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**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee/Council
No. prev. doc.:	12345/16
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 (first reading) = Policy debate/Progress report

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*1. Summary*

This document contains a summary of the results of the discussions on experts level on Value Added Tax (VAT) fraud and its inclusion in the draft Directive on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") during the Netherlands Presidency, as completed by Slovak Presidency, with a view to reaching a compromise solution with the European Parliament.

An updated draft text of the Directive can be found in Annex to this note. This draft text reflects the estimation of the Presidency on the state of play following the latest meetings in HLWP and CATS. Nevertheless, it should be noted that, the Presidency is still receiving some technical proposals from delegations and in this light technical adjustments to the draft text could still be necessary in order to reach a compromise.

## 2. *Background*

In 2012, when the Commission tabled its proposal for a PIF Directive, a majority of the Member States was of the opinion that VAT fraud should be excluded from its scope. The main argument (besides arguments relating to EU and Member States competences in the area of tax law) was based on the lack of proportionality: in the view of some Member States there was no need to establish such protection at EU level, as only a very small portion of the VAT revenues collected by national Tax administrations is transferred into the budget of the EU, and as national protection mechanisms are already in place.

However, on 8 September 2015 the Court of Justice issued its judgment in case C-105/14 Ivo Taricco and others, expressing a legal opinion that the VAT represents a source for the EU budget. In light of this decision the European Parliament has declared that it will not support the PIF Directive unless the VAT fraud is included within its scope.

In 2013 the Commission tabled a proposal on a Regulation establishing the European Public Prosecutor's Office (the EPPO Regulation) to address the ineffective protection of the Union's financial interests. However, the material competence of the EPPO should be defined in the PIF Directive. The European Parliament indicated that it will support the EPPO Regulation only under the condition that the VAT fraud is included in the scope of the PIF Directive.

During the previous Presidencies a lot of Member States reiterated concerns as regards a potential indirect harmonisation in the field of taxation, potential loss of VAT revenues as well as the fact that the inclusion of VAT fraud in the scope of the PIF Directive would interfere with the competence of the Member States as regard the structure, organisation and functioning of their tax administrations. However, as now clearly confirmed through the Taricco case, VAT fraud is covered by the 1995 PIF Convention, which is applicable already now.

If the PIF Directive was not adopted the 1995 PIF Convention would continue to apply (including on VAT fraud). On the other hand, including VAT fraud into the PIF Directive would provide an opportunity for to clarify the inclusion of the VAT fraud to be covered by EU legislation.

During the informal meeting of Justice and Home Affairs ministers on 8 July 2016, a significant majority of Ministers confirmed their wish to establish the EPPO and to include at least some aspects of VAT fraud into its material competence under condition certain technical changes and clarifications would be introduced.

### 3. *Possible compromise solution*

The discussion held at HLWG and then at CATS confirmed that the draft text prepared by the Netherlands Presidency could represent, subject to technical adjustments/changes and clarifications, a sound basis for reach a compromise according to which the VAT fraud would fall into the scope of this Directive only in a limited way. The EPPO competence would be limited to the most serious cases involving e.g. cross-border VAT carousels, Missing Trader Intra-EU Fraud (MTIC fraud), VAT fraud carried out by organised crime structures, or cases above a certain threshold. Later on, at the technical level, thresholds of 1, 3, 5 and 10 million of total damage were frequently mentioned. It should be noted that *the total damage* in criminal law understanding should be understood in financial terms as *the tax (VAT) due*.

Moreover, the draft text includes several stipulations stressing that the competence of Member States in the area of tax administration has to be respected by the PIF Directive. This independent performance of administration of VAT by national tax authorities is of key importance and should be clearly expressed in the PIF Directive. In addition to that, the Slovak Presidency is open to any other clarifications needed to address remaining concerns of Member States.

### 4. *Discussion in the high level working party on tax questions*

In the light of the interest that national ministries of finance have taken in the file, the High Level Working Party on Tax Questions (HLWP) discussed the issue on 20 September 2016. The discussions showed a clear tendency towards a more general acceptance of the idea to include at least serious forms of VAT fraud in the scope of the Directive. Nonetheless, a considerable number of delegations underlined the need to clarify the impact of such an inclusion, not in the least as regards the existing and well-functioning administrative measures against VAT fraud. Most delegations also noted that the criteria for deciding which cases of VAT fraud should be considered serious enough to be included in the Directive will need further analysis.

