The protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union's financial interests*

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I. Fundamental changes in the EU's institutional framework and their impact on the fight against fraud to the Union's financial interests by means of criminal law

The protection of the EU's financial interests, particularly by means of criminal law, is now crucially affected by the characteristics and the limits of the EU's institutional operation in the field of criminal law under the Lisbon Treaty.

Compared to the status in force at the time of the PIF conclusion, the Lisbon Treaty practically elicited three fundamental changes regarding Member States:

- The first change stems from the legal instruments now employed to implement the protection of the EU's financial interests by means of criminal law. In other words, even if the Union chooses to intervene by way of a directive – rather than a regulation – to ensure the effective protection of its financial interests, transposition of the pertinent provisions into national legal systems is now binding for Member States under the threat of monetary penalty;[1] this was not the case under the PIF Convention. Hence, the content of the Directive's provisions inevitably becomes much more significant, as any deviation from its requirements may cause substantial problems for Member States.
- The second change concerns the binding nature attributed under Union law to the Charter of Fundamental Rights of the EU, particularly its institutional equivalence to the *primary* law of the Treaties and its immediate application according to ECJ case-law, even by the national judge who finds a violation.[2] This aspect is obviously of particular value to national legislators attempting to transpose an EU legal instrument into their domestic legal systems, when they detect Charter violations by the EU itself intervening in criminal law. In other words, this binding effect is now technically linked to the requirement of Member States to abide by primary Union legislation. This is why it is now instrumental to screen the content of secondary EU legislation under transposition (in this case, the said Directive) to detect possible incompatibilities with either the Charter of Fundamental Rights of the EU or the primary Union law in general.
- The third fundamental change is linked to the enhanced enforcement arsenal already envisaged in EU primary law with respect to the fight against fraud to the EU's financial interests. In such cases of fraud, general provisions on mutual recognition and facilitation of prosecutorial and judicial mechanisms of criminal justice with the help of European institutions (e.g. Europol and Eurojust) do not apply unreservedly. Art. 86 TFEU foresees the already established EPPO,[3] specifically to investigate, prosecute and refer such acts for adjudication. Through EPPO, a semi-central criminal process is now advanced, to the extent that the pre-trial stage will remain under the decisive competence of the EPPO, while the cases will be adjudicated in one of the Member States (if more than one jurisdiction are involved). This shift demonstrates the institutionally acquired efficiency of the protection of EU's financial interests within the Union, which must apparently be counterbalanced by rules ensuring that criminal suppression of EU-fraud abide by the rule of law.[4] In fact, this should be the case with respect to both substantive law (i.e. primarily at the level of substance of the Directive requiring Member States to criminalize relevant behavior) and the procedural arsenal built around the EPPO's establishment and operation.

In this broader context, this paper attempts to present the Directive's new substantive provisions on fraud against the financial interests of the EU; it will also highlight certain challenges posed to national legislators (in view of the anticipated transposition) and the Union legislator alike, with a view to improving EU legislation itself.

II. The Directive's legal basis and its significance

Before proceeding to the content of Directive (EU) 2017/1371, it is worth reviewing its legal basis, as it does not

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[1] Art 258 and 260 TFEU.

[2] See, e.g., Case C-617/10, Judgment of the Court (Grand Chamber) of 26.2.2013, Åklagaren v. Hans Åkerberg Fransson, para. 45, 46.

[3] Council Regulation (EU) 2017/1939 of 12.10.2017, Implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("The EPPO"). On the establishment of the EPPO see inter alia *Ambos*, European Criminal Law, 2018, pp. 574 et seq.; *Csonka/Juszczak/Sason*, eucrim 2017, 125; Geelhoed/Erkelens/Meij (eds.), Shifting perspectives on the European Public Prosecutor's Office, 2018; *Kuhl*, eucrim 2017, 135; *Met-Domestici*, eucrim 2017, 143; *Guiffrida*, eucrim 2017, 149; *Di Francesco Maesa*, eucrim 2017, 156.

[4] *Kaiafa-Gbandi*, in: Asp (ed.), The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives, 2015, pp. 234 et seq.

only put across an important outlook for future initiatives towards criminalization or amendments to provisions relating to the protection of the EU's financial interests by means of criminal law, but it also carries practical implications for the leeway left to Member States to react.

