



INSIGHT

DIRECTIVE (EU) 2017/1371
ON THE FIGHT AGAINST FRAUD
TO THE UNION'S FINANCIAL INTERESTS
BY MEANS OF CRIMINAL LAW: A MISSED GOAL?

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ABSTRACT: This *Insight* analyses the so-called PIF Directive (i.e. Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law). The aim of the PIF Directive is to strengthen the protection of the financial interests of the Union and to counter fraud and other illegal activities affecting them, as required by Art. 325 TFEU. Given the diverging national criminal rules concerning fraud and other illegal activities affecting the financial interests of the Union and the unfair divergence of sanctions among Member States, the Directive seeks particularly to achieve this objective by harmonising the definitions, sanctions and prescription periods of the offences affecting the Union's financial interests. The PIF Directive is furthermore strictly intertwined with the Regulation establishing the European Public Prosecutor's Office ("EPPO"), as the latter's material competence is defined by reference to the PIF Directive. In this context, it seems therefore particularly important to assess whether the objectives which the Directive sought to achieve have been fulfilled. To this purpose, it is first briefly examined the legal background and the legal basis by virtue of which the Directive is adopted (II), its scope of application and content (III), as well as its repercussion on the competence of the EPPO (IV). Finally, in the conclusion, are summarised the findings of the analysis.

KEYWORDS: protection of the financial interests of the Union by means of criminal law – PIF Directive – material competence of the EPPO – VAT fraud – relationship between Arts 325 and 83 TFEU – harmonisation criminal offences and sanctions.

I. INTRODUCTION

The need of protecting the financial interests of the European Community emerged in the 1970s, when own resources had been allocated to the former European Economic

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Community.¹ At present, there are three types of own resources of the European Union (the sources of revenue of the EU budget are set out in a recently adopted Council decision²): traditional own resources consisting of levies, premiums, customs duties on imports established in respect of trade with third countries and sugar levies; own resources based on a fixed-rate portion of the valued added tax (VAT) collected by the Member States (hereinafter “MSs”); own resources deriving from the transferring of a standard percentage of each Member State’s gross national income (GNI) to the EU.

However, since the creation of the Community’s own resources, fraud and other criminal offences affecting the financial interests of the Union have developed in parallel. Therefore, in the last forty years, an EU *acquis* in the field of protection of the Union’s financial interests by means of criminal law has been developed.³ It has nevertheless been proved that the measures against fraud affecting the financial interests of the Union “have not reached the necessary level of deterrence” and that “there is no equivalent protection of the Union’s financial interests” on the EU territory.⁴

It is in this context that in July 2017, after long negotiations, the EU Directive “on the fight against fraud to the Union’s financial interests by means of criminal law” (“PIF Directive”) was finally adopted.⁵ The aim of the PIF Directive is to strengthen the protection of the financial interests of the Union and to counter fraud and other illegal activities affecting them,⁶ as required by Art. 325 TFEU. Given the diverging national criminal rules concerning fraud and other illegal activities affecting the financial interests of the Union, the unfair divergence of sanctions among MSs and the “consequently often diverging levels of protection”,⁷ the Directive seeks particularly to achieve the above-

¹ Decision 70/243/ECSC of the Council of 21 April 1970 on the replacement of financial contributions from Member States by the Communities’ own resources.

² Decision 2014/335/EU of the Council of 26 May 2014 on the system of own resources of the European Union.

³ Council of the European Union: Act of 26 July 1995 drawing up the Convention on the protection of the European Communities’ financial interests (PIF Convention); Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities’ financial interests (First Protocol); Act of 26 May 1997 drawing up the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union; Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities’ financial interests (Second Protocol).

⁴ Commission 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, pp. 2-4; Commission Staff Working Paper Impact Assessment SWD(2012)195 final Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, p. 8.

⁵ Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (hereinafter “PIF Directive”).

⁶ Art. 1 PIF Directive.

⁷ Proposal for a Directive COM(2012)363 final, cit., pp. 2-4; Impact Assessment SWD(2012)195 final, cit., p. 8.

mentioned main objective by harmonising the definitions, sanctions and prescription periods of the offences affecting the Union's financial interests. The PIF Directive is furthermore strictly intertwined with the Regulation establishing the European Public Prosecutor's Office ("EPPO"), as the latter's material competence is defined by reference to the PIF Directive.⁸

Given the relevance of the Directive for the protection of the Union's financial interests, this contribution aims to assess whether the objectives which the Directive sought to achieve have been fulfilled. For this purpose, the legal background and the legal basis by virtue of which the Directive was adopted are examined in Section II, and its scope of application and content are examined in Section III. Section IV analyses the repercussions on the competence of the EPPO, and the final section summarises the findings of this analysis.

