

III

(Preparatory acts)

COUNCIL

POSITION (EU) No 4/2017 OF THE COUNCIL AT FIRST READING

with a view to the adoption of 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

Adopted by the Council on 25 April 2017

(2017/C 184/01)

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 Committee of the Regions ⁽¹⁾

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures which negatively affect or which threaten to negatively affect its assets and those of the Member States, to the extent that those measures are of relevance to Union policies.
- (2) The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests of 26 July 1995 ⁽³⁾, including the Protocols thereto of 27 September 1996 ⁽⁴⁾, of 29 November 1996 ⁽⁵⁾ and of 19 June 1997 ⁽⁶⁾ (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 Member States drew up the Convention, in which it was 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 the 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 ⁽⁷⁾ 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 that area, fraudulent actions as defined in the Convention and the application of the Member States' criminal law and proceedings.

⁽¹⁾ OJ C 391, 18.12.2012, p. 134.

⁽²⁾ Position of the European Parliament of 16 April 2014 (not yet published in the Official Journal) and position of the Council at first reading of 25 April 2017. Position of the European Parliament of ... (not yet published in the Official Journal).

⁽³⁾ OJ C 316, 27.11.1995, p. 48.

⁽⁴⁾ OJ C 313, 23.10.1996, p. 1.

⁽⁵⁾ OJ C 151, 20.5.1997, p. 1.

⁽⁶⁾ OJ C 221, 19.7.1997, p. 11.

⁽⁷⁾ 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) Union policy in the area of the protection of the Union's financial interests has already been the subject of harmonisation measures such as Regulation (EC, Euratom) No 2988/95. In order to ensure the implementation of Union policy in this area, it is essential to continue to approximate the criminal law of the Member States by complementing the protection of the Union's financial interests under administrative and civil law for the most serious types of fraud-related conduct in that field, whilst avoiding inconsistencies, both within and among those areas of law.
- (4) The protection of the Union's financial interests calls for a common definition of fraud falling within the scope of this Directive, which should cover fraudulent conduct with respect to revenues, expenditure and assets at the expense of the general budget of the European Union (the 'Union budget'), including financial operations such as borrowing and lending activities. The notion of serious offences against the common system of value added tax ('VAT') (the 'common VAT system') as established by Council Directive 2006/112/EC⁽¹⁾ refers to the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation, which create serious threats to the common VAT system and thus to the Union budget. Offences 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, excluding interest and penalties. This Directive aims to contribute to the efforts to fight those criminal phenomena.
- (5) When the Commission implements the Union budget under shared or indirect management, it may delegate budget implementation tasks to the Member States or entrust them to bodies, offices or agencies established pursuant to the Treaties or to other entities or persons. In the event of such shared or indirect management, the Union's financial interests should benefit from the same level of protection as they do when under the direct management of the Commission.
- (6) For the purposes of this Directive, procurement-related expenditure is any expenditure in connection with the public contracts determined by Article 101(1) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council⁽²⁾.
- (7) Union money laundering law is fully applicable to money laundering involving property derived from the criminal offences covered by this Directive. A reference made to that law should ensure that the sanctioning regime introduced by this Directive applies to all serious cases of criminal offences against the Union's financial interests.
- (8) Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned.
- (9) The Union's financial interests can be negatively affected by certain types of conduct of a public official who is entrusted with the management of funds or assets, whether he or she is in charge or acts in a supervisory capacity, which types of conduct aim at misappropriating funds or assets, contrary to the intended purpose and whereby the Union's financial interests are damaged. There is therefore a need to introduce a precise definition of criminal offences covering such conduct.
- (10) As regards the criminal 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 protect Union funds adequately from corruption and misappropriation, the definition of 'public official' therefore needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.

