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OPINION OF THE LEGAL SERVICE*

Subject: 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 (12683/12 DROIPEN 107 JAI 535 GAF 15 FIN 547 CADREFIN 349 CODEC 1924)
- Legal basis

I. INTRODUCTION

1. At the meeting of CATS on 9 October 2012, the Council Legal Service (CLS) made an intervention on the legal basis of the above proposal for a Directive. This opinion reiterates and expands on that intervention.

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II. FACTUAL AND LEGAL FRAMEWORK

2. On 17 July 2012, the Commission submitted a 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 law¹ (the proposed Directive).

3. According to its Article 1, the proposed Directive "[defines] *criminal offences and criminal sanctions*" which are necessary in order to fight fraud and other illegal activities affecting the EU's financial interests. It defines the constituent elements of different criminal offences (Article 4) and contains detailed provisions on the type and level of criminal penalties to be applied to natural persons (Article 7), including different levels of imprisonment (Article 8), and on the minimum sanction types applicable to legal persons (Article 9), as well as provisions on jurisdiction (Article 11). Article 12 contains specific provisions on prescription periods. Article 14 indicates that this comes as a complement to existing Community measures, and more particularly to Regulation 2988/95 on the protection of the EC financial interests² (Regulation 2988/95), which provides for administrative measures and penalties. The proposed Directive is intended to repeal the 1995 Convention on the protection of the EC financial interests³ (the 1995 PIF Convention) (Article 16).

4. The proposed Directive is based on Article 325(4) of the Treaty on the Functioning of the European Union (TFEU) which reads: "*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.*"⁴

¹ COM (2012) 363 final, doc. 12683/12.

² Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1).

³ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 48).

⁴ Article 325(1) TFEU reads: "*The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, 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.*"

5. Article 325 TFEU replaced the former Article 280(4) of the Treaty establishing the European Community (TEC) which contained the sentence "*These measures shall not concern the application of national criminal law or the national administration of justice.*" This wording was deleted by the Lisbon Treaty.

6. The Lisbon Treaty, at the same time, introduced in Title V on the area of freedom, security and justice a new legal basis enabling the EU legislature to approximate national criminal laws through "[establishing] *minimum rules with regard to the definition of criminal offences and sanctions*" in a given area of Union policy where such approximation "*proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures*" (Article 83(2) TFEU).⁵

III. LEGAL ANALYSIS

7. In view of the above provisions of the TFEU, the CLS will first identify the correct legal basis of the proposed Directive (1.) before proceeding to a brief overview of any practical consequences stemming from a possible change from the legal basis proposed by the Commission (2.).

1. Appropriateness of the proposed legal basis

8. According to the settled case law of the Court of Justice, the choice of a legal basis must rest on objective factors which are amenable to judicial review, including the aim and content of the measure.⁶

⁵ Article 83(2) TFEU reads: "*If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question (...)*".

⁶ See, for example, Case C-440/05, *Commission v. Council* [2007] ECR I-9097, point 61; Case C-155/91 *Commission v. Council* [1993] ECR I-939, point 7; Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107, point 41; Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, point 34.

9. Under its recitals (2) and (3), the proposed Directive aims at ensuring, for the most serious types of fraud-related conducts, the effective, proportionate and dissuasive protection of the Union's financial interests with the help of approximation of criminal law as a complement to the protection afforded under administrative and civil law. The essential content of the proposed Directive is described in paragraph 3 above.

10. The proposed Directive therefore pursues the objective expressed in Article 83(2) TFEU which is to ensure the effective implementation of a Union policy (i.e. the protection of the EU's financial interests). The policy in question has been subject to harmonisation measures (i.e. the different existing Community provisions on administrative measures and penalties, and notably Regulation 2988/95), and the proposed Directive aims at ensuring the effective implementation of this policy through the establishment of "*minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.*"

11. In its Explanatory Memorandum, the Commission states that Article 325 TFEU would enable "*to legislate on fraud and any other illegal activities affecting the Union's financial interests in the fields of the prevention and the fight against fraud*" and that, therefore, its paragraph 4 would "[include] *the power to enact criminal law provisions in the context of the protection of Union's financial interests against all angles of illegal attacks.*"⁷ It would therefore seem that, for the Commission, the deletion of the last sentence of the former Article 280 TEC would mean that the legal basis in Article 325(4) TFEU could now be interpreted widely to as to cover also harmonisation of criminal offences and sanctions.

12. The CLS does not share this view. The deletion of the said sentence from the former TEC should be read in conjunction with the insertion of the new legal basis in Article 83(2) TFEU which was meant 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.

⁷ Explanatory Memorandum, point 3.1 (Legal basis), p. 6.

