

The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption

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ABSTRACT

This article outlines the targeted amendment of the PIF Directive proposed in the Commission's legislative initiative for a Directive on Combating Corruption, which was tabled in May 2023. The targeted amendment seeks to align the PIF Directive with the standards set out in said anti-corruption proposal. The areas of alignment are sanctions for natural and legal persons, aggravating and mitigating circumstances, and limitation periods. The amendment is designed to ensure respect for the principle of equivalence and effective protection of the EU's financial interests, as laid down in Art. 325 of the Treaty on the Functioning of the European Union.

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I. Introduction: The “PIF Directive”

The current EU anticorruption legal framework already includes specific measures targeting acts of corruption that damage or are likely to damage the Union’s financial interests. Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law (“PIF Directive”)¹ sets out common definitions and standards for the criminal offences of active and passive corruption (bribery) and misappropriation by a public official (in addition to fraud and money laundering). Indeed, bribery constitutes a particularly serious threat to the EU budget and can in many instances also be linked to fraudulent conduct, e.g. in cases of bribery of public officials in exchange for awarding EU funds or for approving inflated costs in the execution of certain projects.²

The PIF Directive was adopted on 5 July 2017 as part of the Commission’s anti-fraud strategy. It replaces the 1995 Convention on the protection of the European Communities’ financial interests and its Protocols (the “PIF Convention”) for the Member States bound by it.³ This Directive, as implemented by national law, also defines the criminal offences that fall within the material competence of the European Public Prosecutor’s Office (EPPO) pursuant to Art. 22 of Council Regulation (EU) 2017/1939 (“the EPPO Regulation”).

The deadline for transposition of the PIF Directive into national law expired on 6 July 2019. As outlined in the two reports on its implementation, adopted by the Commission on 6 September 2021⁴ and on 16 September 2022,⁵ respectively, several outstanding conformity issues still need to be addressed. To this end, the Commission has already opened infringement proceedings against 19 Member States for incorrect transposition of the PIF Directive.⁶

II. Targeted Amendment of the PIF Directive

In May 2023, the Commission adopted a comprehensive anti-corruption package, which includes a proposal for a Directive on combating corruption.⁷ This ambitious proposal aims *inter alia* at approximating the types and levels of sanctions for individuals and legal persons as well as other sanctions-related provisions. It sets out higher penalty standards compared to those currently provided for by the PIF Directive. These higher standards were considered appropriate in view of the nature of the criminal offences to be harmonised by the proposal, the standards defined by the Member States in their national corruption legal frameworks, and the levels of sanctions established by more recent EU criminal law instruments.

This initiative required the Commission to come up with a targeted amendment of the PIF Directive, notably with a view to ensuring respect for the principle of equivalence and effective protection laid down in Art. 325 of the Treaty on the Functioning of the European Union (TFEU). The latter in fact establishes a shared responsibility between the Union and the Member States to counter fraud and any other illegal activity affecting the financial interests of the Union through effective and deterrent measures. It also sets out an obligation to ensure the same level of protection between the Union’s and national financial interests.

The targeted amendment of the PIF Directive therefore proved necessary to ensure that the Member States have in place equivalent measures to counter corruption affecting the Union’s and their own financial interests. To this end, Art. 28 of the proposal for a Directive on combating corruption seeks to align the PIF Directive with the higher standards set out in that proposal, in terms of sanctions for both natural and legal persons, aggravating and mitigating circumstances, and limitation periods.

For example, with specific reference to penalties for natural persons, the minimum maximum imprisonment level set out in the PIF Directive has been raised from four to six years for bribery and from four to five years

for misappropriation by a public official, when “considerable damage or advantage” is involved. In order to ensure the consistency within the PIF Directive, the penalty provisions of the other PIF offences that were already punished in the same way as corruption (fraud and money laundering) have also been raised to six years. Furthermore, the additional penalties or measures for natural persons provided for in the proposal on combating corruption (including, e.g., fines or disqualification from public office) would also be available for corruption offences affecting the EU budget. The targeted amendment of the PIF Directive further seeks to eliminate the possibility for Member States to lay down sanctions of a non-criminal nature in cases of corruption involving damage of less than €10,000 or an advantage of less than €10,000, since a comparable threshold is not foreseen in the proposal on corruption.