### 5. *Discussions in CATS on 26 September 2016*

The discussions in CATS confirmed the state of play as established in the HLWP. The close links with certain provisions in the EPPO Regulation were also underlined. The CATS confirmed there is a growing political will to include VAT fraud in the scope of the Directive, although there is still need for further technical clarifications and some MS are still against the inclusion of VAT fraud into the PIF Directive.

6. *Discussions in ECOFIN Council on 11 October 2016*

Discussions in ECOFIN Council confirmed the trend described above. Some Member States, which in the past expressed strong opposition against the inclusion of VAT fraud in the Directive and in the competence of the EPPO, agreed to its inclusion as a compromise solution. A few of them suggested an alternative approach.

7. *Questions to ministers*

**Ministers are requested to reflect on the following questions:**

- 1) **Do you agree that the prosecution of serious cross-border VAT fraud should fall under the competence of EPPO on the basis of the PIF Directive ?**
  - 2) **If yes, would you agree that the proposed approach in Annex of this document is a good basis for further work (subject to technical clarifications) ?**
  - 3) **Would you also be open to consider an alternative solution which would result in a direct inclusion of VAT fraud in the competence of the EPPO Regulation ?**
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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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83 (2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Court of Auditors<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures negatively affecting or threatening to negatively affect its assets, and those of the Member States to the extent they are of relevance to Union policies.

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<sup>1</sup> ~~Opinion 8/2012~~, OJ C , , p. .

- (2) The Convention for the protection of the European Communities' financial interests of 26 July 1995<sup>2</sup>, including the Protocols thereto of 27 September 1996<sup>3</sup>, of 29 November 1996<sup>4</sup> and of 19 June 1997<sup>5</sup> ('the Convention') establishes minimum rules relating to the definition of criminal offences and sanctions in the area of fraud affecting the Union's financial interests. The Convention ~~It~~ was drawn up by the Member States ~~of the European Union~~ which noted that fraud affecting Union revenue and expenditure in many cases was not confined to a single country and was often committed by organised criminal networks; on that basis, it was already recognised in that Convention that the protection of the Union's financial interests called for the criminal prosecution of fraudulent conduct injuring those interests. In parallel, Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 ~~on the protection of the European Communities' financial interests~~<sup>6</sup> was adopted. That Regulation lays down general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Union law while, at the same time, referring to sectoral rules in this area, fraudulent actions as defined in the Convention ~~on the protection of the European Communities' financial interests~~ and the application of the Member States' criminal law and proceedings.
- (3) In order to ensure the implementation of the Union policy in the area of the protection of the Union's financial interests which has been the subject of ~~to~~ harmonisation measures such as Council Regulation (EC, Euratom) No 2988/95, it is essential to continue to approximate the criminal laws of the Member States by complementing the protection under administrative and civil law for the most serious types of fraud-related conduct in this field, whilst avoiding inconsistencies, both within and among these areas of law.

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<sup>2</sup> OJ C 316, 27.11.1995, p. 48.

<sup>3</sup> OJ C 313, 23.10.1996, p. 1.

<sup>4</sup> OJ C 151, 20.5.1997, p. 1.

<sup>5</sup> OJ C 221, 19.7.1997, p. 11.

<sup>6</sup> 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).

- (4) The protection of the Union's financial interests calls for a common definition of fraud falling within the scope of this Directive and covering fraudulent conduct with respect to both expenditure and revenues and assets at the expense of the general EU budget of the European Union (the 'Union' budget), including financial operations such as borrowing and lending activities. The most serious forms of VAT fraud, in particular carousel fraud, fraud through missing traders and VAT fraud committed within a criminal organisation constitute serious threats to the common VAT system established by the Council Directive 2006/112/EC and thus, to the Union budget. This Directive aims to contribute to the efforts to fight these criminal phenomena.[-] but this does not necessarily exclude a role for the future European Public Prosecutor's Office in the efforts to fight major cross-border VAT fraud.
- (4a) When the Commission implements the budget under shared or indirect management, it may delegate budget implementation tasks to the Member States, or entrust them to agencies or bodies established pursuant to the Treaties or certain other entities and persons. In any of these cases, the Union's financial interests should enjoy the same level of protection as under direct management by the Commission.
- (4b) For the purposes of this Directive, procurement-related expenditure is any expenditure in connection with the public contracts determined by Article 101(1) of the Regulation (EU, EURATOM) No 966/2012<sup>7</sup> of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union.
- (5) The Union money laundering legislation is fully applicable to the laundering of proceeds of criminal offences ~~in serious cases~~ referred to in this Directive. A reference made to that legislation should ensure that the sanction regime introduced by this Directive applies to all serious cases of criminal offences against the Union's financial interest.

