The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive)

Laying down the foundation for a better protection of the Union's financial interests?

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Article

ABSTRACT

This article gives an account of the negotiations of the Commission proposal for the Directive
on the fight against fraud to the Union's financial interests by means of criminal law ("PIF Directive"). It also outlines the key elements of the finally adopted legal instrument as well as its significance for the European Public Prosecutor's Office. The article concludes that the comprehensive approach followed by the EU in fighting crime against the Union budget will lead to tangible results and a significantly better protection of the financial interests of the European Union.

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I. Introduction

After five years of intense and constructive negotiations,[1] the Council[2] and the European Parliament have adopted the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive").[3] The Directive, which is binding for all Member States, save for Denmark and the United Kingdom,[4] is part of the Commission's overall strategy to strengthen the protection of the Union's financial interests. It will increase the protection provided by the current legislative framework by further harmonising the definitions, sanctions, and prescription periods of criminal offences affecting the Union's financial interests. The Convention on the protection of the European Communities' financial interests of 1995[5] (the "PIF Convention") and its three protocols[6] will be replaced by the Directive for the Member States bound by it.[7]

Given the diverging rules in the laws of the Member States, as well as the unsatisfying level of both effectiveness and deterrence across the Member States when it comes to protecting the financial interests of the Union,[8] the adoption of the Directive seeks to significantly step up the equivalent and effective protection of the Union's financial interests required by Art. 325 TFEU. The Directive will also facilitate the recovery of misused EU monies, which causes considerable damage to the EU budget. According to the EU's Anti-Fraud Office (OLAF), the damage to the Union budget lies in the range of more than half a billion Euros per year,[9] while other sources see the financial damage going into the billions of Euros; the financial damage to the Union and the national budgets resulting from serious cross-border value added tax (VAT) fraud alone is estimated to be around 50 billion per year,[10] in addition to the economic damage as a result of the distortion of the markets.

This article will briefly give an account of the negotiations of the Commission proposal for the PIF Directive (below 2.), outline in detail the key elements of the finally adopted legal instrument (below 3.) as well as its significance for the European Public Prosecutor's Office (below 4.). The article concludes (below 5.) that the comprehensive approach followed by the EU in fighting crime against the Union budget – with the new Directive, the envisaged European Public Prosecutor's Office, and, last but not least, the EU's Anti-Fraud Office (OLAF) being the constitutive elements – will lead to tangible results and a significantly better protection of the financial interests of the European Union.

II. Negotiations of the Commission Proposal for the Directive

The Commission proposal for the Directive was adopted on 11 July 2012,[11] based on Art. 325(4) TFEU. Compared to the PIF Convention and its protocols, the Commission proposal includes a comprehensive set of fraud and fraud-related offences, more deterrent sanctions for "serious" offences, and also common rules on limitation periods.[12]

On 6 June 2013 already, the Council adopted its position on the Directive,[13] thereby departing from the Commission proposal on a number of points. The European Parliament issued its report on 16 April 2014,[14] suggesting a number of changes to the text as proposed by the Commission. In particular, the envisaged inclusion of VAT fraud within the scope of the Directive posed a great challenge in the negotiations, even giving rise to concerns that this initiative could fail as a whole.[15] Although not explicitly mentioned in the main body, recitals 4 and 5 of the Commission proposal made it clear that VAT fraud falls within the

definition of the Union's financial interests and hence the scope of the Directive. Opposition by the Council[16] against any inclusion of VAT fraud within the scope of the Directive, on the one hand, and strong support by Commission and Parliament[17] for an inclusion of VAT fraud, on the other, eventually led to a standstill in the negotiations in June 2015. This deadlock was only broken by the Court of Justice's decision in the *Taricco* case,[18] when the negotiations were taken up again with new verve. And it was only after numerous meetings at the technical level as well as discussions at both the Justice and Home Affairs and the Economic and Financial Affairs Councils that a compromise solution and political agreement on the text of the Directive could eventually be found between Parliament and Council in January/February 2017.

The following section will examine in detail the compromise solutions found.[19] Before moving on to this section, however, one issue, though unrelated to the substance of the Directive, yet subject to lengthy legal debates, deserves special mention: the question of the legal basis of the Directive. While the Commission has based its proposal on Art. 325(4) TFEU, Council and Parliament have opted for an adoption on the basis of Art. 83(2) TFEU within the EU's competence in the area of freedom, security and justice.