The same logic applies through Art. 28 of the proposal with regard to inclusion in the PIF Directive of the additional aggravating and mitigating circumstances,⁸ the cross-reference to the provisions on penalties concerning legal persons,⁹ and the introduction of higher limitation periods to ensure consistency with those laid down in the proposal on corruption.¹⁰

III. Way Forward

The proposed amendment of the PIF Directive does not go so far as to extend its material scope to additional corruption offences that have been harmonised by the proposal on combating corruption but not yet included in the PIF Directive (i.e., bribery and misappropriation in the private sector, trading in influence, abuse of functions, obstruction of justice, enrichment from corruption offences). Nonetheless, as clarified in the explanatory memorandum of the proposal, the Commission will assess the extent to which these criminal offences also need to be included in the PIF Directive. This assessment will be done – in the context of the evaluation of the PIF Directive.¹¹

The possible extension of the scope of the PIF Directive to the entire spectrum of corruption offences would further enhance the fight against crimes affecting the financial interests of the Union in the future. In addition, such possible extension of the scope of the PIF Directive would also extend the material scope of the EPPO’s competence. The latter in fact is defined by means of a dynamic reference to the PIF Directive. As a result, the EPPO would become competent to investigate, prosecute, and bring to judgment the perpetrators of the entire spectrum of corruption offences affecting the Union’s financial interests.¹²

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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) *eu-crim*, 80-87. PIF stands for “*protection des intérêts financiers*”.↵
 2. See, for example, the typologies identified by the European Public Prosecutor’s Office (EPPO) in its annual activity reports 2021 and 2022, available at: <https://www.eppo.europa.eu/sites/default/files/2022-07/EPPO_Annual_Report_2021.pdf> and <https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf>. All hyperlinks in this article were last accessed on 11 December 2023.↵
 3. The PIF Directive applies to 26 EU Member States; Denmark is not bound by it.↵
 4. 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, 6.9.2021, COM(2021) 536 final. For an overview, see W. Van Ballegooij, ‘Protecting the EU’s Financial Interests through Criminal Law: the Implementation of the “PIF Directive”’, (2021) *eucrim*, 177-181. With specific reference to corruption, the report notes that an additional element of “breach of duties” is required in the definition of both active and passive corruption in several Member States. This additional aspect significantly narrows the scope of the Directive’s definitions of corruption. On “passive corruption”, the Commission found that, in a small number of Member States, the aspect concerning the refraining of public officials “from acting in accordance with [their] duty” is not covered by national legislation. On “active corruption”, the report mentions that some of the aspects of the definition provided for by the Directive are missing or not transposed correctly in some Member States.↵
 5. Second report 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, Brussels, 16.9.2022, COM(2022) 466 final.↵
 6. See European Commission, Press corner – infringements decision: December 2021 infringements package (<https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201>); February 2022 infringements package: (<<https://ec.europa.eu/commission/presscorner/detail/en/>>)

- inf_22_601>); May 2022 Infringements package(<https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548>); June 2023 infringement package (< https://ec.europa.eu/commission/presscorner/detail/en/inf_23_2707>).↵
7. COM(2023) 234 final. For an overview, see F. Clementucci and A. Miekina, "The Commission Proposal for a Directive on Combating Corruption, in this issue.↵
 8. The PIF Directive at present only provides for one aggravating circumstance, in case the criminal offences harmonised therein are committed in the framework of a criminal organisation, while the proposal on corruption includes a list of additional aggravating and mitigating circumstances. By means of the proposed amendment (Art. 28(6) of the proposal on corruption) all these circumstances would also be available in the context of the PIF Directive.↵
 9. Compared to Art. 9 of the PIF Directive, Art. 17 of the proposal on corruption provides for additional sanctions for legal persons and, with regard to fines, relies on the calculation method based on the worldwide turnover of the legal person concerned in the business year preceding the fining decision (in line with the recent Commission proposal on the protection of the environment through criminal law and replacing Directive 2008/99/EC (COM(2021) 851 final) and the proposal on the violation of Union restrictive measures (COM(2022) 247 final), both currently under negotiation). Art. 28(7) of the proposal on corruption would also make these additional sanctions for legal persons available in the context of the PIF Directive.↵
 10. Similarly, Art. 28(8) of the proposal on corruption aligns the rules on limitation periods between that Directive and the PIF Directive.↵
 11. The evaluation of the PIF Directive is foreseen in its Art. 18.↵
 12. While the EPPO is already competent to investigate and prosecute non-PIF crimes that are "inextricably linked" to the PIF crimes, under the conditions set out in Art. 25(2) of the EPPO Regulation, only a comprehensive amendment of the PIF Directive would result in an extension of its competence to the whole set of corruption offences envisaged in the proposal on corruption, provided that such offences affect the EU budget.↵

Author statement

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