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<sup>7</sup> OJ L 298, 2012, p. 1.

- (6) Corruption constitutes a particularly serious threat ~~to~~against the Union's financial interests, which can in many cases also be linked to fraudulent conduct. ~~A particular criminalisation as regards all undue advantages in this area is therefore included.~~ As any public official has the duty to exercise judgment or discretion impartially, giving bribes in order to influence the public official's judgment or discretion and taking such bribes should fall under the definitions of corruption irrespective of the law or regulations of the particular official's country or international organisation.
- (7) The Union's financial interests can be negatively affected by certain types of conduct ~~by~~of a public official who is entrusted with the management of funds or assets, be it as official in charge or in a supervisory function, which aim at misappropriating funds or assets contrary to the intended purpose foreseen, where the Union's financial interests are thereby damaged. There is therefore a need to introduce a precise definition of offences covering such conduct.
- (7a) The Union's financial interests can be negatively affected where individual tenderers use information which is not publicly available directly or indirectly received from the tendering body in order to obtain an unlawful gain. Such conduct may also distort or destroy natural competition among bidders and may cause damage to the Union's financial interests. The offence is very similar to fraud, but does not necessarily need to bear all the hallmarks of a full fraud offence on the side of the tenderer, since the provided bid may meet all necessary criteria. It includes true information, albeit based on information unlawfully received from public authorities. Consequently, the prohibition against public procurement fraud should apply where a person who has unlawfully received, directly or indirectly from the tendering body, information of a precise nature relating to the awarding of a Union grant or procurement, which is not publicly available, uses it and takes unfair advantage of the benefit gained from that information in order to obtain an unlawful gain. This Directive does not cover tenderers who use information without knowing that this was not publicly available or without aiming to obtain an unlawful gain. Bid-rigging behaviour between tenderers violates Union competition rules and equivalent national laws; it is subject to public enforcement action and sanctions throughout the Union and should remain outside the scope of this Directive.

- (8) As regards the offences of passive corruption and misappropriation, there is a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union in the Member States or in third countries. Private persons are increasingly involved in the management of Union funds. In order to adequately protect Union funds from corruption and misappropriation, the definition of 'public official' therefore needs to cover also persons who ~~that~~ do not hold a formal office, but nonetheless are assigned and exercising, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.
- (9) With regard to the criminal offences provided for ~~foreseen~~ in this Directive, the notion of intention must apply to all the elements constituting those offences ~~referred to in this Directive~~. The intentional nature of an act or omission may be inferred from objective, factual circumstances. Offences by natural persons which do not require intention are not covered by this Directive.
- (10) This Directive does not oblige Member States to provide for ~~foresee~~ penalties sanctions that consist of imprisonment for perpetrators of criminal offences that are not of a serious nature, in cases where intent is presumed under national law.
- (11) Some offences against the Union's financial interests are in practice often closely related to the offences covered by Article 83 (1) of the Treaty and Union legislation based on that Article. Coherence between ~~with~~ such legislation and this Directive should therefore be ensured in the wording of the provisions.
- (12) In as much as the Union's financial interests can also be damaged or threatened by conduct attributable to legal persons, they should be liable for the criminal offences, as defined in this Directive, committed on their behalf.
- (13) In order to protect the Union's financial interests equivalently through measures which should act as a deterrent throughout the Union, Member States should further provide for ~~foresee~~ certain types and levels of sanctions when the criminal offences defined in this Directive are committed. The levels of sanctions should not go beyond what is proportionate for the offences.