II. LEGISLATIVE BACKGROUND AND CHOICE OF THE LEGAL BASIS

The first criminal law measures aimed at protecting the Community's financial interests date back to 1995, when the Convention for the protection of the financial interests of the European Communities and its accompanying protocols (hereinafter collectively referred to as "PIF Convention") were adopted under the third pillar.⁹ Subsequently, in response to the delays in ratification of these instruments, the Commission issued a first pillar proposal for a directive on criminal law protection of the Community's financial interests aimed at harmonising the MSs' criminal law provisions.¹⁰ The use of Art. 280 of the Treaty establishing the European Community (TEC) as legal basis of the Proposal was nevertheless considered not appropriate by the Council, which did not take the proposal forward.

After the entry into force of the Lisbon Treaty, which abolished the three-pillars structure and introduced a new distribution of competence between the EU and the MSs, a new proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law was issued by the Commission in July 2012.¹¹ It was particularly issued on the basis of Art. 325, para. 4, TFEU, which, unlike its precursor, does not preclude the EU from taking measures concerning the "application of national criminal law and the administration of justice".¹² The text of the Commission Proposal has been amended significantly during the negotiations within the Council and in Octo-

⁸ Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"): hereinafter, "the EPPO Regulation".

⁹ PIF Convention, cit.; First Protocol, cit.; Second Protocol, cit.

¹⁰ Commission Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Community's financial interests, COM(2001)272 final.

¹¹ Proposal for a Directive COM(2012)363 final, cit.

¹² This limitation was provided for by Art. 280, para. 4, TEC.

ber 2016 was eventually reached a preliminary compromise agreement on the full text of the PIF Directive, then in July 2017 was finally adopted the PIF Directive.

In this section, a brief overview of the repercussions deriving from the use of a certain provision instead of another as legal basis of the Directive is given. The choice of the legal basis has been a delicate and contested issue from the very first time the Commission issued its initial proposal in 2012. The Legal Service of the Council did not share from the beginning the Commission's opinion that the Directive should be based on Art. 325, para. 4, TFEU, as in its opinion the appropriate legal basis was Art. 83, para. 2, TFEU. There are multiple and significant repercussions stemming from the choice of one instead of the other legal basis and that is one of the main reasons which led the Council to strenuously oppose the Commission. Arts 83, para. 2, and 325 TFEU are two very different provisions, both in respect of the objectives pursued and of the powers conferred to the EU legislator.

Art. 325 is the sole Article of Chapter Six, dedicated to "combatting fraud", of Title II of Part Six of the TFEU, which is devoted to the financial provisions concerning the Union's own resources. It explicitly imposes an obligation on the Union and the MSs to "counter fraud and any other illegal activities affecting the financial interests of the Union through measures [...], which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies". Thus, the Commission chose Art. 325, para. 4, TFEU as the legal basis of the PIF Directive due to the specific objectives that it wanted to achieve with its adoption, namely the effective protection of the Union's financial interests by means of criminal law. Art. 325, para. 4, TFEU, in the Commission's view, allows in fact the EU legislator itself, when it is necessary and the principle of proportionality and subsidiarity are respected, to adopt any kind of measures, including criminal ones, to achieve the objective of preventing and fighting against fraud affecting the financial interests of the Union. In the Commission's opinion, the deletion of the last sentence of Art. 280, para. 4, TEC, which explicitly provided that the measures taken "should not concern the application of national criminal law and the administration of justice", was a clear indicator of the fact that the EU was conferred the power to adopt criminal measures to fight fraud and other illegal activities affecting the Union's financial interests.¹³ The Commission's reasoning is based on the fact that the text of Art. 280, para. 4, TEC was entirely transposed into Art. 325 TFEU apart from the final sentence; in its opinion, therefore, the deletion of the last sentence of Art. 280, para. 4, TEC was a clear hint that the Member States intended to confer on the EU the power to adopt criminal measures to fight fraud and other illegal activities affecting the financial interests of the EU by means of criminal law.