In the explanatory memorandum accompanying the Directive, the Commission provided the reasons why it based its proposal on Art. 325(4) TFEU.[20] The Commission argued that Art. 325 TFEU confers upon the Union strong powers to adopt measures that act as a deterrent and afford effective and equivalent protection. In order to achieve this aim, Art. 325 equips the EU itself with the power to enact measures not only in the fields of prevention but also in the fight against fraud and any other illegal activities affecting the Union's financial interests, including by means of criminal law. Art. 325(4) TFEU provides for the legislative procedure to adopt these measures, whereby the term "fraud" within the meaning of this article has to be understood in a broad sense, i.e., including not only fraud but also certain fraud-related criminal offences. This will ensure the necessary effective and equivalent protection of the Union's financial interests, as required by Art. 325 TFEU.

The Commission moreover stressed that the fight against illegal activities affecting the Union's financial interests is a very specific policy area, particularly highlighted by the very first article in the title on financial provisions in the TFEU, Art. 310(6), which underscores the obligation to fight illegal activities affecting the Union's financial interests ("shall" provision). The Commission also pointed to a historical interpretation by arguing that contrary to the precursor of Art. 325 TFEU, namely Art. 280 (particularly para. 4) EC Treaty, the EU law today contains a criminal law dimension, including the power to enact criminal law provisions on the basis of Art. 325(4) TFEU.

This view has been challenged by Council and Parliament. In October 2012, the Legal Service of the Council issued an Opinion on this matter, in which it argued in favour of Art. 83(2) TFEU as the legal basis for the Directive.[21] It stated that the proposed Directive pursues the objective expressed in Art. 83(2) TFEU, which is to ensure the effective implementation of a Union policy (i.e., the protection of the EU's financial interests).[22] It disagreed with the Commission's stance that Art. 325 TFEU allows for measures under criminal law. The Legal Service of the Council further stressed that, compared to the previous Art. 280 EC Treaty, the absence of an explicit exclusion of criminal law measures in Art. 325 TFEU is insufficient to argue in favour of a legal basis for them. This is because the new legal basis in Art. 83(2) TFEU was meant to tackle all cases in which the EU legislature needs to harmonise the definition of criminal offences and sanctions in order to make other (non-criminal) harmonised EU measures more effective.[23]

Following this line of argument, Council changed the legal basis for the Directive to Art. 83(2) TFEU[24] and Parliament[25] shared this position. As a result thereof, the Directive falls within the scope of the opt-in/opt-out rules according to Protocols 21 and 22 on Ireland and the United Kingdom and Denmark, respectively: it

will not apply to Demark and the United Kingdom, while Ireland indicated that it will participate in this measure.

The opinion of the Council Legal Service as regards the legal basis for the Directive is not convincing. Art. 325 TFEU is a special provision, embedded in the Title regulating the composition and management of the EU budget, which aims at the widest possible and most effective protection of the financial interests of the Union. Unlike the precursor provision, Art. 280 EC Treaty, measures under Art. 325 TFEU may also include those falling in the area of criminal law. The obligations enshrined in this provision are binding ("shall") on all Member States and the Union, and they are not subject to any exemptions, such as measures under the Title on Freedom, Security and Justice. Also, the protection under Art. 325 TFEU is not striving to set minimum standards only but for a comprehensive and effective protection of the Union budget.

The measure undertaken in the case at hand – the adoption of the Directive – pursues its own policy purpose within the realm of the financial provisions of the TFEU; unlike Art. 83(2), it is not confined to indirectly making other EU harmonised measures more effective should this be proven to be essential. This *proof of essentiality* has been proffered by the Treaty for cases of combating fraud and other illegal activities affecting the financial interests of the Union. As laid out above, the grammatical, historical, systematic, and teleological interpretations all point to Art. 325(4) TFEU as the appropriate legal basis for the Directive. This interpretation does not deprive Art. 83(2) TFEU, which does not even mention crimes affecting the financial interests of the Union amongst the so called "Eurocrimes" listed in its first paragraph, of its effective scope of application in other areas of crime, while, by contrast, the interpretation of the Council and Parliament in favour of Art. 83(2) as the legal basis for the Directive, would deprive Art. 325(4) TFEU of an essential part of its content.