- (14) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests.
- (15) This Directive does not affect the proper and effective application of disciplinary measures or penalties other than of a criminal nature. Sanctions of another nature, that cannot be equated to criminal penalties, and which are already imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence defined under this Directive. ~~in individual cases;~~ For other sanctions, the principle of ne bis in idem should be fully respected. This Directive does not criminalise behaviour which is not also subject to disciplinary ~~penalties~~sanctions or other measures concerning a breach of official duties, in cases where such disciplinary ~~penalties~~sanctions or other measures can be applied to the persons concerned.
- (16) The sanctions for natural persons should in more serious certain cases should provide for~~foresee~~ a maximum penalty of imprisonment of at least four years of imprisonment. ~~In determining whether an offence is serious, Member States should, in accordance with national law, have regard to all relevant circumstances.~~ These should in principle include cases involving considerable damages done or advantages gained, whereby such as the damages or advantages should be presumed to be considerable when involving more than EUR 100 000. Those Member States whose legal systems do not in legislation provide for an explicit threshold for considerable damage or advantage as a basis for maximum penalty should ensure that the amount of damage or advantage is duly taken into account by their courts in the determination of sanctions for offences referred to in Articles 3 and 4. These cases could also be determined on the basis of other serious circumstances defined in national law. Serious abuse of the common VAT system as referred to in Article 3(1)(d) is presumed when the total damage caused by the offence exceeds the threshold of EUR [1/3/10 million]. In relation to the latter type of fraud the notion of total damage is used to express that this is the total of the estimated damage, both, for the financial interests of the Member States concerned and for the Union. ~~the integrity of or confidence in systems for managing the Union's financial interests.~~

The introduction of minimum levels of maximum imprisonment ~~sanctions penalties for serious offences~~ is necessary in order to guarantee that the Union's financial interests are given an equivalent protection throughout ~~the Union-Europe~~. The sanctions will serve as a strong deterrent for potential criminals, with effect all over ~~the Union-Europe~~.

- (17) Member States should ensure that when the offence was committed within a criminal organisation in the sense of Council Framework Decision 2008/841/JHA<sup>8</sup>, this should be considered an aggravating circumstance in accordance with the applicable rules established by their legal systems. They should ensure that this aggravating circumstance is available for judges to consider when sentencing offenders, although there is no obligation for judges to apply those aggravating circumstances. Member States are not obliged to provide for the aggravating circumstance when in national law the offences in the sense of Council Framework Decision 2008/841 are criminalised as a separate offence and may lead to more severe sanction levels.
- (18) Given in particular the mobility of perpetrators and of proceeds stemming from illegal activities at the expense of the Union's financial interests, as well as the complex cross-border investigations which this entails, all Member States should establish their jurisdiction in order to enable them to counter these activities. Member States should thereby ensure that their jurisdiction includes situations where an offence is committed by means of information and communication technology accessed from their territory.
- (18a) Given the possible multiple jurisdictions for cross-border offences falling under the scope of this Directive, the Member States should ensure that the principle of *ne bis in idem* is respected in full in the application of national law transposing this Directive.

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<sup>8</sup> OJ L 300, 11.11.2008, p. 42.

- (19) Member States should lay down rules concerning ~~prescription~~ periods of limitation necessary in order to enable them to counter illegal activities at the expense of the Union's financial interests. In cases of ~~serious offences punishable by a maximum sanction of at least four years of imprisonment~~, the ~~prescription~~ period of limitation should be at least five years from the time when the offence was committed. This is without prejudice to those Member States which do not set ~~limitation~~ periods of limitation for investigation, prosecution and enforcement.
- ~~(20) Administrative measures and sanctions play an important role in the protection of the Union's financial interests. The imposition of criminal sanctions on the basis of offences foreseen by this Directive and of administrative sanctions does not lead to the breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice. The obligations under this Directive do not exempt Member States from the obligation to apply and implement administrative Union sanctions and measures within the meaning of Article 4 and 5 of Council Regulation No 2988/95.~~
- (21) Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters and to other rules under Union law, in particular under Regulation (EU, Euratom) No 883/2013<sup>9</sup> of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), there is a need for appropriate provision to be made for cooperation between Member States and the Commission to ensure effective action against the criminal offences defined in this Directive affecting the Union's financial interests, including exchange of information between the Member States and the Commission as well as technical and operational assistance lent by the Commission to the competent national authorities as they may need to facilitate coordination of their investigations. The assistance by the Commission should not entail the participation of the Commission in the investigation or prosecution procedures of individual criminal cases conducted by the national authorities.

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<sup>9</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

- (22) The Commission should report to the European Parliament and the Council on the measures taken by Member States to comply with the Directive. The report may be accompanied, if necessary, by proposals taking into consideration possible evolutions, in particular regarding the financing of the Union budget.
- (23) ~~The Convention for the protection of the European Communities' financial interests of 26 July 1995<sup>10</sup> and the Protocols thereto of 27 September 1996<sup>11</sup> and 29 November 1996<sup>12</sup> and of 19 June 1997<sup>13</sup>~~ should be replaced by this Directive in relation to Member States ~~participating in the adoption of~~ bound by this Directive.
- (24) Proper implementation of this Directive by the Member States includes the processing of personal data among the competent national authorities, and its exchange between Member States, on the one hand, and between competent Union bodies on the other hand. The processing of personal data at the national level between national competent authorities should be regulated by the EU-acquis. The exchange of personal data between Member States should meet the requirements of Council Framework Decision 2008/977/JHA<sup>14</sup>. To the extent personal data are processed by Union institutions, bodies, agencies and offices, they should comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>15</sup> and with the applicable rules concerning the confidentiality of judicial investigations.