The Lisbon Treaty, aside from unifying the pillars into a single institutional structure, broadened the EU's competence to intervene with respect to the criminal law of Member States. Especially in regard to the criminal protection of the EU's financial interests, it is argued that the EU was granted competence not only to introduce minimum rules concerning the constituent elements of the offenses and the respective criminal sanctions via Directives, but also to define the respective offenses via regulations, i.e. on its own initiative, without the cooperation of the Member States. According to this view, apart from Art. 83, 325 (4) TFEU also provides the legal basis for the above-mentioned protection, referring specifically to combating fraud against the EU's financial interests.[5] Art. 325 (4) TFEU as it currently stands, by referring to the adoption of necessary "measures" in the field of the prevention of and fight against fraud affecting the financial interests of the EU, does not exclude the adoption of a regulation, since the term "measures" includes both directives and regulations, according to EU law and based on common practice. It is further suggested that Art. 86 (2) TFEU on the European Public Prosecutor's Office also provides a legal basis for the adoption of a regulation for the criminal protection of the EU's financial interests, insofar as this provision links the definition of the offenses falling within the competence of the EPPO to the regulation on its establishment (Art. 86 [1] TFEU).[6]

These views, which seek to offer a legal basis for the criminal protection of the EU's financial interests in provisions of the Treaty other than Art. 83 TFEU, have become the subject of criticism, with notable counter-arguments.[7]

However, it is noteworthy that the EU chose Art. 83 (2) TFEU as its legal basis for a Directive concerning the fight against fraud to the EU's financial interests in the post-Lisbon era. The use of the latter provision (instead of Art. 325 [4] TFEU) has allowed Member States to rely on the emergency brake in the framework of the legislative process, whenever they consider that the draft Directive would affect fundamental aspects of their criminal justice systems, a possibility that exists only under Art. 82 and 83 TFEU, and not under Art. 325 TFEU. Of course, it has been argued that the emergency brake should also apply in relation to Art. 325 (4) TFEU.[8] However, this is not unanimously accepted. Thus, the use of this provision as a legal basis would grant the EU, at least according to a certain view, a much broader range of options, since the draft Directive would not risk being countered by an emergency brake, which might undermine the effort for a harmonized and effective protection of the EU's financial interests throughout its territory and could lead to the establishment of enhanced cooperation among only certain Member States. Nevertheless, an attempt to employ Art. 325 (4) as a legal basis was actually made in the Commission's proposal,[9] but it was unsuccessful, given that the final version of the Directive, after the intervention of both the Council and the European Parliament, invokes as such Art. 83 (2) TFEU.

The legal basis ultimately relied upon for the anti-fraud Directive conveys a sound approach, suitable for a democratic two-tier system of enacting criminal statutes: the supranational body foresees the elements of crimes, but each Member State is left with a margin to specify the elements of the criminalized acts and their envisaged penalties coherent with its national criminal law system. This *collaborative* model[10] is particularly valued in supranational regimes that communicate their respect for the fundamental rights and constitutional traditions of their Member States, as the latter are predominantly linked with criminal law as a measure for both safeguarding legally protected interests and guaranteeing civil liberties.

III. Key points of the Directive and a concise assessment

As far as its content is concerned, the Directive will replace the PIF convention and its protocols, as it is explicitly cited in Art. 16. In comparison with the regime under the PIF convention, the Directive bears certain key characteristics.

1. The notion of the EU's financial interests

First of all, the Directive clearly defines the financial interests of the EU (Art. 2), by referring to all revenues, expenditure and assets covered by the budget of the EU, its institutions and other bodies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them. It goes as far as to clarify that the Directive shall also apply in respect of revenue arising from VAT own resources, but only in cases of serious offenses, which are defined as offenses connected with the territory of two or more Member States and involving a total damage of at least EUR 10.000.000. Initially, the Commission aimed to criminalize (as fraud to the EU's financial interests) any "fraud affecting Value Added Tax (VAT) [which] diminishes tax receipts of Member States and subsequently the application of a uniform rate to Member States' VAT assessment base"[11]. In addition, it had

[5] See inter alia *Fromm*, EG-Rechtsetzungsbefugnis im Kriminalstrafrecht, 2009, pp. 70 et seq.

[6] See *Krüger*, HRRS 2012, 317; cf. *Safferling*, Internationales Strafrecht, 2011, § 10 para. 41.

[7] See mainly *Asp*, The Substantive Criminal Law Competence of the EU, 2013, pp. 142 et seq., 147 et seq.; *Sicurella*, in: Klip (ed.), Substantive Criminal Law of the European Union, 2011, pp. 236 et seq.

[8] *Asp*, (fn. 7), p. 154 et seq.; *Satzger*, Internationales und Europäisches Strafrecht, 8th ed. 2018, § 9 para. 52 et seq.

[9] COM (2012) 363 final, Brussels 11.7.2012.

[10] *Kaiafa-Gbandi*, Elements of European Union Criminal Law and its transposition in the Greek legal order, 2016, pp. 13 et seq. (in Greek).