⁽¹⁾ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

⁽²⁾ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

- (11) With regard to the criminal offences provided for in this Directive, the notion of intention must apply to all the elements constituting those criminal offences. The intentional nature of an act or omission may be inferred from objective, factual circumstances. Criminal offences which do not require intention are not covered by this Directive.
- (12) This Directive does not oblige Member States to provide for sanctions of imprisonment for the commission of criminal offences that are not of a serious nature, in cases where intent is presumed under national law.
- (13) Some criminal offences against the Union's financial interests are in practice often closely related to the criminal offences covered by Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) and Union legislative acts that are based on that provision. Coherence between such legislative acts and this Directive should therefore be ensured in the wording of this Directive.
- (14) Insofar as the Union's financial interests can be damaged or threatened by conduct attributable to legal persons, legal persons should be liable for the criminal offences, as defined in this Directive, which are committed on their behalf.
- (15) In order to ensure equivalent protection of the Union's financial interests throughout the Union by means of measures which should act as a deterrent, Member States should provide for 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.
- (16) 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.
- (17) This Directive does not affect the proper and effective application of disciplinary measures or penalties other than of a criminal nature. Sanctions that cannot be equated to criminal sanctions, which are imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence defined in this Directive. For other sanctions, the principle of prohibition of being tried or punished twice in criminal proceedings for the same criminal offence (*ne bis in idem*) should be fully respected. This Directive does not criminalise behaviour which is not also subject to disciplinary penalties or other measures concerning a breach of official duties, in cases where such disciplinary penalties or other measures can be applied to the persons concerned.
- (18) Sanctions with regard to natural persons should, in certain cases, provide for a maximum penalty of at least four years of imprisonment. Such cases should include at least those involving considerable damage done or advantage gained whereby the damage or advantage should be presumed to be considerable when it involves more than EUR 100 000. Where a Member State's law does not provide for an explicit threshold for considerable damage or advantage as a basis for a maximum penalty, the Member State should ensure that the amount of damage or advantage is taken into account by its courts in the determination of sanctions for fraud and other criminal offences affecting the Union's financial interests. This Directive does not prevent Member States from providing for other elements which would indicate the serious nature of a criminal offence, for instance when the damage or advantage is potential, but of very considerable nature. However, for offences against the common VAT system, the threshold as of which the damage or advantage should be presumed to be considerable is, in conformity with this Directive, EUR 10 000 000. The introduction of minimum levels of maximum imprisonment sanctions is necessary in order to ensure equivalent protection of the Union's financial interests throughout the Union. The sanctions are intended to serve as a strong deterrent for potential offenders, with effect throughout the Union.
- (19) Member States should ensure that the fact that a criminal offence is committed within a criminal organisation as defined in Council Framework Decision 2008/841/JHA ⁽¹⁾ is considered to be an aggravating circumstance in accordance with the applicable rules established by their legal systems. They should ensure that the aggravating circumstance is made available to judges for their consideration when sentencing offenders, although there is no obligation on judges to take the aggravating circumstance into account in their sentence. Member States are not obliged to provide for the aggravating circumstance where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions.
- (20) Given, in particular, the mobility of perpetrators and of the 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, each Member State should establish its jurisdiction in order to enable it to counter such activities. Each Member State should thereby ensure that its jurisdiction covers criminal offences which are committed using information and communication technology accessed from its territory.

⁽¹⁾ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

- (21) Given the possibility of multiple jurisdictions for cross-border criminal 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.
- (22) Member States should lay down rules concerning limitation periods necessary in order to enable them to counter illegal activities at the expense of the Union's financial interests. In cases of criminal offences punishable by a maximum sanction of at least four years of imprisonment, the limitation period should be at least five years from the time when the criminal offence was committed. This should be without prejudice to those Member States which do not set limitation periods for investigation, prosecution and enforcement.
- (23) 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 of the European Parliament and of the Council⁽¹⁾, there is a need for appropriate provision to be made for cooperation 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 provided by the Commission to the competent national authorities as they may need to facilitate coordination of their investigations. Such assistance should not entail the participation of the Commission in the investigation or prosecution procedures of individual criminal cases conducted by the national authorities. The Court of Auditors and the auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies should disclose to the European Anti-Fraud Office (OLAF) and to other competent authorities any fact which could be qualified as a criminal offence under this Directive, and Member States should ensure that national audit bodies within the meaning of Article 59 of Regulation (EU, Euratom) No 966/2012 do the same, in accordance with Article 8 in Regulation (EU, Euratom) No 883/2013.
- (24) The Commission should report to the European Parliament and to the Council on the measures taken by Member States to comply with this Directive. The report may be accompanied, if necessary, by proposals taking into consideration possible evolutions, in particular regarding the financing of the Union budget.
- (25) The Convention should be replaced by this Directive for the Member States bound by it.
- (26) For the application of point (d) of Article 3(4) of Directive (EU) 2015/849 of the European Parliament and of the Council⁽²⁾, the reference to serious fraud affecting the Union's financial interests as defined in Article 1(1) and Article 2(1) of the Convention should be construed as fraud affecting the Union's financial interests as defined in Article 3 and in Article 7(3) of this Directive or, as regards offences against the common VAT system, as defined in Article 2(2) of this Directive.
- (27) Proper implementation of this Directive by the Member States includes the processing of personal data by the competent national authorities, and the exchange of such data between Member States on the one hand, and between competent Union bodies on the other. The processing of personal data at national level between national competent authorities should be regulated by the *acquis* of the Union. The exchange of personal data between Member States should be carried out in accordance with Directive (EU) 2016/680 of the European Parliament and of the Council⁽³⁾. To the extent that the Union institutions, bodies, offices and agencies process personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council⁽⁴⁾ or, where applicable, other Union legal acts regulating the processing of personal data by those bodies, offices and agencies as well as the applicable rules concerning the confidentiality of judicial investigations, should apply.