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<sup>10</sup> OJ C 316, 27.11.1995, p. 48.

<sup>11</sup> OJ C 313, 23.10.1996, p. 1.

<sup>12</sup> OJ C 151, 20.5.1997, p. 1.

<sup>13</sup> OJ C 221, 19.7.1997, p. 11.

<sup>14</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60).

<sup>15</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

- (25) The intended dissuasive effect of the application of criminal law ~~sanctions penalties~~ requires particular caution with regard to fundamental rights. This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and ~~in particular notably~~ the right to liberty and security, the protection of personal data, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of the legality and proportionality of criminal offences and ~~sanctions penalties~~, as well as the prohibition of being tried or punished twice in criminal proceedings for the same criminal offence. This Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.
- (25a) Member States should take the necessary measures to ensure the prompt recovery of such sums and their transfer to the Union budget, without prejudice to the relevant Union sector-specific rules on financial corrections and recovery of amounts unduly spent.
- (25b) Administrative measures and penalties play an important role in the protection of the Union's financial interests. This Directive does not exempt Member States from the obligation to apply and implement administrative Union measures and penalties within the meaning of Article 4 and 5 of Regulation (EC, Euratom) No 2988/95. ~~In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative measures and penalties does not lead to a breach of the principle of ne bis in idem.~~
- (25c) This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the acts of Fraud and fraud related criminal offences affecting the Union's financial interests to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases. Member States may in principle continue to apply administrative measures and penalties in parallel in the area covered by the Directive. In the application of national law transposing this Directive, Member States should however ensure that the imposition of criminal sanctions of offences in accordance with this Directive and of administrative measures and penalties does not lead to a breach of the Charter of Fundamental rights.

- (25d) The structure, organisation, and functioning of, as well as the effective application of VAT legislation by the tax administration of the Member States are not affected by this Directive.
- (26) This Directive will apply without prejudice to the provisions on the lifting of the immunities contained in the Treaty, the Protocol on the Privileges and Immunities of the European Union, the Statute of the Court of Justice and the texts implementing them, or similar provisions incorporated in national law. In the application of national law transposing this Directive, those privileges and immunities, including the respect of the freedom of Members' mandate, are fully taken into account.
- (27) This Directive is without prejudice to the general rules and principles of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case.
- (28) Since the objective of this Directive cannot be sufficiently achieved by the Member States ~~alone and~~ but can rather therefore, by reasons of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (29) In accordance with Article 3 and 4a(1) of the Protocol (No 21) on the position of United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, ~~the United Kingdom and~~ Ireland has notified its wish to take part in the adoption and application of this Directive.

- (30) In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (31) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

**Title I: Subject matter and definition**

*Article 1*

*Subject matter*

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the field of the fight against fraud and other illegal activities affecting the Union's financial interests, with a view to contributing effectively to a stronger protection against crime affecting those financial interests, in line with the acquis of the Union in this field.

*Article 2*

*Definition of the Union's financial interests and scope of the Directive*

For the purposes of this Directive, 'the Union's financial interests' means all revenues, ~~and~~ expenditures and assets covered by, acquired through, or due to:

- (a) the Union budget;
- (b) the budgets of institutions, bodies, offices and agencies established pursuant to~~under~~ the Treaties or budgets directly or indirectly managed and monitored by them.

[~~Revenues arising from VAT shall be excluded from the scope of this Directive.~~]

## Title II: Criminal offences in the field of fraud affecting the Union's financial interests

### Article 3

#### *Fraud affecting the Union's financial interests*

1. Member States shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence, when committed intentionally. For the purposes of this Directive, *fraud affecting the Union's financial interests* shall consist of:
  - (a) in respect of ~~and aid~~ expenditure, any act or omission relating to:
    - (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf,
    - (ii) non-disclosure of information in violation of a specific obligation, with the same effect,
    - (iii) the misapplication of such funds for purposes other than those for which they were originally granted;
  - (b) by derogation of point (a), in respect of ~~other~~ procurement-related<sup>16</sup> expenditure, any act or omission relating to:
    - (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf, ~~or~~
    - (ii) non-disclosure of information in violation of a specific obligation, with the same effect,

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<sup>16</sup> The concept of public procurement is already regulated in EU legislation, for example the Financial Regulation or the public procurement directives, contrary to the concept of “aids”

(iii) the misapplication of such funds for purposes other than those for which they were originally granted, which damages the Union's financial interests;

at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests;

(c) in respect of revenue, any act or omission relating to:

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf,

(ii) non-disclosure of information in violation of a specific obligation, with the same effect,

(iii) misapplication of a legally obtained benefit, with the same effect.