[11] COM (2012) 363 final, Brussels 11.7.2012, p. 12.

invoked the ECJ's case-law,[12] according to which "there is a direct link between, on the one hand, the collection of the Value Added Tax revenue in compliance with the applicable Union law, and on the other, the availability to the Union budget of the corresponding Value Added Tax resources, since any lacuna in collection of the first potentially causes a reduction in the second". However, this position was not accepted by the Council; finally, the compromise made includes only cross-border VAT fraud, which, additionally, must concern a large sum of money.[13]

Despite the cross-border dimension of the act, though, this choice is still not undisputable, because VAT fraud directly affects the property of each Member State, and only indirectly the property of the EU.

In particular, it is well-known that VAT proceeds do not constitute revenue of the EU budget in and of themselves, but they are a simple computational point of reference for the proportional determination of the contribution of each Member State to the Union budget. Therefore, they are assets owned by Member States, of which Member States are obliged to apportion a certain percentage to the EU. Accordingly, any perceived damage to the EU assets is *indirect*, i.e. it affects the ability of Member States to apportion a fraction of evaded earnings from their own assets.[14] The contrasting outlook of the ECJ[15] and the Directive essentially converts a national legally protected interest into a Union one, thereby repositioning it in the Union's criminal repression orbit. The problem inherent in this view can be grasped if conceived that – according to it – any fraudulent violation against a Member State's GDP (i.e. the calculation basis for its contribution to the EU budget) should be considered an abuse against the financial interests of the Union.[16]

Of course, the EU disguises the problem by containing only serious and transnational fraud, i.e. essentially remaining under the competence of Art. 83 (1) TFEU to intervene in the proscription of offenses and sanctions. However, transnational VAT-fraud does not fall under the list of euro-crimes, and besides the EU expressly evokes Art. 83 (2) TFEU[17] as a legal basis for the Directive, because it aims at guaranteeing the effectiveness of its harmonized provisions on the circulation of goods and services within the Union by means of criminal law, at the same time effectively ensuring the financial interests of the Member States involved.[18] However, it should not escape our attention that in this case a party under protection by criminal law (= the EU) engages in "self-protection" to safeguard something that it is yet not its own, but claims to possess it in the future, because it relates to its financial existence.

Moreover, the preamble to the Directive (para. 4) reveals both the genuine legally protected interest inflicted and the confusion created by the inclusion of VAT fraud within its scope. In particular, the preamble mentions: "Offenses against the common VAT system should be considered to be serious where they are connected with the territory of two or more Member States, result from a fraudulent scheme whereby those offences are committed in a structured way with the aim of taking undue advantage of the common VAT system and the total damage caused by the offences is at least EUR 10.000.000. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, *both to the financial interests of the Member States concerned and to the Union*, […]". This raises a crucial issue: the calculation of total damages including the alleged losses of both the EU and Member States results in an erroneous *double* computation of amounts already accounted for as Member States' losses from VAT fraud, as the calculation of the percentage attributable to the EU is made on the basis of evaded VAT inflows. Therefore, the preamble's attempt to define the total damage in the way it did *directly violates the proportionality principle*. In other words, the EUR 10.000.000 threshold cannot include a percentage of the amount already calculated in its entirety as such. No damage other than that relating to Member States exists so as to justify its inclusion on account of a perceived infliction against another legally protected interest. Moreover, if the rationale behind the provision is the EU's exposure to the risk of failure to collect contributions from its Member States, *it is because of the losses they themselves incur* and *under no circumstance is it reasonable for such losses to be recalculated – even to a certain proportion – as Union-relevant impairment jeopardy*.

Apart from that, the definition of serious offenses against the common system of value added tax (VAT) – particularly the pertinent provision of Art. 2 (2) of the Directive – should encompass the other elements referred to in the preamble (obviously apart from the inclusion of damages incurred and the link to the EU's financial interests), as incorporating types of conduct such as forms of fraud resulting from a fraudulent scheme or in a structured way etc., because such elements reduce the extent of criminalization that Member

[12] See already Case C-539/09, Judgment of the Court (Grand Chamber), 15.11.2011, European Commission v. Federal Republic of Germany, para. 72.

[13] Also see Art. 18 para. 4 lit. a of the directive, providing that the Commission shall by 2022 assess whether the threshold indicated in Art. 2 para. 2 for VAT fraud (total damage of 10.000.000 euros) is appropriate, highlighting the concern and the interest of the Commission in this matter.

[14] See *Papakyriakou*, in: Pavlou/Samios (eds.), Special Criminal Laws, 5th ed. 2016, pp. 11 et seq. (in Greek).