This view has been nevertheless criticised by Council and the European Parliament, who argued in favour of Art. 83, para. 2, TFEU as the appropriate legal basis for adopt-

¹³ Proposal COM(2012)363 final, cit., p. 7.

ing the PIF Directive.¹⁴ The Council argued that Art. 83, para. 2, TFEU is the specific provision included in the Treaty to “tackle all cases where the EU legislature needs to harmonise the definition of criminal offences and sanctions in order to make other (non-criminal law) EU harmonised measures more effective”.¹⁵ In support of this view, it argued that the deletion of the last sentence of the former Art. 280 TEC could not be interpreted “as establishing a special criminal law regime to flank exclusively Article 325 TFEU measures”¹⁶ and that Art. 325 TFEU could not be considered a *lex specialis* in respect of Art. 83, para. 2, TFEU.¹⁷ On the contrary, in the Council's opinion, Art. 83, para. 2, TFEU is a *lex specialis*¹⁸ for the harmonisation of national criminal law.¹⁹ On the basis of such arguments, the Council changed the legal basis of the PIF Directive from Art. 325 TFEU to Art. 83, para. 2, TFEU.²⁰

However, in the Author's view the arguments expressed by the Legal Service of the Council are not convincing because of the following reasons. In the first place, the main argument, i.e. the fact that criminal sanctions aimed at protecting the financial interests of the Union might not be based on Art. 325 TFEU, but only on Art. 83 TFEU, has been proven to be false by the jurisprudence of the Court of Justice. In this regard, the Court particularly stated that Art. 325 TFEU imposes an obligation for the MSs to counter illegal activities affecting the financial interests of the EU through effective deterrent measures²¹ and that from Art. 325 TFEU derives a precise obligation for the EU and the MSs to adopt criminal penalties for combating, at least, the more serious offences affecting the financial interests of the EU.²² Art. 325 TFEU represents therefore the legal basis which allows the EU legislator to define criminal offences affecting the financial interests of the Union and the relative sanctions in a EU instrument adopted to that purpose.²³ The deletion of the last sentence of the former Art. 280, para. 4, TEC is a

¹⁴ Opinion of 22 October 2012 of the Legal Service of the Council, doc. 15309/12.

¹⁵ *Ibid.*, point 12.

¹⁶ *Ibid.*, point 14.

¹⁷ *Ibid.*, point 15.

¹⁸ *Ibid.*, point 15.

¹⁹ *Ibid.*, point 18. See also Opinion of 27 November 2012 of the Parliament's Committee on Legal Affairs, doc. PE500.747V02-00.

²⁰ The European Parliament agreed with the Council. See Opinion of 27 November 2012 of the Parliament's Committee on Legal Affairs.

²¹ Court of Justice: judgment of 8 September 2015, case C-105/14, *Taricco et al.*, para. 37; judgment of 26 February 2013, case C-617/10, *Akerberg Fransson*, para. 26; judgment of 5 December 2017, case C-42/17, *M.A.S and M.B. (Taricco bis)*, para. 30.

²² *Taricco et al.*, cit., para. 39; *Taricco bis*, cit., para. 34.

²³ In the same vein, see A. JUSZCZAK, 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?*, in *EuCrIm: the European Criminal Law Associations' forum*, 2017, p. 80 *et seq.*

clear indication in that sense.²⁴ Art. 325 TFEU, therefore, represents a *lex specialis* in the field of the protection of the Unions' financial interests compared to Art. 83, para. 2, TFEU, which is a general legal basis which can be used in conjunction with any substantive Treaty provision for the adoption of minimum criminal rules with regard to the definition of criminal offences and sanctions in a given area.²⁵ A different interpretation of Art. 325 TFEU would deprive this provision of its *effet utile* and would therefore not be acceptable. The useful effect of Art. 325 TFEU, which is to ensure the most effective protection of Union's financial interests, would in fact be weakened if it was interpreted as a provision which does not give the EU legislator the competence to protect its own financial interests by means of criminal law, when necessary.

The choice of Art. 83, para. 2, TFEU instead of Art. 325 TFEU as a legal basis for the Directive is not without consequences. In the first place, the specific requirements, as well as the specific limitations imposed by Art. 83, para. 2, TFEU apply, if the PIF Directive is adopted on the basis of this provision. Thus, firstly, national criminal laws may be harmonised only if their approximation "proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures".²⁶ The essentiality of criminal measures to ensure the effective protection of the Union's financial interests should therefore be proved, as well as the existence of harmonisation measures in this area of EU law. Secondly, only "*minimum rules* with regard to the definition of criminal offences and sanctions in the area concerned" may be adopted. Thirdly, these measures may be adopted only by means of directives.²⁷ These limitations are not required by Art. 325 TFEU. Firstly, it does not require to prove that criminal measures are essential, but only that these measures are "necessary" to ensure an effective and equivalent protection of the Union's financial interests in the MSs and in all the Union's bodies.²⁸ Secondly, it does not limit the EU competence to adopt "minimum rules" regarding the definition of criminal offences affecting the financial interests of the Union and relative sanctions; therefore, the degree of harmonisation could be substantively higher than this resulting from Art. 83, para. 2, TFEU. In the third place, it does not specify which kind of measures should be adopted, with the result that the EU legislator could use a regulation to define which offences affecting the financial interests of the EU should be criminalised and which penalties should be adopted to sanction the perpetrators of these offences. In the second place, on a procedural level, while Art. 83, para. 3, TFEU establishes a special mechanism of "emergency break"

²⁴ *Ibid.*, p. 82.