III. Main Elements of the Directive

The duty to protect the Union's financial interests, as enshrined in Art. 325 TFEU, calls for a comprehensive approach that includes preventive measures as well as civil law, administrative law, and, as an *ultima ratio*, criminal law measures.[26]

The new Directive pursues this goal by laying down the foundation for a better protection of the Union's financial interests by means of criminal law. This will be achieved by setting common standards as regards definitions of criminal offences affecting the financial interests of the Union (here under a) as well as in relation to sanctions (b) and limitation periods (c) for these offences. At the end, this section will briefly touch upon the remaining provisions of the Directive (d).

1. Definitions of criminal offences

Central provisions on the definition of criminal offences affecting the Union's financial interests are Arts. 3 and 4 in Title II of the Directive. The Directive builds upon the *acquis* of the PIF Convention and its accompanying protocols.[27] It modernises, extends, and, in some instances, narrows down the scope of the definitions.

Art. 2(1)(a) of the Directive defines the financial interests of the Union as being all revenues, expenditures, and assets covered by, acquired through, or due to the Union budget, as well as the budgets of the institutions, bodies, offices, and agencies established under the Treaties or budgets directly or indirectly managed or monitored by them, hence bringing about greater clarity on this point compared to the PIF Convention.

a) Fraud

As regards the offence of fraud affecting the Union's financial interests (Art. 3), the Directive initially closely followed the PIF Convention; however, it underwent some substantial changes in the course of negotiations. This applies particularly to the now clear language on VAT fraud in Art. 3(2)(d).

Like the PIF Convention, the Directive differentiates between fraud in respect of expenditures and revenue. As far as expenditure is concerned, the definition has been concretised further compared to the PIF Convention, because the Council favoured making a distinction between non-procurement related expenditure, on the one hand (Art. 3 paragraph 2 lit. a), and procurement related expenditure, on the other (Art. 3 paragraph 2 lit. b). While the Directive follows the definition of the PIF Convention for fraud concerning non-procurement related expenditure, such as grants or other financial instruments, fraud concerning procurement-related expenditure, however, requires that it was committed in order to make an unlawful gain for the perpetrator or another person by causing a loss to the Union's financial interests. Procurement-related expenditure means any expenditure in connection with the public contracts determined by Art. 101 paragraph 1 of Regulation No. 966/2012,[28] such as building contracts, supply contracts, works contracts, or service contracts between economic operators and the EU contracting authority.[29] In the case of procurement-related expenditure fraud, it is hence not sufficient that the fraudster aimed at obtaining an advantage; in addition, the damage must actually have been caused.

As far as revenue is concerned, the by far most controversial point was, as mentioned above, the question of whether and, if so, to what extent VAT fraud falls within the scope of the Directive. While Commission and Parliament strongly favoured that VAT fraud be included, the Council disagreed with this, stating that VAT is solely a national matter and that the damage resulting from VAT fraud only occurs in the EU Member State affected by it.

The PIF Convention itself did not exclude VAT from its scope, nor did it explicitly include it. In the Explanatory Report to the PIF Convention,[30] the Council took the view that, for the purpose of the PIF Convention, "revenue" means only customs duties and certain agricultural levies and contributions, i.e., the first two categories of the European Union's own resources only. VAT was explicitly excluded by the Council, as VAT was not an own resource collected directly for the account of the Communities.

Against this view, the Commission, supported by the Parliament, stressed from the beginning that the general reference in the PIF Convention to the EU's financial interests means nothing other than that VAT falls within the ambit of that Convention and, accordingly, that VAT has to fall within the scope of the proposed Directive. Both Commission and Parliament pointed out that this would not only be desirable from a criminal policy perspective but, in particular, also in view of the significant damage that complex and serious VAT fraud cases cause each year, both to the national and EU budgets as well as to the Single Market in the EU.

It was at a time when the negotiations were stalled that the Court of Justice shed some light on this matter, which, in turn, led to a new dynamic on the question of VAT and the negotiations on the Directive as a whole.