[15] See inter alia Case C-539/09, Judgment of the Court (Grand Chamber), 15.11.2011, European Commission v. Federal Republic of Germany, para. 69–72; Case C-617/10, Judgment of the Court (Grand Chamber) of 26.2.2013, Åklagaren v. Hans Åkerberg Fransson, para. 26. Cf. also C-524/15, Judgment of the Court (Grand Chamber), of 20.3.2018, Menci, para. 21.

[16] See *Papakyriakou* (fn. 14), pp. 12 et seq. Also cf. C-524/15, Judgment of the Court (Grand Chamber), of 20.3.2018, Menci.

[17] On the legal basis, see the initial reference of the preamble to the Directive: "Having regard to the Treaty on the Functioning of the European Union, and *in particular* Art. 83 (2) thereof […]".

[18] Cf. *Papakyriakou* (fn. 14), p. 13.

States are bound to introduce. Thus, the Directive does not adhere to the *principle of legality* in this respect.

2. Definition of "fraud" (actus reus and mens rea)

The definition of fraud distinguishes the acts that concern expenditure from the acts that concern revenue; the offense still needs to be committed intentionally and it is still titled imprecisely (Art. 3), because the prosecuted act is not necessarily a fraudulent one. Regarding expenditure fraud, there is further specification of the relevant acts. In respect of non-procurement-related expenditure, fraud may be committed via "the misapplication of such funds or assets for purposes other than those for which they were originally granted" (i.e. without further damage required); in respect of procurement-related expenditure, the misapplication of funds, as defined just above, needs to damage the EU's financial interests, while all the relevant acts are restricted by the additional requirement of the perpetrator's aim to make unlawful gain for him/herself or another by causing loss to the EU's financial interests.

The above distinctions fundamentally function towards adherence to the principle of legality (nullum crimen nulla poene sine lege), to which the EU is subject when introducing minimum standards for the definition of offenses and sanctions via Directives,[19] while the delineation of EU's financial interests in Art. 2 (1) (a) is equally helpful in this regard. However, the general reference to any act or omission relating to (e.g.) the use or presentation of false, incorrect or incomplete statements or documents, etc. remains an essential problem with respect to the demarcation of all individual forms of criminal conduct, as any act or omission *simply associated* with a given conduct could ultimately include any behaviour whatsoever.[20] Thus, the actus reus should firmly be associated with the particular acts described (= "the use or presentation of false, incorrect or incomplete statements" etc.). Besides, committing fraud by omission should be linked to the conditioning of a particular legal obligation incumbent on the perpetrator to prevent the occurrence of the result. Only thus may an act be viewed as equal to an omission from a normative perspective. These amendments would definitely serve the principle of legality regarding the punishable offenses (nullum crimen sine lega certa) as well as show respect for the ultima ratio principle, and they would facilitate national legislators in effectively incorporating EU law into their national legislation.

As to the punishable conduct, which may only be intentional, it is encouraging that the preamble stresses that the notion of intention must apply to all the elements constituting the criminal offenses (para. 11). At the same time, however, and especially in view of the accompanying reference to the specific point that "the intentional nature of an act or omission may be inferred from objective, factual circumstances", it must be clarified that the notion of intention with its *dispositional element*[21] is subject to a complex and hierarchical system of empirical/observable indications and counter-indications, i.e. to a system which includes many more additional elements than those possibly encompassed by a reference to "factual circumstances".

3. Sanctions

Compared to the PIF Convention, provisions on criminal sanctions are (for the first time) introduced in the directive; this is understandable in view of the legal instrument used as well as the evolution of the EU institutional regime, especially with regard to the EU's competence to intervene in the criminal law systems of its Member States.

Regarding fraud, the sanctions that Member States are required to introduce maintain the general form used in the PIF Convention: they should be "effective, proportionate and dissuasive criminal sanctions" (Art. 7 [1]). The maximum penalty must consist in imprisonment (Art. 7 [2]); in addition, the EU sets a minimum number of years for the maximum penalty that must be provided for by the Member States regarding cases of serious fraud (i.e. when they involve damage or advantage over EUR 100.000). More specifically, a maximum penalty of at least 4 years of imprisonment is required. This provision follows the approach also used in other Directives, where the EU sets minimum standards for the maximum penalties to be provided for by the national legislators. In the case of this Directive, following the above-mentioned approach has been the choice of the Council and of the European Parliament. The Commission, on the other hand, attempted to impose on the Member States minimum standards also with regard to the minimum penalties to be provided for by national legislators; this intervention, which was suggested for the first time, was rightfully rejected. Such a choice is incompatible with the characteristics of a Directive, since it would not have left any margin for actual decisions on the penalties to Member States, and it would have caused significant problems for the criminal justice systems of those Member States that do not provide for minimum penalties.