(d) by derogation of point (c) in respect of revenue arising from VAT own resources, any act or omission committed through serious abuse of the common VAT system, where the offences are connected with the territory of two or more Member States and relating to:

(i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the serious diminution<sup>17</sup> of the resources of the Union budget;

(ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect.

(iii) the presentation of correct VAT-related statements for the purposes of disguising non payment.

~~2. Subject to Article 7(4), Member States shall take the necessary measures to ensure that the acts or omissions as referred to in paragraph 1 of this Article constitute a criminal offence, when committed intentionally.~~

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<sup>17</sup> Recital 16

## Article 4

### *Fraud related criminal offences affecting the Union's financial interests*

1. Member States shall take the necessary measures to ensure that the unlawful disclosure or use of information, which is not publicly available, in the application for a public procurement or grant, in a way which damages the Union's financial interests and in order to make an unlawful gain, constitutes a criminal offence when it is committed intentionally.
2. Member States shall take the necessary measures to ensure that money laundering as defined in Article 1 (2) of Directive 2005/60/EC of the European Parliament and of the Council<sup>18</sup> involving property derived from the offences referred to in Article 4, paragraph 1 (ii) and (iii), and, at least when they constitute serious offences, the offences referred to in Article 3 and 4, paragraph 1 (iv), covered by this Directive constitutes punishable as a criminal offence.
3. Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, punishable as constitute criminal offences.
  - (a) For the purposes of this Directive, passive corruption shall consist of means the action of a public 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 to refrain from acting in accordance with his duty or in the exercise of his functions ~~in breach of his official duties~~ in a way which damages or is likely to damage the Union's financial interests;
  - (b) For the purposes of this Directive, active corruption shall consist of means the action of whosoever promises, offers or gives, directly or through an intermediary, an advantage of any kind whatsoever to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions ~~in breach of his official duties~~ in a way which damages or is likely to damage the Union's financial interests;

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<sup>18</sup> OJ L 309, 25.11.2005, p. 15.

4. Member States shall take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence.

For the purposes of this Directive, misappropriation means an act by any public official who is 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, and which damages the Union's financial interests.

5. For the purpose of this ~~Directive~~Article 'public official' means:

- (a) any 'Union' or 'national' official, including any national official of another Member State ~~and~~any national official of a third country;

- (i) the term 'Union' official ~~shall~~means:

- any person who is an official or other contracted employee within the meaning of the Staff Regulations of Officials of the European Union or the Conditions of Employment of Other Servants of the European Union,

- any person seconded to the ~~European~~ Union by the Member States or by any public or private body, who carries out functions equivalent to those performed by European officials or other servants.

Without prejudice to the provisions on privileges and immunities contained in Protocols 3 and 7 annexed to the TEU and the TFEU, Members of institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be ~~treated~~assimilated to as Union officials, inasmuch as the Staff Regulations of the European Union or the Conditions of Employment of Other Servants of the European Union do not apply to them;

- (ii) the term 'national official' shall be understood by reference to the definition of 'official' or 'public official' in the national law of the Member State or third country in which the person in question performs the function.

Nevertheless, in the case of proceedings involving an official of a Member State, or a national official of a third country, initiated by another Member State the latter shall not be bound to apply the definition of 'national official' except in so far as the definition is compatible with its national law.

The term 'national official' shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional and local level shall be assimilated to a national official.

- (b) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

**Title III: General provisions relating to the criminal offences in the fields of the fight against fraud affecting the Union's financial interests**

*Article 5*

*Incitement, aiding and abetting, and attempt*

1. Member States shall take the necessary measures to ensure that inciting, aiding or abetting the commission of any of the criminal offences referred to in Articles 3 and 4 is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that an attempt to commit any of the criminal offences referred to in Article 3 and in Article 4, ~~paragraph (4iv)~~, is punishable as a criminal offence.