²⁵ In the same vein, see L. PICOTTI, *Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto della competenza della procura europea*, in *Diritto penale contemporaneo*, 13 novembre 2013, www.penalecontemporaneo.it, p. 20 *et seq.*

²⁶ Art. 83, para. 2, TFEU.

²⁷ *Ibid.*, emphasis added.

²⁸ Art. 325, para. 4, TFEU.

according to which the ordinary procedure is suspended if a member of the Council considers that a draft directive “would affect fundamental aspects of its criminal justice system”,²⁹ Art. 325 TFEU does not provide for such a mechanism. In the third place, since Art. 83, para. 2, is part of Title V of part Three of the TFEU, the PIF Directive would fall within the scope of application of Protocols 21 and 22 annexed to the Treaties, thus not being applicable to Denmark, to the UK and Ireland, unless the UK or Ireland decide to participate in its adoption. So far, only Ireland has notified its intention of taking part in the adoption and application of the PIF Directive.³⁰ Thus, Denmark will continue to be bound by the PIF Convention, while the UK will not be bound by any EU act which criminalises offences committed against the financial interests of the Union.³¹

III. CONTENT OF THE DIRECTIVE

III.1. OFFENCES AFFECTING THE FINANCIAL INTERESTS OF THE UNION FALLING WITHIN THE SCOPE OF APPLICATION OF THE PIF DIRECTIVE

As provided for in Art. 1 of the PIF Directive, it aims at establishing “minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests [...]”.

As far as the scope of application of the PIF Directive is concerned, Art. 2, para. 2, read in conjunction with Art. 3, para. 2, let. d), explicitly delimits the scope of application of the Directive in respect of VAT fraud. The question of whether VAT fraud should fall within the scope of the Directive and, if so, to what extent, was one of the most debated question during the negotiations, which almost led to the failure of the whole Directive. The final inclusion of a limited number of VAT offences in the final text of the Directive is the result of a compromise between the Council, on the one hand, and the Commission and the European Parliament on the other hand; a compromise was finally reached after the ruling of the Court of Justice in the *Taricco* judgment.³²

The Court in reality had already held in previous judgments that the Union's own resources include VAT revenue.³³ Nonetheless, the Council insisted on arguing that VAT revenue was mostly a national interest and that, therefore, should be excluded from the scope of the PIF Directive.³⁴ On the contrary, in the European Parliament and Com-

²⁹ The procedure applicable in this case is described in Art. 83, para. 3, TFEU.

³⁰ Recital 36 of the PIF Directive.

³¹ The UK since 2014 is not bound by the PIF Convention.

³² *Taricco et al.*, cit.

³³ Court of Justice, judgment of 15 November 2011, case C-539/09, *Commission v. Germany*, para. 72; *Akerberg Fransson*, cit., para. 26.

³⁴ Art. 2 of Council of the European Union, 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 – General approach, 6 June 2013, doc. 10729/13.

mission's view the exclusion of VAT fraud from the scope of the Directive would represent "a backward step from the existing PIF framework and an undesirable limitation of the range of action of the future European Public Prosecutor's Office".³⁵ These diverging positions were composed only after the *Taricco* judgment, where the Court not only repeated what it had already established in previous occasions, but also stated that criminal penalties may be essential "to combat certain serious cases of VAT evasion in an effective and dissuasive manner".³⁶ Thus, after this judgment, there was no doubt that criminal penalties against VAT fraud should be included within the scope of a Directive concerning the fight against fraud to the Union's financial interests by means of criminal law. However, even after this judgment many MSs within the Council did not agree on including VAT fraud in the scope of the PIF Directive. It is only after various technical and political meetings that, in October 2016, a compromise was reached.