Besides, it is noteworthy that the same maximum penalty is linked to VAT fraud, which is considered as serious when it involves a *total* damage of at least EUR 10.000.000, bringing about questions on the proportionality of the penalties, given that serious fraud that does not concern VAT starts with a damage of at least EUR 100.000 according to the Directive.

Similar proportionality issues derive from the provision of the same minimum maximum penalty of 4 years for all the different offenses of Art. 4 in the directive, such as receiving a bribe that can damage the EU's financial interests or laundering the proceeds of a crime under the same condition and

[19] See *European Criminal Policy Initiative (ECPI)*, ZIS 2009, 708.

[20] *Kaiafa-Gbandi*, EuCLR 2012, 331.

[21] See inter alia *Hassemer*, Einführung in die Grundlagen des Strafrechts, 2nd ed. 1990, pp. 183 et seq.; *Hassemer*, in: Lüderssen/Sack (eds.), Vom Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht, vol. 1, 1980, pp. 243 et seq.; *Kaiafa-Gbandi*, criminal law 1994, 172 (in Greek); *Mylonopoulos*, ZStW 99 (1987), 687.

regardless of the fact that those offenses affect different legal interests.[22]

Besides, the provision of Art. 8, which provides that the commission of the offenses of the Directive within a criminal organization shall be considered to be an aggravating circumstance, is also flawed. The provision amounts to a breach of the principle of proportionality, because this issue could very well be dealt with by applying the rules of concurrence, in so far as participating in a criminal organization is criminalized as a distinct offense in the EU. Of course, there is recital 19 of the preamble of the Directive, which clarifies that "Member States are not obliged to provide for the aggravating circumstance where national law provides for the criminal offenses as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offense and this may lead to more severe sanctions". Even so, this should not be left to interpretation, but should be clarified by the provision itself once the Union legislator decided to include an unnecessary provision on aggravating circumstances referring to fraudulent acts committed within a criminal organization.

Another point of concern is that the only reference of the Directive to the prohibition of double jeopardy (= the ne bis in idem principle) is confined to its preamble ([17], [31]). This prohibition also applies to the accumulation of criminal and administrative sanctions for the same act according to the ECJ[23] and ECtHR[24] case-law (as is typically the case in fraudulent conduct against the EU's financial interests) when "administrative" sanctions are essentially penalties (according to the Engel criteria). On the contrary, Art. 14 of the Directive includes a reverse wording for the principle, i.e. "the application of administrative measures, penalties and fines […] shall be without prejudice to this Directive" and "Member States shall ensure that any criminal proceedings […] do not unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings".

However, on the positive side, one should note the provision allowing Member States not to criminalize acts of fraud (or related offenses) that cause damage or bring benefit of less than EUR 10.000 and are not considered as "serious" (Art. 7 [4]) – (see the similar PIF provision providing for a sum of under 4.000 ECU). Such a provision is consistent with the principle of employing criminal law as an ultima ratio.

Last but not least, in the field of criminal sanctions as well, the provision regarding confiscation (Art. 10) is new compared to the second protocol of the PIF convention, insofar as it refers to the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014/42/EU), and not to the national laws of the Member States. The said Directive has been seriously criticized, since, in providing for extended confiscation in relation to ordinary offenses (not just organized crime and terrorism), it breaches the principle of proportionality, while its provisions also fail to abide by the principle of guilt and the presumption of innocence.[25] When taking into consideration how important it is to the EU to recover proceeds of economic offenses, in order to support the notion "crime does not pay", one can see how significant but also problematic the link of the PIF-Directive to the Directive on confiscation is.

4. Other criminal offenses affecting the Union's financial interests

An important difference regarding the PIF convention is also spotted in the Directive's broader reference to "Other criminal offences affecting the Union's financial interests" (Art. 4). Besides money laundering and bribery concerning public service acts that may affect the EU's budgets, there is a novel offense, cited as "misappropriation" (Art. 4 [3]), which covers the action of a public official directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the EU's financial interests. An important element of this offense that renders it more than a mere breach of the terms of use regarding the allocated resources is the direct causality link between the specific conduct and a demonstrable actual damage against EU property.

On the other hand, bribing a public official to act in a way which is likely to damage the EU's financial interests has a broader scope as well, because it is now connected to *legal* actions of the public official, too, although it is hard to imagine how these can actually damage the EU's financial interests. At the same time, the definition of "public official" is itself broadened, because the term "Union official" (Art. 4 [4]) includes not only "an official or other servant engaged under contract by the Union", but also "any other person assigned and exercising a public service function involving the management of or decisions concerning the EU's financial interests in Member States or third countries" (e.g. public contractors dealing with EU funds).