13. As stated in the CLS' opinion on the "MAD/MAR" proposals⁸ "[t]his new provision was introduced by the Lisbon Treaty into the TFEU as a follow up to the case law developed by the EU Court of Justice (ECJ) in 2005 and 2007 under which where this was essential for ensuring that the Community rules at stake are fully effective, the Community legislation could define the constituent elements of criminal offences and require Member States to provide for effective, proportionate and dissuasive criminal penalties.⁹ The ECJ later clarified that the determination of the type and level of criminal penalties did not fall within the Community's sphere of competence."¹⁰

14. Moreover, it should be stressed that the former Article 280 TEC is not the only instance where the Lisbon Treaty proceeded to delete an exception to "the application of national criminal law or the national administration of justice." Article 135 TEC on customs cooperation also contained the same exclusion, while its TFEU equivalent, Article 33, does no longer contain such an exclusion. Thus, the deletion of the last sentence of the former Article 280 TEC cannot be interpreted - by creatively using an *a contrario* argument - as establishing a special criminal law regime to flank exclusively Article 325 TFEU measures but, quite the opposite, as aligning all substantive enabling provisions in the TFEU with the general regime under which approximation of criminal law through the definition of criminal offences and sanctions for the purposes of effective implementation of other (non-criminal) Union policies is to be made under Article 83(2) TFEU.

15. In the same vein, the Commission seems to consider that Article 325 TFEU should be regarded as some sort of a derogatory provision (*lex specialis*) from the conditions and procedures established in Article 83(2) TFEU. Apart from the fact that there is nothing in the text of both provisions that would imply or even suggest an interpretation in this sense, such an argument could be extended to virtually all other enabling provisions, thus depriving Article 83(2) TFEU of any practical applicability.

⁸ See opinion of the Council Legal Service of 27 July 2012 on the proposals for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation and a Regulation on insider dealing and market manipulation and other instruments regarding the harmonisation of administrative sanctions in the framework of financial services (doc. 12979/12), para. 7.

⁹ See Case C-176/03, *Commission v. Council* [2005] ECR p. I-7879, points 47 to 49.

¹⁰ See Case C-440/05, *Commission v. Council* [2007] ECR p. I-9097, point 70.

In particular, teleological considerations related to the "*peculiarity*" of "*this specific field*" or to the fact that "*the term 'deterrent' appears nowhere else in the Treaty*"¹¹ cannot be valid reasons for putting in abeyance an unambiguous Treaty provision of horizontal application. It is Article 83(2) TFEU which is a *lex specialis*.

16. Long before the introduction of that *lex specialis*, the CLS had already stated in two opinions in 2001 that "*the Community cannot adopt measures relating to questions such as the type and level of penalties to be applied, jurisdiction, the liability of natural and legal persons, restrictions on public proceedings and other obstacles to prosecution. In the same way, it is not competent to rule on questions relating to criminal procedure within the Member States.*"¹²

17. Thus, given the clear and precise wording of Article 83(2) TFEU, which refers explicitly to "*approximation of criminal laws and regulations*" through the establishment of "*minimum rules with regard to the definition of criminal offences and sanctions*", and the absence of any limitations of its scope in relation to the subject-matter of the proposed Directive, the CLS is of the opinion that a legislative proposal that aims at "*defining criminal offences and sanctions*" (Article 1 of the proposed Directive) cannot eschew Article 83(2) TFEU as a legal basis in favour of a provision such as Article 325(4) TFEU.

18. This is even more so given the specificities of the area of criminal law. Article 83(3) TFEU gives the right to a member of the Council that considers that a draft directive would affect fundamental aspects of its criminal justice system to request that the draft directive be referred to the European Council, suspending the ordinary legislative procedure. Conversely, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they can proceed on this basis.

¹¹ Explanatory Memorandum, point 3.1 (Legal basis), p. 6.

¹² See opinion of the Council Legal Service of 5 March 2001 on the draft EU Framework Decision on the protection of the environment through criminal law compliance with Community powers (Article 47 of the TEU) (doc. 6793/01), para. 13. See also para. 8 of the opinion of the Council Legal Service of 25 July 2001 on the proposal for a Directive on the criminal-law protection of the Community's financial interests (doc. 11221/01).

These particular safeguards are designed to apply to all directives establishing minimum rules on the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimension (Article 83(1) TFEU) or in areas which have been subject to harmonisation measures (Article 83(2) TFEU). Therefore, to proceed with such an approximation on a different legal basis would be tantamount to circumventing this protective mechanism established by the Treaty.