The solution adopted is nevertheless not completely satisfactory. According to it, not all VAT fraud cases, but only the most serious offences against VAT fall within the scope of the PIF Directive.³⁷ In particular, the Directive applies only to those offences which are the result of an intentional act or omission against the common VAT system, which are connected to the territory of two or more MSs and involve a total damage of at least 10 millions of euro.³⁸ Only the most serious forms of VAT fraud, such as VAT carousel fraud, Missing-Trader Intra-EU Fraud (MTIC fraud), VAT fraud carried out by organised crime structures, or cases above a certain threshold, are therefore included in this definition. The scope of application of the PIF Directive is consequently narrower than that of the PIF Convention. Art. 2 of the PIF Convention, as interpreted by the Court of Justice, covers in fact all the VAT fraud,³⁹ and not only the most serious offences against the common VAT system. However, the theoretical possibility of maintaining the PIF Convention in force for VAT fraud offences only while having the PIF Directive application for the other offences falling within its scope of application would not be effective as it would create a complex patchwork of legal instruments regulating the offences affecting the Union's financial interests.⁴⁰

Thus, the added value of the PIF Directive is weakened by its limited scope of application, but it is also weakened by the extensive leeway left to the MSs in defining the offences affecting the financial interests of the Union. As regards VAT fraud, for in-

³⁵ Council of the European Union, Informal Justice and Home Affairs Ministers' meeting, Discussion paper – 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, 9-10 July 2015, available at www.statewatch.org, p. 1.

³⁶ *Taricco et al.*, cit., para. 39.

³⁷ See Art. 2, para. 2, read in conjunction with art. 3, para. 2, let. d), of the PIF Directive.

³⁸ See, about the assessment of appropriateness of the indicated threshold, Art. 18, para. 4, of the PIF Directive. About the definition of "total damage", see recital 4 of the PIF Directive.

³⁹ *Taricco et al.*, cit., para. 41.

⁴⁰ See A. JUSZCZAK, E. SASON, *The Directive on the Fight*, cit., p. 83.

stance, the concept of “damage” is not defined in the Directive and considering that it is a legal concept defined in different ways by the MSs, the definition of VAT fraud will vary to a considerable extent across the EU. Therefore, until an autonomous definition of this notion is given by the Court, the scope of the PIF Directive will depend on the way the MSs decide to implement it. The illustration above is but one example of how the Directive leaves a considerable leeway to the MSs. Another example of the extensive leeway left to the MSs and of the negative consequences this entails is to be found article 5 of the Directive concerning incitement, aiding and abetting, and attempt. In this regard, the Directive stipulates that MSs “shall take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences”.⁴¹ However, the same provision does not give a definition of these notions, does not specify further which kind of criminal offences should be created to punish the inciting, aiding, abetting and attempt, and, finally, it does not establish a minimum threshold of the sanctions that MSs are asked to adopt to punish said conducts.⁴² Therefore, the MSs’ legislations implementing Art. 5 of the PIF Directive would differ considerably and the objective of harmonising the legal definition of the offences affecting the financial interests of the Union would be obtained only to a minimum extent.

From the considerations above, it can therefore be concluded that the objective pursued by the PIF Directive to create a comprehensive common legal framework for the offences affecting the Union’s financial interests is fulfilled only to a minimum extent and that the large discretion left to the MSs in implementing it risks watering down the minimum harmonisation envisaged by the Directive.

III.2. SANCTIONS

The definition of a harmonised set of sanctions is essential to ensure an effective and equivalent protection of the Union’s financial interests in the MSs and in all the Union’s bodies. In the absence of uniform level of penalties, the risk of non-homogeneous protection of the Union’s financial interests throughout the EU and the consequent risk of *forum shopping* is high. The perpetrators of offences against the financial interests of the Union could in fact decide to commit the offence in a State where the sanctions regime is more lenient. The degree of deterrence of the system of penalties adopted in

⁴¹ Art. 5 of the PIF Directive.

⁴² Furthermore, a considerable leeway is left to the MSs in implementing the Directive also in respect of the other criminal offences affecting the Union’s financial interests there regulated (Art. 4 of the PIF Directive). Among them, some are in line with the *acquis* of the PIF Convention, some others have been improved in the Directive, while a new offence of misappropriation has been introduced. The final text of the Directive is nevertheless the result of a compromise and the most far-reaching provisions included by the Commission in its initial proposal, such as the offence of abuse of public procurement procedures (see Art. 4, para. 1, of Proposal COM(2012)363 final, cit.), have not been finally included in the PIF Directive.

the Directive is therefore strictly connected to the establishment of a uniform level of penalties throughout the EU territory.

However, the Directive achieves only partially the objective of creating a uniform sanctioning regime regarding the offences affecting the financial interests of the Union. Art. 7, para. 1, of the PIF Directive merely repeats the formula generally adopted since the ruling of the Court in the *Greek maize* case,⁴³ i.e. that the offences should be punished by means of effective, proportionate and dissuasive criminal sanctions; it does not describe either the level or the type of criminal sanctions that should be applied. Some indications about the type and level of criminal penalties to be adopted by the MSs are given in the next paras of the same Art. 7, where it is established that MSs should ensure that the offences referred to in the previous articles are punishable “by a maximum penalty which provides for imprisonment”⁴⁴ and “by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage”.⁴⁵ The meaning of the term “considerable” is explained in the same article,⁴⁶ which also specifies that MSs “may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law”.⁴⁷ Thus, the definition of the circumstances which allow the adoption of a maximum sanction of at least four years of imprisonment depends once again on the national legislation implementing the PIF Directive.