In the *Taricco* decision, the Court of Justice confirmed the Commission's view that VAT fraud falls under the scope of the definition of fraud in the PIF Convention.[31] The Court had already held earlier that VAT is an own resource of the Union and that there is a direct link between the collection of VAT by the Member States and the availability of the corresponding VAT resources to the European Union budget.[32]

In *Taricco*, the Court further stated that "criminal penalties may…be essential to combat certain serious cases of VAT evasion in an effective an dissuasive manner"[33] and that the Member States must ensure that cases

of serious VAT fraud and VAT evasion "are punishable by criminal penalties which are, in particular, effective and dissuasive."[34]

In this light, there seemed no doubt that VAT fraud also falls within the scope of the Directive, since the Directive uses the same definition of fraud as the PIF Convention.

Despite these clarifying words by the Court, the Council maintained its view that VAT was excluded from the PIF Convention, as outlined in the Explanatory Report. However, Advocate General *Juliane Kokott* in the *Taricco* case already pointed out in her opinion[35] that only the Court is entitled to give an interpretation of the PIF Convention, which is legally binding within the European Union, not the Council's Explanatory Report, to which neither the Convention nor the third protocol make any reference.[36]

Following various meetings at the technical and political levels – including with Ministries of Finance – the majority of Member States at the Economic and Financial Affairs Council on 11 October 2016 and at the Justice and Home Affairs Council on 14 October 2016 expressed their readiness to agree on a political compromise solution to the inclusion of VAT fraud within the scope of the Directive.[37] This solution however entails that not all VAT fraud cases but only serious offences against the common VAT system fall within the scope of the Directive (Art. 3(2)(d) jointly read with Art. 2(2)). That is, offences connected with the territory of at least two or more Member States, which result from a fraudulent scheme and involve a total damage of at least €10 million. The total damage of €10 million refers thereby to the estimated damage resulting from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding, however, interests and penalties due.

In order to dispel concerns on the part of various Member States, Art. 2(3) further stresses that the structure and functioning of the national tax administrations are not affected by the Directive.

The definition of VAT fraud in Art. 3(2)(d), read in conjunction with Art. 2(2), targets the most serious forms of VAT fraud, such as VAT carousel fraud, Missing-Trader Intra-Community (MTIC) fraud or fraud committed within a criminal organisation. It is understood in a broad way, so as to capture all of the possible forms of VAT fraud; however, some raised the concern that the definition of VAT fraud is not precise enough. The transposition and implementation process will therefore need to be carefully scrutinised. Art. 18 accordingly obliges the Commission to provide assessment reports on the extent to which Member States have complied with the Directive and the impact of national law transposing the Directive on the prevention of fraud to the Union's financial interests.

Even if only serious cross-border VAT fraud cases of at least €10 million fall within the scope of the Directive – by contrast, the PIF Convention, as construed by the Court of Justice, covers all VAT fraud cases – the need to establish a comprehensive set of rules on the protection of the Union's financial interests in the Directive, i.e. including VAT fraud, is evident. Even if this leads to a limited scope for VAT fraud offences in the PIF Directive, it has not been considered as viable to keep the PIF Convention in place for the purpose of VAT fraud only, as this would create a complex and in practice unworkable legal patchwork of two parallel legal instruments (Directive and PIF Convention). Moreover, Art. 18(4) explicitly foresees that the financial threshold of €10 million foreseen in Art. 2(2) of the Directive will be subject to scrutiny and review. It is in this light that the approach taken in the Directive has to be seen.

b) Other criminal offences

Art. 4 governs other criminal offences than fraud affecting the Union's financial interests. This provision follows the *acquis* of the PIF Convention and its protocols but makes some important improvements and introduces a completely new offence of misappropriation.

The initial Commission proposal included a new offence in Art. 4(1) that concerned the abuse of public procurement procedures. This provision did not find support in the Council, as it was considered too far-reaching by criminalising conduct that is merely a breach of contractual obligations.

Art. 4(1) of the finally adopted Directive now provides an updated reference to money laundering offences, thereby referring to Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "4th AML Directive").[38] It is of note in this context that, on 21 December 2016, the Commission adopted a proposal for a Directive on countering money laundering by criminal law.[39] This future Directive, which is still in the legislative process, will not, however, change anything with regard to money laundering related to the financial interests of the Union, as the PIF Directive will remain untouched as *lex specialis*.