19. Finally, the specific need to "*combat crimes affecting the financial interests of the Union*" (emphasis added) is addressed in Article 86 TFEU, part of Chapter 4 on judicial cooperation in criminal matters, which provides that the Council may establish a European Public Prosecutor's Office. This is to be contrasted with the terminology used by Article 325 TFEU which provides for the adoption of measures "*in the fields of the prevention of and fight against fraud affecting the financial interest of the Union*" (emphasis added), located in a different title of the TFEU.

20. In the light of all of the above considerations, the CLS considers that the correct legal basis for the proposed Directive is Article 83(2) TFEU.

2. Practical implications of using Article 83(2) TFEU as a legal basis for the proposed Directive

21. A change of the legal basis of the proposed Directive from Article 325(4) to Article 83(2) TFEU would not entail a modification of the applicable voting rules in the Council (qualified majority), nor of the adoption procedure (which will remain the ordinary legislative procedure), since Article 83(2) TFEU makes applicable the adoption procedure used for the adoption of the EU harmonisation measure which the criminal law measures are to make more effective.¹³

22. The only consequence would be that since Article 83(2) TFEU is part of Title V of Part Three of the TFEU, the proposed Directive would fall within the ambit of Protocols No 21 and No 22 according to which the United Kingdom, Ireland and Denmark would not take part in the adoption of the proposed Directive, which would not be binding upon them.

¹³ The last sentence of Article 83(2) reads: "*Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question (...)*".

23. However, given that all three Member States are already bound by the 1995 PIF Convention, and that the proposed Directive which would modify (in effect replace) this *acquis* would not bind them, they would remain bound by the legal framework as it existed prior to the adoption of the proposed Directive.¹⁴ The legal situation would thus be the same as in the case, for instance, of the recently adopted Directive on preventing and combating trafficking in human beings which replaced (and not repealed) the previous Framework Decision only "*in relation to Member States participating in the adoption of this Directive*", the non-participating Member States therefore remaining bound by the previous Framework Decision.¹⁵ The drafting of Article 16 of the proposed Directive should be adapted accordingly and the appropriate recitals should be inserted.¹⁶

24. The United Kingdom and/or Ireland could also elect to participate in the adoption of the proposed Directive, by virtue of Articles 3 and 4 of Protocol No 21. They may do so within three months after the Council has decided to change the legal basis. By analogy with what the CLS had already indicated in 2000, the commencement of the three month period should be the date on which the Council decides to inform the European Parliament of the proposed new legal basis.¹⁷ They may also, at any given time after its adoption, notify the Council and the Commission that they wish to accept this measure (in which case Article 331 TFEU will apply *mutatis mutandis*, as provided for in Article 4 of Protocol No 21). In case of opting-in, the proposed Directive would bind them and they would no longer be bound by the 1995 PIF Convention. This option is not available to Denmark, to which the 1995 PIF Convention would remain applicable in any event.

¹⁴ See para. 12 of the opinion of the Council Legal Service of 29 June 2011 on the proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast) - Consequences for the United Kingdom and Ireland of their non-participation in the proposed recasting (doc. 12011/11).

¹⁵ See Article 21 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

¹⁶ I.e. a recital mirroring the text of recital 30 of Directive 2011/36/EU which reads: "*This Directive aims to amend and expand the provisions of Framework Decision 2002/629/JHA. Since the amendments to be made are of substantial number and nature, the Framework Decision should in the interests of clarity be replaced in its entirety in relation to Member States participating in the adoption of this Directive*", as well as the usual recitals referring to the situations under Protocols No 21 and 22.

¹⁷ See para. 7 of the note from the Council Legal Service of 28 January 2000 sent to Permanent Representatives which, at the time (i.e. when only the consultation procedure applied to the JHA area), suggested "*to refer to the date on which the Council decides to consult or reconsult the European Parliament on a legal basis laid down in Title IV* [i.e. a Title where opt-in/out procedures applied]".

IV. CONCLUSIONS

25. The Legal Service concludes that:

- 1) The correct legal basis for the proposed Directive is Article 83(2) TFEU.
- 2) A change of the legal basis of the proposed Directive from Article 325(4) to Article 83(2) TFEU would not entail a modification of the applicable voting rules in the Council, nor of the adoption procedure.
- 3) Unless the United Kingdom and/or Ireland decide to opt in the proposed Directive, the latter would not be binding upon them and they would remain bound by the 1995 PIF Convention.
- 4) The proposed Directive would not be applicable to Denmark, which would remain bound by the 1995 PIF Convention.
- 5) The appropriate standard clauses should be inserted in the proposed Directive so as to reflect the application of Protocols No 21 and 22 and the fact that the proposed Directive would apply only to the participating Member States.