*Article 6*

*Liability of legal persons*

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:
  - (a) a power of representation of the legal person;
  - (b) an authority to take decisions on behalf of the legal person; or
  - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, of any of the criminal offences referred to in Articles 3, 4 and 5 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 3 and 4 or criminally liable under Article 5.

4. For the purpose of this Directive, ‘legal person’ ~~shall mean~~ any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

#### *Article 7*

##### *~~Penalties~~ Sanctions for natural persons*

1. As regards natural persons, Member States shall ensure that the criminal offences referred to in Articles 3, 4 and 5 shall be punishable by effective, proportionate and dissuasive criminal ~~sanctions~~ penalties.

2. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 shall be punishable by a maximum penalty which provides for imprisonment.

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 shall be punishable by a maximum penalty of at least four years of imprisonment when they ~~constitute serious offences~~ involve considerable damages or advantages. The damages or advantages shall be presumed to be considerable when involving more than 100 000 euros.

Member States may also provide for a maximum penalty of at least four years of imprisonment on the basis of other serious circumstances defined in national law.

4. In cases of offences involving damages of less than EUR 10, 000 and advantages of less than EUR 10, 000. Member States may provide instead for other than criminal ~~sanctions~~ penalties, ~~unless the case constitutes a serious offence.~~

4a. In cases regarding offences referred to in Article 3(1)(d), Member States may provide instead for other than criminal penalties in cases of offences involving total damage of less than [EUR 1/3/10 millions].

5. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials.

*Article 8*

*Aggravating circumstance*

Member States shall take the necessary measures to ensure that it shall be regarded as an aggravating circumstance when a criminal offence referred to in Articles 3, 4 or 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841 of 24 October 2008 on the fight against organised crime.

*Article 9*

*Minimum sanction types for legal persons*

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent exclusion from public tender procedures;
- (c) temporary or permanent disqualification from the practice of commercial activities;
- (d) placing under judicial supervision;
- (e) judicial winding-up;
- (f) temporary or permanent closure of establishments which have been used for committing the offence.

*Article 10*  
*Freezing and confiscation*

Member States shall take the necessary measures to enable freezing and confiscation of proceeds and instrumentalities from the offences referred to in Articles 3, 4 and 5. Those Member States ~~participating in~~ bound by Directive 2014/42/EU of the European Parliament and of the Council<sup>19</sup> ~~on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union~~ shall do so in accordance with that Directive.

*Article 11*  
*Jurisdiction*

1. Each Member States shall take the necessary measures to establish its ~~their~~ jurisdiction over the criminal offences referred to in Articles 3, 4 and 5 where:
  - (a) the offence is committed in whole or in part within its~~their~~ territory; ~~or~~
  - (b) the offender is one of its nationals.
2. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3, 4 and 5 where the offender is subject to the Staff Regulation or the Conditions of Employment of Other Servants at the time of the offence. Each Member States may refrain from applying or may apply only in specific cases or conditions the jurisdiction rules laid down in this paragraph and shall inform the Commission thereof.
3. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 3, 4 and 5 committed outside its territory where:
  - (a) the offender is a habitual resident in its territory;
  - (b) the offence is committed for the benefit of a legal person established in its territory, or
  - (c) the offender is one of its officials who acts on his or her official duty.

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<sup>19</sup> Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39).

42. For the case referred to in point (b) of paragraph 1, Member States shall take the necessary measures to ensure that their jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

## *Article 12*

### *Prescription for offences affecting the Union's financial interests*

1. Member States shall take the necessary measures to provide for a prescription 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 offences, such that those offences may be tackled effectively.
2. Member States shall in cases of ~~serious~~-offences referred to in Articles 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment take the necessary measures to enable their investigation, prosecution, trial and judicial decision of criminal offences for a period of at least ~~ensure that the prescription period amounts to at least five~~ years from the time when the offence was committed.
3. By derogation of paragraph 2, Member States may establish a prescription period that is shorter than five years, but not less than three years, ~~in cases of serious offences~~ provided that they shall ensure that the period may be interrupted or suspended upon specified acts.

4. Member States shall take the necessary measures to enable the enforcement of:

(a) a penalty of more than one year of imprisonment, or alternatively,

(b) a penalty of imprisonment in a case of an ~~serious~~-offence which is punishable by a maximum penalty of at least four years of imprisonment,

imposed following a final conviction for a criminal offence referred to in Articles 3, 4 and 5, for at least five years from the date of the final conviction. This period may include extensions of the prescription period arising from interruption or suspension.