Regarding the level of sanctions, the Directive has provided for a “minimum maximum sanction” of four years of imprisonment, but it has not set out minimum imprisonment terms for particularly serious offences, as proposed by the Commission in its initial proposal.⁴⁸ According to the Commission’s opinion, “[e]conomic crime – including fraud – is typically an area where criminal sanctions can have a particularly deterrent effect, as potential perpetrators can be expected to make a certain calculation of risks before deciding to engage in such criminal activities”. The introduction of minimum sanctions was consequently “considered necessary to ensure that an effective deterrence all over Europe” could be achieved.⁴⁹ The minimum threshold was fixed by the Commission to three months imprisonment, since in its view it was a proportionate period in relation to the seriousness of the offences and it could ensure that a European

⁴³ Court of Justice, judgment of 21 September 1989, case 68/88, *Commission v. Hellenic Republic*.

⁴⁴ Art. 7, para. 2, of the PIF Directive.

⁴⁵ *Ibid.*, Art. 7, para. 3.

⁴⁶ *Ibid.*

⁴⁷ Art. 7, para. 4, of the PIF Directive provides for a criminalisation threshold (10.000 euro) below which the MSs “may provide for sanctions other than criminal sanctions”.

⁴⁸ Art. 8, para. 1, of Proposal COM(2012)363 final, cit.

⁴⁹ Proposal COM(2012)363 final, cit., p. 10.

Arrest Warrant was issued and executed.⁵⁰ Nonetheless, the final text of the Directive does not provide for minimum sanctions.

Therefore, from the analysis above it can be concluded that the minimum harmonisation envisaged by the Directive does not eliminate the diverging sanctioning regime currently in existence; it could, therefore, easily happen that the same offence is punished by three months' imprisonment in one MS and by six years' imprisonment in another.⁵¹

III.3. LIMITATION PERIODS

An important innovation introduced by the Directive concerns the partial harmonisation of the limitation rules applicable to criminal proceedings related to offences affecting the financial interests of the Union. However, even in this regard, the provision concerning the "limitation periods for criminal offences affecting the Union's financial interests" included in the PIF Directive does not harmonise national rules on limitation periods as it could be. Art. 12, para. 1, of the PIF Directive provides for a general obligation for the MSs "to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively". A more specific limitation period of five years from the time when the offence is committed has been established for those serious offences punishable by a maximum sanction of at least four years of imprisonment.⁵² The harmonisation of limitation rules set down in the PIF Directive is therefore partial and far from providing a common definition of limitation rules at the EU level.⁵³

However, in this regard, the Court stated in a recent judgment that MSs are in breach of their obligations under Art. 325, paras 1 and 2, TFEU if the limitation rules laid down by national law do not allow effective punishment of the perpetrators of serious VAT fraud.⁵⁴ Furthermore, it stated that, in order to "give full effect to the obligations under Article 325(1) and (2) TFEU" it is for the national competent courts to "disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union",⁵⁵ and that the national provisions concerning limitation period are to be regarded as liable to have an adverse effect on the fulfilment of the obligations of the MSs concerned under Art. 325, paras 1 and 2,

⁵⁰ See Art. 2 of Council Framework Decision 2002/584/JHA of 13 June on the European arrest warrant and the surrender procedures between Member States ("EAW Framework Decision").

⁵¹ See, about the considerable different levels of punishment in the MSs, Proposal COM(2012)363 final, cit.

⁵² Art. 12, para. 2, of the PIF Directive.

⁵³ As it has also been stated by the Court of Justice in the case *Taricco bis*, cit., para. 44.

⁵⁴ *Ibid.*, para. 36.

⁵⁵ *Ibid.*, para. 39.

TFEU if they prevent “the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union”, or provide “for shorter limitation periods for cases of fraud affecting those interests than for those affecting the financial interests of that Member State”.⁵⁶

The harmonisation at the EU level of the rules on limitation periods is therefore essential to avoid that the application of effective and deterrent measures to protect the financial interests of the Union are hindered by national rules providing for shorter limitation periods or by national rules providing for the suspension or interruption of limitation periods in cases of fraud affecting the financial interests of the Union.