Furthermore, the PIF Directive brings the offence of active and passive corruption (Art. 4(2)) in line with best practices and the United Nations Convention against Corruption by removing – compared to the PIF Convention – the element of "breach of duties" from the definition.

A new element of the Directive is the criminal offence of misappropriation (Art. 4(3)). This offence was not foreseen in the PIF Convention and its inclusion received broad support. This new offence will cover the conduct of a public official who is entrusted with the management of funds or assets and who spends these funds or assets contrary to the purposes for which they were initially intended and thereby damages the Union's financial interests. A prerequisite for the criminalisation of the offence is that such misappropriation has been committed intentionally.

For the purpose of the offences of corruption (Art. 4(2)) and misappropriation (Art. 4(3)), the Directive defines the meaning of a "public official" in Art. 4(4) in a wide manner, thereby extending the definition of public official to any other person who exercises a public service function. This notion hence also applies to private persons involved in the management of EU funds.

Linked to the list of offences are the general provisions on inciting, aiding and abetting, and attempt in Art. 5. Member States are required to criminalise forms of preparation of and participation in the criminal offences listed in the Directive.

2. Sanctions for offences

In order to ensure an equivalent protection of the Union's financial interests throughout the EU, the inclusion of proportionate and dissuasive sanctions, which may involve a custodial sentence, is also essential. This aspect is of utmost importance in order to create a higher level of deterrence for committing PIF offences, as required by the Treaties and the jurisprudence of the Court of Justice.

The Directive follows the logic of the PIF Convention. While the PIF Convention foresaw that criminal conduct affecting the Union budget shall be punishable by effective, proportionate, and dissuasive criminal penalties and that other, non-criminal sanctions could be provided for minor cases below a threshold of 4000 ECU[40], Art. 7(1) of the Directive similarly stipulates the obligation to punish the offences listed in Arts. 3, 4, and 5 by effective, proportionate, and dissuasive criminal sanctions. Art. 7(4), however, raises the criminalisation threshold to €10,000.

Like the PIF Convention, the Directive foresees in Art. 7(3) that the criminal offences referred to in Artt. 3 and 4, which cause considerable damage or advantage, are punishable by a maximum penalty of at least four years of imprisonment. Unfortunately the co-legislators did not take up the Commission's proposal to

introduce minimum sanctions. Instead, the Directive now provides only for a maximum penalty of at least four years of imprisonment ("minimum maximum sanctions").

While the PIF Convention set the threshold at 50,000 ECU for serious fraud, the Directive presumes the damage or advantage to be considerable if the damage or advantage involves more than €100,000. Beyond the mere financial damage or advantage, however, the Art. 7(3) expands this scope to other serious circumstances defined under national law. For offences against the common VAT system, the Directive sets the threshold as of which the damage or advantage is to be considerable at €10 million, in line with Art. 2(2).

The Directive further states that when a criminal offence is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA, this also shall be considered an aggravating circumstance (Art. 8).

As regards the liability of and sanctions for legal persons (Arts. 6 and 9), the provisions of the Directive largely correspond to the obligations under Artt. 3 and 4 of the Second Protocol of the PIF Convention. When legal persons are held liable for any of the listed criminal offences, they shall be subject to effective, proportionate, and dissuasive criminal or non-criminal sanctions. In line with the Second Protocol, the Directive includes a non-binding and non-exhaustive list of possible sanctions. Following the request of the Parliament, the sanction of “temporary or permanent exclusion from public tender procedures” was included in the list.

3. Limitation periods

An important new element of the Directive concerns the inclusion of limitation periods. This provision did not exist in the PIF Convention and governs the time periods within which criminal offences affecting the financial interests of the Union should be followed up and enforced. In Art. 12(1), the Directive foresees a general obligation for Member States to provide for a limitation period that enables the investigation, prosecution, trial, and judicial decision of criminal offences for a *sufficient period of time* after the commission of the offences listed in Artt. 3, 4, and 5.