Broadening the scope of the "other criminal offenses *affecting the Union's financial interests*" as described above is problematic. In particular, money laundering of assets derived from EU fraud and active and passive bribery which is detrimental or likely detrimental to the financial interests of the EU are among the first-mentioned "other criminal offenses affecting the Union's financial interests" (Art. 4). However, whether the laundering of criminal proceeds harms the same legally protected interest as the predicate offense is quite doubtful, and the modern theory fairly rejects this position.[26] Therefore, money laundering of EU-fraud proceeds

[22] *Kaiafa-Gbandi*, EuCLR 2012, 329.

[23] See Cases C-617/10, Judgment of the Court (Grand Chamber) of 26.2.2013, Åklagaren v. Hans Åkerberg Fransson, para. 33 et seq. and C-524/15, Judgment of the Court (Grand Chamber), of 20.3.2018, Menci, para. 21.

[24] See inter alia Kapetanios v. Greece, 30.4.2015, A. and B. v. Norway, 15.11.2016.

[25] Cf. *Kaiafa-Gbandi*, in: Reindl-Krauskopf/Zerbes/Brandstetter/Lewisch/Tipold (eds.), Festschrift für Helmut Fuchs, 2014, p. 215.

[26] See *Chatzinikolaou*, in: Kaiafa-Gbandi (ed.), Financial crime and corruption in the public sector, vol. 1: Evaluation of the current institutional framework, 2014, p. 745 (758,

does not harm the Union's financial interests. In addition, passive or active bribery, which are detrimental or likely detrimental to the financial interests of the EU, primarily damage another legally protected interest (= national or EU public service), which is in any case safeguarded autonomously at both national and the EU level,[27] while service-related acts perpetrated by a public official which are detrimental or likely detrimental to the EU property are – by and large – autonomously penalized (e.g. in the form of disloyalty, embezzlement etc.).

In other words, introducing special versions of offenses that relate to fraud is not justified as long as there are other EU legal instruments criminalizing the respective acts, such as money laundering or bribery. Bribery (e.g. under the 1997 Convention)[28] does not even need to be connected to public service acts that may affect the EU's financial interests.[29] Besides, under the Convention public service has a notion that even covers persons who do not hold formal office but are nonetheless assigned and exercise a public service function,[30] and last but not least it affects, of course, a totally different legally protected interest.

Therefore, concocting a whole body of provisions around EU fraud and misleadingly labeling it "other offenses against the financial interests of the EU" serves expediency by ideologically promoting the principal choice made for a largely effective protection of EU's financial interests. In particular, including provisions regarding other criminal offenses in the Directive obviously aims to serve the formation of a very clear field of competence for the European Public Prosecutor's Office (Art. 4 of the Regulation 2017/1939), which has recently been established. However, even this does not justify the above-mentioned addition, since it is possible for the EPPO's competence to include offenses defined in different EU legal instruments as long as their definitions are clear.[31] Therefore, fraud-related bribery and money laundering should not have been included in the Directive; the only offense which might justifiably remain, under this reasoning, is misappropriation by public servants.

Of course, one must not forget the most important aspect of this debate: the delimitation of substantive law provisions proscribing criminal offenses in such a manner as to facilitate the exercise of competence by EPPO (which will also be able to prosecute related offenses).[32] In effect, *it instrumentalizes substantive criminal law for procedural purposes of effective prosecution*. This approach tends to systematically emasculate substantive criminal law as the elements of crimes no longer derive from a specifically affected and thoroughly delineated legally protected interest, but are rather determined on the basis of procedural expediencies it is called upon to serve.

The other offenses affecting the Union's financial interests are problematic as regards the sanctions envisaged. The penalties for EU fraud and for the other abovementioned offenses against the financial interests of the Union (Art. 7 [3]) are not further classified on account of the harm done when the damage or profit exceeds EUR 100.000. However, one can only wonder how it is possible to even out abuses against different legally protected interests, such as EU property and public service, especially when the latter requires an additional harm or risk to the EU's financial interests.[33] Obviously, the ideological confusion over what is punishable and the focus on procedural considerations tend to undermine the principle of proportionality as to the prescribed penalties – since this requires an unambiguous understanding of the punishable subject matter – and do not foreshadow a sound coexistence among the newly-established crimes alongside existing ones.