The concepts of suspension and interruption of the limitation period, which are essential in order to determine when an offence will become time-barred, are nevertheless not defined in the Directive contrary to what was proposed by AG Bot in his opinion in *Taricco bis*, where he argued that an autonomous EU definition of the concept of interruption of limitation period should be developed at EU level.⁵⁷ As a result, divergent rules concerning limitation periods will continue to exist in the different MSs and, as a consequence, the risk of not giving full effect to the obligations under Art. 325, paras 1 and 2, TFEU will persist, since national rules may provide for shorter limitation periods for offences affecting the financial interests of the EU compared to the offences affecting national financial interests. Furthermore, MSs may provide in their national legislation for rules on suspension and interruption of limitation periods that lead to impunity in a significant number of cases, thus not ensuring an effective protection of the financial interests of the EU as required by Art. 325 TFEU.

IV. PIF DIRECTIVE AND EPPO

The definition of the scope and content of the PIF Directive entails considerable consequences also in respect of the EPPO, considering that its material competence is determined by reference to the PIF Directive, “as implemented by national law”.⁵⁸ Due to space constraints and not to go beyond the scope of the analysis, neither the structure nor the powers conferred to the EPPO are examined by this contribution.⁵⁹ This section will only

⁵⁶ *Ibid.*, para. 40.

⁵⁷ Opinion of AG Bot delivered on 18 July 2017, case C-42/17, *M.A.S and M.B. (Taricco bis)*, para. 101.

⁵⁸ Art. 22 of Regulation 2017/1939, cit.

⁵⁹ See, for an in-depth analysis, ex multis, M. ZWIERS, *The European Public Prosecutor's Office: Analysis of a Multilevel Criminal Justice System*, Antwerpen: Intersentia, 2011; K. LIGETI, *The European Public Prosecutor's Office: Which Model?*, in A. KLIP (ed.), *Substantive Criminal Law of the European Union*, Antwerpen, Apeldoorn, Portland: Maklu, 2011, p. 51 *et seq.*; K. LIGETI, M. SIMONATO, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, in *New Journal of European Criminal Law*, 2013, pp. 10-12; K. LIGETI (ed.), *Toward a Prosecutor for the European Union – Volume I: A Comparative Analysis*, Oxford: Hart Publishing, 2013; L.H. ERKELENS, A. MEIJ, M. PAWLIK (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, The Hague: T.M.C. Asser Press, 2015; A.

address the repercussions that the adoption of the PIF Directive entail on the EPPO. As it results from the foregoing analysis, the PIF Directive provides only for “a very minimalistic degree of minimum harmonisation”.⁶⁰ The competence of the EPPO, therefore, will be defined by reference to the national law of the MSs implementing it. Furthermore, the MSs have a considerable leeway when it comes to the implementation of the Directive. The existing diverging rules on the level of sanctions and on the definition of the offences affecting the Union’s financial interests falling within the EPPO’s competence, consequently, will continue to exist unaltered and the definition of the offences falling within the EPPO’s mandate will rely on a patchwork of different national laws.

As a result, not only the effective prosecution of the perpetrators of the offences affecting the financial interests of the Union is at risk,⁶¹ but also the fundamental rights of the suspect involved in the proceedings of the EPPO risk being undermined. The suspects, especially in cross-border cases, will have great difficulties in knowing which law is applicable, for which offences they can be held responsible and which penalty would be applied in the specific case. Pursuant to applicable national laws the same action could be considered a criminal offence in one MS, but not in another. The position is the same as regards penalties: the same action may be considered a criminal offence punishable by one year’s imprisonment in one MS, while it could be punishable by a sanction of three years’ imprisonment in another one. This does not only increase the risk of *forum shopping* by the EPPO, which could choose the law of a MS which provides a higher penalty, but it also undermines the fundamental rights of the suspects, namely the principle of legal certainty, the right of the defence and the right to a fair trial. That is because, especially when the applicable law changes in the course of investigations, as it could happen according to the EPPO Regulation,⁶² the defendant is required to prepare his/her line of defence at a later stage of the proceedings according to a different law compared to the one of the MS where investigations had been initiated. In this regard, the principle of legal certainty risks being undermined as the defendant cannot

WEYEMBERGH, C. BRIERE, *Towards a European Public Prosecutor’s Office (EPPO)*, Study for the LIBE Committee, www.europarl.europa.eu, 2016; W. GEELHOED, L.H. ERKELENS, A. MEIJ (eds), *Shifting Perspectives on the European Public Prosecutor’s Office*, The Hague: T.M.C. Asser Press, 2018.

⁶⁰ J.A.E. VERVAELE, *The material scope of competence of the European Public Prosecutor’s Office: Lex incerta and unpraevia*, in *ERA Forum Journal of the Academy of European Law*, 2014, p. 97.