A specific limitation period of five years has been introduced for serious offences punishable by a maximum sanction of at least four years of imprisonment (Art. 12(2)). Provided that the limitation period may be interrupted or suspended upon specified acts, Member States are allowed to establish an even shorter period than five years, however not shorter than three years (Art. 12(3)). As regards the enforcement part, the Directive stipulates that, within at least five years of the date of the final conviction, Member States are required to take the necessary measures to enable the enforcement of a penalty of more than one year of imprisonment or, alternatively, a penalty of imprisonment in case of a criminal offence punishable by a maximum sanction of at least four years of imprisonment (Art. 12(4)).

4. Other issues

Other issues covered by the Directive concern the freezing and confiscation of instrumentalities and proceeds (Art. 10), the establishment of jurisdiction (Art. 11), and rules on recovery (Art. 13). Furthermore, the Directive includes provisions clarifying the interaction between administrative and criminal sanctioning regimes (Art. 14) as well as the cooperation between the Member States and the Commission (OLAF) and other Union institutions, bodies, offices, or agencies, including Eurojust and the yet to be established European Public Prosecutor’s Office (Art. 15). Finally, the Directive governs the replacement of the Convention and its protocols (Art. 16) as well as the transposition obligations for Member States and, the reporting duties for the Member States and the Commission (Arts. 17 and 18).

The Directive also includes a set of review clauses in Art. 18(4). The Commission has to assess, as mentioned above, the appropriateness of the threshold of €10 million applying to cross-border VAT fraud and furthermore the effectiveness of the provision relating to limitation periods. It must also assess whether the Directive effectively addresses cases of procurement fraud, given that this new specific provision has been removed from the initial Commission proposal.

IV. Significance of the Directive for the European Public Prosecutor's Office

The Directive will not solely serve as an instrument to harmonise the criminal law of the Member States in the area of fraud against the EU budget; it will also be of essential importance to the future European Public Prosecutor's Office (hereinafter: EPPO), as it provides for the material scope of the criminal offences falling within the EPPO's competence. The Directive and EPPO are fully interlinked and have to be considered together as key elements of the comprehensive approach towards a stronger protection of the Union budget. Whereas the Directive lays down the foundation of harmonising criminal offences, sanctions, and limitation periods, the EPPO will play a key role in investigating, prosecuting and enforcing these offences in practice.

A general approach on the Regulation establishing the European Public Prosecutor's Office under enhanced cooperation was reached by 20 Member States at the Justice and Home Affairs Council of 8 June 2017.[41] While the Regulation has undergone several changes throughout the course of the negotiations, the EPPO's main features remain. The EPPO will be an independent and highly specialised European prosecutorial body fully equipped with investigatory and prosecutorial powers. As a single office, it will operate across all participating Member States in real-time, thus allowing for round-the-clock information exchanges, coordinated police investigations, fast freezing or seizure of assets, and arrests on the basis of a common European investigation and prosecution strategy.

Once established, the EPPO will help overcome the current fragmented efforts to fight offences affecting the Union's financial interests. There will be no need for lengthy and complicated *ad hoc* cooperation between different national authorities on a case-by-case basis. The establishment of the Office is expected to lead to a greater number of prosecutions, convictions, and a higher level of recovery of fraudulently lost Union funds.[42]

The EPPO will work closely with the EU's anti-fraud watchdog, OLAF. The EPPO Regulation clarifies that the EPPO and OLAF will maintain a close relationship with due respect for their distinct mandates. It ensures that that there will be no overlaps or duplication of work between the EPPO and OLAF and that the Union budget is, hence, protected in the widest possible manner. An evaluation of OLAF Regulation 883/2013 is currently ongoing and may lead to legislative changes so as to reflect the future relationship between OLAF and the EPPO.