5. Participation, attempt, liability of legal persons and jurisdiction

It is positive that the Directive, unlike the PIF Convention, does not require the criminalization of the preparation or supply of false, incorrect or incomplete statements or documents, given that it introduces provisions concerning partici-

767, in Greek), with further bibliographical references.

[27] On the prior relevant criticism against the proposal for a directive see *Kaiafa-Gbandi* (fn. 26), pp. 476 et seq. (in Greek).

[28] Council Act of 26.5.1997, OJ C 195 of 25.6.1997.

[29] According to the Convention e.g. passive corruption is the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties. Thus, there has been practically no need, despite the opposite opinion expressed in the preamble (para. 8), to introduce an offence of bribery in the Directive concerning the protection of the EU financial interests, as in order to damage or endanger the official act needs to be in breach of the official's duties.

[30] According to the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union European official is "any person who is an official or other contracted employee within the meaning of the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the European Communities, *as well as any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants*".

[31] See e.g. Art. 22 para. 3 of the Regulation 2017/1939, referring to any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of para. 1 of Art. 22, which has to do with the fraud against the EU's financial interests.

[32] See Art. 4 of the EPPO Regulation: "The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offenses affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 […]".

[33] For a critical assessment on the proposal for a directive see *Kaiafa-Gbandi*, in: Kaiafa-Gbandi (fn. 26), p. 480.

pation in connection to all the offenses defined therein (Art. 5 [1]), including money laundering; in this respect, it broadens the scope of PIF and its protocols.

Contrary to participation, the Directive only asks for the criminalization of the attempt of fraud and misappropriation (Art. 5 [1]), just as the PIF Convention required only the criminalization of the attempted fraud. This approach is correct, because the above-mentioned offenses actually harm (not just endanger) the respective legal interests. Thus, punishing their attempt does not amount to excessive criminalization.

The Directive includes provisions on the liability of legal persons which are essentially the same (Art. 6 and 9) as in the PIF Convention; thus, Member States can still provide for administrative sanctions.

On the other hand, the Directive obliges Member States to extend their jurisdiction regarding fraud and fraud-related offenses committed outside their territory, compared to the PIF Convention. More specifically, Art. 11 calls for the establishment of jurisdiction based on the active personality principle, without allowing reservations or the introduction of the double criminality requirement or the provision of other conditions, i.e. that the victim file a complaint or that the government of the country where the offense was committed formally request prosecution (para. 4). Such extension of jurisdiction is understandable when it concerns offenses committed in the territory of third countries, where it may actually not be linked to the double criminality principle. However, it needs to be emphasized that – despite the broadening of jurisdiction to more Member States by virtue of the above provisions – the Directive makes no explicit reference to the need to safeguard the ne bis in idem principle when the same act falls within the scope of jurisdiction of more legal systems, once more marginalizing such an important reference in its preamble (para. 21).

6. Limitation periods

Art. 12, concerning the limitation periods for the criminal offenses and for the sanctions imposed, is one of the main novelties of the Directive. Apart from the open question whether the EU has competence to act in respect with the statute of limitations or not,[34] since the latter usually falls within the scope of the general part of national criminal codes, another important issue arises from the fact that not only does the Directive define a minimum limitation period (of at least 5 years from the time the offence was committed) for offenses punishable by a maximum sanction of at least 4 years of imprisonment, but it also intervenes with regard to the suspension of limitation periods that are shorter than five years (Art. 12 para. 4).[35]

The predominance of achieving effectiveness in the protection of EU's financial interests is evident also with respect to this matter (Art. 12).[36] This intervention in Member States' criminal justice systems is incompatible with EU's primary law, which naturally foresees the obligation to provide *effective* protection of EU assets, but – referring in particular to criminal law – stipulates that Member States shall assume *the same measures* to counter EU fraud as they do to counter fraudulent acts against their own financial interests. Therefore, the obligation to envisage special relevant limitation periods may not be imposed by EU law.[37] In addition, this would constitute an unacceptable intervention in terms of the rule of law, given that the statute of limitations – to the extent that it is acceptable by a legal system – is subject to evaluations related to the comparative gravity of all individual offenses, as well as to other general assessments within a legal order.

As expressly stated in the Directive's preamble, the above-mentioned provision was selected for reasons of criminal repression *efficiency* (para. 22). However, one should also be familiar with the ECJ's Taricco I[38] and – especially – Taricco II[39] judgments. In the latter, the ECJ dealt with a preliminary question of the Italian Constitutional Court and, following extensive criticism on Taricco I, was forced to explicitly accept that the effective protection of the EU's financial interests imposed on Member States by virtue of Art. 325 TFEU may not take precedence over the protection of fundamental rights and principles enshrined in the EU Charter and acknowledged as such in the Member States' constitutional orders.[40] Thus, the implicitly holds that if the specific provision violates the principle of proportionality in the legal order of a Member State on the rules applicable on the statute of limitations as a whole, the Member State is not obliged to comply.