*Article 13*

*Recovery*

This Directive shall be without prejudice to the recovery ~~of sums unduly paid in the context of the commission of the criminal offences referred to in Articles 3, 4 and 5.~~

(i) at EU level of sums unduly paid in the context of the commission of the criminal offences referred to in Article 3(1) a, b and c and Articles 4 and 5;

(ii) at national level of any VAT not paid in the context of the commission of the criminal offences referred in Articles 3(1) d and Articles 4 and 5.

## Article 14

### *Interaction with other applicable legal acts of the Union*

~~This Directive shall be without prejudice to the application of administrative measures and sanctions as laid down in Union law, in particular those within the meaning of Articles 4 and 5 of Council Regulation No 2988/95<sup>20</sup>, or in national law adopted in compliance with a specific obligation under Union law.~~ The application of administrative measures, penalties and fines as laid down in Union law, in particular those within the meaning of Articles 4 and 5 of Council Regulation No 2988/95, or in national law adopted in compliance with a specific obligation under Union law, shall be without prejudice to this Directive. Member States shall ensure that any criminal proceedings initiated on the basis of national provisions implementing this Directive shall not unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings, laid down in Union law or national implementing provisions.

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<sup>20</sup> Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interest, OJ L 312, 23.12.1995, p. 1.

## **Title IV: Final provisions**

### *Article 15*

#### *Cooperation between the Member States and the European Commission*

##### *(European Anti-Fraud Office)*

1. Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, the Member States, Eurojust/EPPO<sup>21</sup> and the Commission shall, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in Articles 3, 4 and 5. To that end the Commission, and where appropriate, Eurojust, shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.
2. The competent authorities in the Member States may, within their competences, exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against the criminal offences referred to in Articles 3, 4 and 5. The Commission and the competent national authorities shall take into account in each specific case the requirements of confidentiality and the rules on data protection. Without prejudice to national legislation on access to information, a Member State may, when supplying information to the Commission, to that end set specific conditions covering the use of information, whether by the Commission or by another Member State to which the information may be passed.
- 2a. The Court of Auditors and auditors responsible for auditing the budgets of the institutions, bodies and agencies established pursuant to the Treaties, or the budgets managed and audited by the institutions, shall disclose to OLAF and to other competent authorities any fact of which they become aware during their mission, which could be qualified as a criminal offence as referred to in Articles 3, 4 and 5. Member States shall ensure that national audit bodies do the same.

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<sup>21</sup> The reference to Eurojust could be replaced by a reference to EPPO, once this body is in place.

3. ~~In applying this Article, the Commission and the competent national authorities shall take into account in each specific case the requirements of confidentiality and the rules on data protection.~~

#### *Article 16*

##### *Replacement of the Convention for the protection of the European Communities' financial interests*

The Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto of 27 September 1996, of 29 November 1996 and of 19 June 1997 (the "Convention"), is hereby replaced ~~for the in relation to~~ Member States bound by participating in the adoption of this Directive, with effect from [day of application under Art. 17 (1) second subparagraph]. ~~In relation to~~ For the Member States bound by participating in the adoption of this Directive, references to the Convention shall be construed as references to this Directive.

#### *Article 17*

##### *Transposition*

1. Member States shall adopt and publish, by [two years from the adoption] ~~at the latest~~, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission. ~~forthwith provisions.~~

They shall apply those measures ~~provisions~~ from ... .

When Member States adopt those measures ~~provisions~~, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 18*

*Reporting and assessment*

1. The Commission shall by [24 months after the deadline for implementation of the Directive] submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, ~~subject to appropriate information being made available by Member States.~~
  
2. Without prejudice to reporting obligations laid down in other Union legislation, Member States shall annually send the following statistics on the offences referred to in Articles 3 to 5 to the Commission, if they are available at a central level in the Member State concerned:
  - (a) the number of criminal proceedings initiated, the number of proceedings dismissed, the number resulting in an acquittal, the number resulting in a conviction and the number of ongoing proceedings;
  
  - (b) the amounts recovered following criminal proceedings and the estimated damages.
  
3. The Commission shall, by [60 months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the impact of national law transposing this Directive on the prevention of fraud to the Union's financial interests. The Commission shall take into account reports pursuant to paragraphs 1 and 2 of this Article. The report shall be accompanied, if necessary, by a legislative proposal.

*Article 19*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the  
*Official Journal of the European Union.*

*Article 20*  
*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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