The competence of the EPPO is defined by reference to the PIF Directive, as implemented by national law.[43] An interesting legal discussion in this regard concerns the choice of the legal instrument, i.e. Directive or a Regulation, in order to define the EPPO's competence.[44] Since a Directive allows Member States some leeway in its transposition, variations in national rules could occur. For the EPPO, this would mean that the way in which Member States transpose the Directive, to a certain extent affects the competence of the Office as well as, potentially, the rights of defendants subject to EPPO investigations to the extent the differences in transposing the Directive would impact upon their rights. Certainly, a Regulation containing criminal offences falling within the EPPO's competence would bring about greater clarity and legal certainty. Adopting a Regulation with the material law for the EPPO on the basis of Art. 86(1) TFEU or Art. 325(4) has, for various,

not least also political, reasons, not been considered viable. A "PIF Regulation", compared to a "PIF Directive", would be the more "intrusive" legal instrument on the national legal systems. Furthermore, a Directive, as transposed into national law, is also in line with the fact that the EPPO will, for a large part, rely on national law to conduct its investigations and will eventually bring its prosecutions before national courts. Operating on the basis of a Directive therefore appears more practical in ensuring successful investigations and prosecutions in the Member States.

Moreover, the EPPO Regulation and the Directive have built in certain safeguards to ensure legal certainty. Member States have to supply the EPPO with a list of the national substantive criminal law provisions, as transposed on the basis of the Directive, and any other relevant national law.[45] Similarly, Member States are obliged to communicate the transposed measures to the Commission, on the basis of which the Commission will assess and report the extent to which the Member States have taken the necessary measures to comply with the Directive.[46] This will enable the EPPO to operate on the basis of a clear set of criminal offences, while at the same time respecting the national judicial systems and traditions.

V. Conclusions

Although the Directive is not as far-reaching as initially proposed by the Commission, it constitutes a significant improvement by setting a more modern and more comprehensive set of rules to better fight fraud and other offences affecting the EU budget. In particular, in conjunction with the operations of the EPPO, both, the Directive and the EPPO Regulation, will jointly be a cornerstone in fighting PIF crimes more effectively by means of criminal law, while OLAF may continue with its administrative investigations as a complementary measure[47]. The Directive has to be seen in this context – as part of the EU's comprehensive approach towards protecting its financial interests.

While the Directive has only been adopted recently, it will surely not mark the end of the EU's legislative action to protect its financial interests. Not least with the reporting and assessment provision foreseen in Art. 18, the Directive will maintain a dynamic character in order to further enhance the fight against crimes affecting the financial interests of the Union in the future.

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1. Regular updates on the state of play of the negotiations have been provided in eucrim.↩
2. Six Member States voted against the Council's position at first reading of 25 April 2017, namely Cyprus, Germany, Hungary, Ireland, Malta and Poland, but they were not able to reach a blocking minority in accordance with the applicable voting rules in the legislative procedure.↩
3. Directive of 5 July 2017 (PE-CONS 32/17). Published in the Official Journal on 28 July 2017 (O.J. L 198, 28.07.2017, 29).↩
4. Based on Protocol nos. 21 and 22 of the Lisbon Treaty.↩
5. *O.J.* C 316, 27.11.1995, 48.↩
6. Protocol of 27.11.1996 (*O.J.* C 313, 23.1.1996, 1); Protocol of 29.11.1996 (*O.J.* C 151, 20.5.1997, 1; Protocol of 19 June 1997 (*O.J.* C 221, 19.7.1997, 11).↩
7. I.e. it will remain in force for Denmark and the UK.↩
8. Protection of the European Union's financial interests – Fight against fraud 2015 Annual Report, COM(2016) 472 final of 14 July 2016 and Protection of the European Union's financial interests – Fight against fraud 2014 Annual Report, COM(2015) 386 final of 31 July 2015.↩
9. Communication from the Commission and Commission staff working paper on the protection of the financial interests of the European Union by criminal law and by administrative investigations – COM(2011) 293 final of 26 May 2011 and SEC(2011) 621 final of 26 May 2011.↩
10. Cf. V. Jourova, "The Cost(s) of Non-Europe in the Area of Freedom, Security and Justice – The European Public Prosecutor's Office as a Guardian of the European Taxpayers' Money," (2016) *eucrim*, 94 et seqq. with further references.↩
11. Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.↩
12. For the contents of the proposal and its background, see also L. Kuhl, "The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law", (2012) *eucrim*, 63-66.↩
13. General Approach on the PIF Directive of 10 June 2013 (Council document: 10729/13).↩
14. Cf. European Parliament position at first reading of 16 April 2014, Document P7_TA(2014)0427.↩
15. See also T. Wahl, eucrim 2016, p. 9.↩
16. General Approach on the PIF Directive of 10 June 2013 (Council document: 10729/13).↩