IV. Conclusion and the way forward

As a general conclusion concerning the Directive, one should keep in mind the broadening of the scope of the criminal law provisions on the fight against fraud to the EU's financial interests, promoted through the addition of fraud-related

[34] *Caeiro*, in: Klip (fn. 7), p. 124.

[35] According to it, Member States may establish a shorter limitation period, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts.

[36] Specifically, consistent with Art. 12 (2): "Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Art. 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment, for a period of at least five years from the time when the offence was committed."

[37] Of course, the EU obviously hovered towards a relatively low period that would not overturn the existing status in individual Member States, but this coincidental effect does not preclude the need to institutionally circumscribe a *special* statute of limitations for EU fraud.

[38] Case C-105/14, Judgment of the Court (Grand Chamber), 8.9.2015.

[39] Case C-42/17, Judgment of the Court (Grand Chamber), 5.12.2017.

[40] Case C-42/17, Judgment of the Court (Grand Chamber), 5.12.2017, para. 62.

offenses and the determination of minimum and maximum penalties, as well as through provisions regarding the statute of limitations, jurisdiction beyond the territoriality principle and confiscation, which follows an entirely new direction based on the respective EU Directive.

However, this broadening of the scope is accompanied by deficiencies of the new Directive, leading to violations against fundamental rights of the EU Charter, general principles of criminal law, and even primary EU law, which regulates aspects of the relationship between the Union and its Member States. Despite the constructive reference in paragraph 28 of the preamble, that "this Directive respects fundamental rights and observes the principles recognized in particular by the Charter […]" and that "[it] seeks to ensure full respect for those rights and principles and must be implemented accordingly", the Directive's normative content leaves it short of achieving these goals, at least with respect to some of the issues involved. Perhaps that is why the EU legislator has not incorporated the relevant stipulation within the body of the Directive's provisions, although this has been done in other EU legal instruments of the single area of freedom, security and justice.

These circumstances call for increased attention, primarily for national legislatures, as compliance with fundamental rights and principles of Union law is at any rate expressly binding according to the established ECJ case-law. Therefore, national legislatures should:

- regulate the relationship between administrative and criminal penalties for such fraudulent conduct into their national legal systems, with utmost respect to the ne bis in idem principle;
- be aware that any EU intervention to expand criminalization and incorporate VAT fraud should unambiguously describe the characteristics of serious cross-border criminality that could justify it (e.g. committed within a criminal organization, in a structured way, involving at least two membership States in a concrete way, etc.), and also define the method of calculation of the minimum damage exceeding EUR 10.000.000, which cannot include any other aspect beyond the damage incurred due to VAT evasion in Member States;
- restore respect for the principle of legality in proscribing the offenses under Art. 3 of the Directive, both by defining individual acts or omissions allegedly associated with the Directive's provision and with the requirement of a special legal obligation for perpetration by omission;
- restore the principle of proportionality as regards the threatened penalties for individual acts of EU fraud (especially those relating to VAT fraud) and avoid the introduction of an aggravating circumstance when such acts are committed in the context of a criminal organization, if they already proscribe the participation in a criminal organization as a distinct offense with reference to fraudulent acts against the EU's financial interests;
- verify whether the so-called "other crimes affecting the financial interests of the European Union" (Art. 4 of the Directive) are already punishable in their national legal systems (e.g. money laundering, active and passive bribery of officials) and address issues of regulatory confluence with EU fraud, in order to further adhere to the principle of proportionality as regards punishing these offenses in view of the differentiation between the abused legally protected interests; and last but not least
- ensure that the limitation period for offenses against the Union's interests adheres to the principle of assimilation of their safeguarding by means of criminal law with the corresponding protection they foresee for their own financial interests, simultaneously ensuring an effective protection for both categories, with compliance to fundamental rights and the principles of the rule of law.

These constraints are also to be observed by the EU legislature, which is required to respectively amend the recent Directive on the protection of the financial interests of the EU by means of criminal law. Its laxity apparently offers neither an excuse nor the possibility to deviate from the respect imposed by EU law for the above principles and fundamental rights, which the national legislators are called upon to restore in transposing the Directive in their domestic legal order. Moreover, this is the added value of a *collaborative* model of establishing criminal provisions within a supranational organization such as the EU, as both tiers participating in the production of legislation become *"custodians" of fundamental rights* and *assume full responsibility for their appreciation* and their *direct* applicability in the framework of both regulatory levels.