⁶¹ See K. LIGETI, *Approximation of substantive criminal law and the establishment of the EPPO*, in F. GALLI, A. WEYEMBERGH (eds), *Approximation of substantive criminal law in the EU. The way forward*, Brussels: Éditions de l’Université de Bruxelles, 2013, p. 82.

⁶² This scenario is possible by virtue the combination of Arts 26, 31 and 36 and of the EPPO Regulation. According to the EPPO Regulation it is possible that during the investigations the case is allocated to a European Delegated Prosecutor of a different Member State from that where investigations were initiated; alternatively, the case may also be brought to prosecution in a different Member State.

foresee in advance the applicable law and the relevant penalties,⁶³ and the right of the defence is at risk as the defendant cannot prepare in advance his/her line of defence with the result that also the right to a fair trial risks being undermined.

V. CONCLUSION

From the foregoing analysis it emerges that, although the PIF Directive represents an important step to improve the protection of the Union's financial interests, the compromise, which is what the final text of the Directive amounts to, does not achieve the objectives which it was supposed to fulfil, namely the elimination of the patchy legal framework concerning the offences affecting the financial interests of the Union and the relative penalties. The degree of harmonisation provided for in the Directive is in fact minimum and the definition of offences and sanctions in regard of illegal activities affecting the financial interests of the Union will continue to depend largely on the national rules implementing the Directive. As a result, the objective of strengthening the protection of the financial interests of the Union and of countering fraud and other illegal activities affecting them by means of harmonising the definitions, sanctions and prescription periods of the offences affecting the Union's financial interests, which was deemed to be the main objective of the Directive, is not achieved. The protection of the Union's financial interests will continue to be fragmented and diverging levels of sanctions and protection will continue to apply in the EU territory. In fact, compared to the previous legal framework the Directive will bring minimal improvements.

Furthermore, such a minimum harmonisation would also affect the effectiveness of the EPPO's investigations and prosecutions, considering that its competence is defined

⁶³ The principle of legal certainty, strictly linked, among the others, with the right to a fair trial, according to the Court of Justice, encompasses both substantive and procedural criminal law and requires that "that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly" (in this sense, see Court of Justice, judgment of 3 June 2008, case C-308/06, *Intertanko and Others*, para. 69). As regards, the principle of legality *per se*, the European Court of Human Rights, as well as the Court of Justice, repeated in numerous occasions that in order for the principle of legality to be respected, the law should meet the requirements of accessibility and foreseeability. See, in this regard, European Court of Human Rights: judgment of 22 June 2000, no. 32492/96, 32547/96, 32548/96, 33209/96 e 33210/96, *Coëme et al. v. Belgium*, para. 145; judgments of 22 November 1995, no. 20166/92 and no. 20190/92, *S.W. v. United Kingdom and CR. v. United Kingdom*, paras 34-36 and 32-34; judgment of 15 November 1996, no. 17862/91, *Cantoni v. France*, paras. 29 to 32. General Court, judgment of 5 April 2006, case T-279/02, *Degussa AG v. Commission of the European Communities*; Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH et al., KE KELIT Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH e ABB Asea Brown Boveri Ltd v. Commission of the European Communities*, paras 215-219. See also M. PANZAVOLTA, *Choice of Forum and the Lawful Judge Concept*, in: M. LUCHTMAN (ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, The Hague: Eleven International Publishing, 2013, pp. 143 and 160.

by reference to the PIF Directive and, therefore, to the different national legislations implementing it. In this regard, not only the effectiveness of the EPPO's investigations and prosecutions will be affected. As it has been shown in the previous section, the rights of the suspects involved in the EPPO's proceedings, specifically the principle of legality, the right of the defence and the right to a fair trial, will likewise be endangered.

The main objective of the Directive, i.e. the adoption of an effective and equivalent legal framework throughout the MSs cannot, therefore, be considered achieved by the PIF Directive. In the light of the foregoing, and taking into account the broader scope of EU criminal law, one might perhaps wonder how likely it is that MSs will be able to harmonise criminal laws in other areas if they were not able to agree on a more extensive harmonisation of criminal offences and sanction in the PIF Directive (i.e., in a directive aimed at protecting purely European interests). In spite of the new possibilities offered by the Treaty, it seems that the MSs are not yet willing to surrender their sovereignty in order to create a proper Area of Freedom, Security and Justice where both the need to effectively prosecute the perpetrators of offences affecting the financial interest of the Union or the suspects of serious offences having a cross-border dimension and the need to protect the fundamental rights of the persons involved in the proceedings are protected. Without the willingness of the MSs to create a more integrated area of freedom, security and justice, the creation of new bodies, such as the EPPO, likewise risks being not as effective and useful as it could be.

