certain predicate offences.

Another compliance issue concerns the conflation of the requirements for persons having a leading position within the legal person and persons under their authority. Here, it should be pointed out that Art. 6(1) does not require “the lack of supervision or control” when a PIF offence is committed for the benefit of a legal person by a person “having a leading position within the legal person.” In reference to Art. 9, the Commission emphasises that corporate liability should not be made dependent on the final conviction of a natural person, as is the case in one Member State, because this undermines the possibility to impose “effective, proportionate and dissuasive” sanctions on legal persons.

Member States also have to draw up minimum rules on criminal penalties for natural persons, including minimum-maximum sanctions of at least four years for the criminal offences referred to in Arts. 3 and 4 when these offences involve considerable damage or advantage (Art. 7 of the PIF Directive). Like Art. 9, Art. 7 provides that the criminal sanctions must be “effective, proportionate and dissuasive”. For Art. 7, conformity issues have been identified in a quarter of the Member States. The legislation of several Member States contains provisions that allow individuals to escape criminal liability or the imposition of sanctions if they report the crime or repay the damage caused to the Union’s financial interests at various stages prior to or during criminal proceedings. Such provisions could make sanctions ineffective and prevent them from being dissuasive. Yet other conformity issues relate to the failure to meet the sanctions’ threshold of four years, notably for: “non-disclosure of information” in the context of procurement- and non-procurement-related expenditure fraud, preparatory acts for money laundering, passive and active corruption, and misappropriation.

c) Jurisdiction rules

The PIF Directive obliges Member States to: (i) establish jurisdiction over the criminal offences referred to in Arts. 3, 4, and 5 where the offence is committed in whole or in part within their territory or the offender is one of their nationals and where the offender is subject to the EU Staff Regulations at the time of the criminal offence;¹⁰ and (ii) avoid making the exercise of jurisdiction over PIF offences committed abroad by their nationals subject to certain conditions (Art. 11).

As for the establishment of jurisdiction on the basis of territoriality, the Commission has identified two conformity issues. The first relates to the lack of jurisdiction on money laundering as defined in Art. 4(1) of the PIF Directive. The second relates to additional conditions such as those for incitement and aiding and abetting PIF offences:

- The main perpetrator should be acting within the territory of the Member State;
- The punishment provided by national law must be above a certain threshold.

The extension of jurisdiction to offenders subject to the EU Staff Regulations, with or without imposing specific conditions, has been provided for by the national legislation of about half of the Member States bound by the Directive. A similar number of Member States have extended their jurisdiction over PIF offences committed: (i) by habitual residents in their territory; or (ii) for the benefit of a legal person established in their territory; and/or (iii) by one of their officials acting in his/her official duty. A last conformity issue concerns the fact that certain Member States impose the condition that prosecution for PIF offences can be initiated only following a report made by the victim in the place where the criminal offence was committed or they require a complaint from the injured party (if such a complaint is required for prosecution under foreign law).

d) Limitation periods

According to Art. 12 of the PIF Directive, Member States have to: (i) prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in Arts. 3, 4, and 5 in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum sanction of at least 4 years of imprisonment; and (ii) take the necessary measures to enable penalties to be enforced. A specific transposition issue relates to the provision of a limitation period for the execution of a judgment imposed following a final conviction for a criminal offence referred to in Arts. 3, 4, or 5 that is shorter than the five years required by Art. 12.

III. Conclusion and The Way Forward

The PIF Directive was adopted with the aim of strengthening the protection against criminal offences affecting the Union's financial interests. The Directive provides added value by setting: (i) common minimum rules for defining criminal offences; and (ii) sanctions for combating fraud and other illegal activities affecting the Union's financial interests. All Member States have transposed the PIF Directive's main provisions.

However, the Commission's implementation report of 6 September 2021 shows that the transposition of the Directive still needs to be improved, notably to ensure: (i) the consistent transposition of the definitions of the criminal offences referred to in Arts. 3, 4, and 5; and (ii) the liability of – and sanctions for – legal persons and natural persons in accordance with Arts. 6, 7, and 9. The provisions on the exercise of jurisdiction (Art. 11) and limitation periods (Art. 12) also need to be transposed.

Proper transposition requires further legislative action by the Member States to fully align their national legislation with the requirements of the PIF Directive. This is especially important in order to enable the EPPO to conduct effective investigations and prosecutions. In this regard, it should also be noted that it is essential for Member States to report statistical data to the European Commission on criminal proceedings and their outcome (Art. 18(2) of the PIF Directive). This reporting is crucial for assessing whether the protection of the Union's financial interests has been achieved on the basis of the PIF Directive. In accordance with Art. 18 of the PIF Directive, the Commission will continue to assess Member States' compliance with the PIF Directive

and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.

1. O.J. L 198, 28.7.2017, 29–41: for background, see A. Juszczak and E. Sason, “The Directive on the Fight against Fraud to the Union’s Financial Interests by means of Criminal Law (PIF Directive), Laying down the foundation for a better protection of the Union’s financial interests?”, (2017) *eucrim*, 80-87.↵
2. European Commission, “Commission Anti-Fraud Strategy: enhanced action to protect the EU budget”, COM (2019) 196 final, 29.4.2019.↵
3. In accordance with Protocol 22 to the Treaties, Denmark did not take part in the adoption of the PIF Directive and is therefore not bound by it or subject to its application. However, it remains bound by the PIF Convention. Ireland, in contrast, did exercise its right to take part in the adoption and application of the PIF Directive in accordance with Protocol 21 to the Treaties.↵
4. Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, O.J. C 316, 27.11.1995, 49–57.↵
5. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), O.J. L 283, 31.10.2017, 1-71.↵
6. Art. 22(1) of Regulation (EU) 2017/1939.↵
7. European Commission, “Report from the Commission to the European Parliament and the Council on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law”, COM(2021) 536 final, 6.9.2021.↵
8. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, O.J. L 141, 5.6.2015, 73-117.↵
9. This means that Member State A would only prosecute officials of other Member States (B, C, etc.) if they commit a crime within the territory of Member State A.↵
10. In accordance with Art. 11(2), Member States may refrain from applying this rule or may apply it only in specific cases or only where specific conditions are fulfilled, and they must inform the Commission if they take this course of action.↵

* Author statement

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