17. Cf. European Parliament position at first reading of 16 April 2014, Document P7_TA(2014)0427.↩
18. Judgment of the Court (Grand Chamber) of 8 September 2015, case C-105/14, *Ivo Taricco and others*.↩
19. See below 3.↩
20. Point 3.1 of the Explanatory Memorandum of COM(2012) 363 final (op. cit. (n. 11)).↩
21. Opinion of the Legal Service of 22 October 2012 (Council document: 15309/12).↩
22. Point 10 of the Opinion, op cit. .↩
23. Points 11 and 12 of the Opinion, op. cit. .↩
24. With the change to Art. 83(2) TFEU as the legal basis the ordinary legislative procedure remained, however, with the procedural specificities foreseen in Art. 83(3) TFEU (the so called "emergency break").↩
25. The Parliament agreed to change the legal basis in its position at first reading of 16 April 2014, following an opinion of the Parliament's Committee on Legal Affairs of 27 November 2012, which considered that Art. 83(2) TFEU was a *lex specialis* with regard to Art. 325(4) TFEU, cf. document PE500.747v02-00, included in the Parliament's report of 25 March 2014 (A7-0251/2014). On 22 May 2013 the Legal Service of the Parliament issued a legal opinion on the consequences of this choice, without taking a position as to its correctness, cf. document SJ-0320/13.↩
26. The area of the protection of the Union's financial interests has been already subject of harmonisation measures, such as Regulation No 2988/95 relating to homogenous checks and to administrative measures and penalties.↩
27. Cf. footnotes 5 and 6 above.↩
28. Regulation No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (*O.J.* L 298, 26.10.2012, 1).↩
29. Cf. Articles 101, 117 and 190 of Regulation No 966/2012.↩
30. Explanatory Report on the Convention on the protection of the European Communities' financial interests, approved by the Council on 26 May 1997 (*O.J.* C 191, 23.06.1997,1); in the report, see in particular the explanations relating to Article 1(1) of the Convention (*O.J.* C 191,23.06.1997, 4, last paragraph).↩
31. CJEU, *Taricco,* op. cit. (n. 18), para. 41.↩
32. CJEU, 15 November 2011, case C-539/09,-*European Commission v Federal Republic of Germany*, para. 72; CJEU, 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 26).↩
33. CJEU, *Taricco,* op. cit. (n. 18), para. 39.↩
34. CJEU, *Taricco,* op. cit. (n. 18), para. 43 .↩
35. Cf. Opinion of Advocate General *Kokott*, 30 April 2015, case C-105/14, *Ivo Taricco and Others*, para. 97.↩
36. AG Kokott continued by stating that this was made apparent from the very outset by the additional protocol to the PIF Convention, which empowered the Court to interpret that convention. Today, this follows from the second sentence of Article 19(1) TEU, Article 19(3) TEU, and Article 267 TFEU.↩
37. See also T. Wahl, (2016) *eucrim*, 158.↩
38. *O.J.* L 141, 5.6.2015, 73.↩
39. Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM(2016) 826 final of 21 December 2016. See also T. Wahl, (2016) *eucrim*, 159.↩
40. European Currency Unit.↩
41. A general approach was reached by 20 Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain, and Slovenia) on the basis of the draft Regulation implementing enhanced cooperation on the establishment of the EPPO of 2 June 2017 (Council document: 9545/2/17). See also the news section in this issue.↩
42. European Commission press release IP/17/1550 of 8 June 2017 (http://europa.eu/rapid/press-release_IP-17-1550_en.htm) and Council of the EU press release 333/17 of 8 June 2017. (http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-eppo/).↩
43. Article 22 of the draft EPPO Regulation of 30 June 2017 (Council document: 9941/17).↩
44. These points were also raised by the Committee of the Regions in its opinion of 30 January 2014 (2014/C 126/10) as well as by some Member States.↩
45. Article 117 of the draft EPPO Regulation of 30 June 2017 (Council document: 9941/17).↩
46. Article 17 of the PIF Directive.↩
47. Of course OLAF will continue as before in respect of Member States which do not participate in the EPPO.↩

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