⁽¹⁾ 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).

⁽²⁾ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

⁽³⁾ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

⁽⁴⁾ 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).

- (28) The intended dissuasive effect of the application of criminal law sanctions 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 (the 'Charter') and in particular 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, as well as the principle of *ne bis in idem*. This Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.
- (29) Member States should take the necessary measures to ensure the prompt recovery of 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.
- (30) 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 Articles 4 and 5 of Regulation (EC, Euratom) No 2988/95.
- (31) This Directive should oblige Member States to provide in their national law 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 this Directive. In the application of national law transposing this Directive, Member States should, however, ensure that the imposition of criminal sanctions for criminal offences in accordance with this Directive and of administrative measures and penalties does not lead to a breach of the Charter.
- (32) This Directive should not affect the competences of Member States to structure and organise their tax administration as they see fit to ensure the correct determination, assessment and collection of value added tax, as well as the effective application of VAT law.
- (33) This Directive applies without prejudice to the provisions on the lifting of the immunities contained in the TFEU, Protocol No 3 on the Statute of the Court of Justice of the European Union and Protocol No 7 on the Privileges and Immunities of the European Union, annexed to the TFEU and to the Treaty on European Union (TEU), and the texts implementing them, or similar provisions incorporated in national law. In the transposition of this Directive into national law as well as in the application of national law transposing this Directive, those privileges and immunities, including the respect for the freedom of the Member's mandate, are fully taken into account.
- (34) 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.
- (35) Since the objective of this Directive cannot be sufficiently achieved by the Member States but can rather, by reason of its 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 TEU. 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.
- (36) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified its wish to take part in the adoption and application of this Directive.
- (37) In accordance with Articles 1 and 2 of 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.

- (38) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (39) The European Court of Auditors has been consulted and has adopted an opinion ⁽¹⁾,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

Subject-matter, definitions and scope

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the *acquis* of the Union in this field.

Article 2

Definitions and scope

1. For the purposes of this Directive, the following definitions apply:
 - (a) 'the Union's financial interests' means all revenues, expenditure and assets covered by, acquired through, or due to:
 - (i) the Union budget;
 - (ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them;
 - (b) 'legal person' means an 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.
2. In respect of revenue arising from VAT own resources, this Directive shall apply only in cases of serious offences against the common VAT system. For the purposes of this Directive, offences against the common VAT system shall be considered to be serious where the intentional acts or omissions defined in point (d) of Article 3(2) are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000.
3. The structure and functioning of the tax administration of the Member States are not affected by this Directive.

TITLE II

Criminal offences with regard to 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.
2. For the purposes of this Directive, the following shall be regarded as fraud affecting the Union's financial interests:

⁽¹⁾ OJ C 383, 12.12.2012, p. 1.

- (a) in respect of non-procurement-related 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; or
 - (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted;
- (b) in respect of procurement-related expenditure, 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, 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; or
 - (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;
- (c) in respect of revenue other than revenue arising from VAT own resources referred to in point (d), 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; or
 - (iii) misapplication of a legally obtained benefit, with the same effect;
- (d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:
 - (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
 - (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
 - (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Article 4

Other criminal offences affecting the Union's financial interests

1. Member States shall take the necessary measures to ensure that money laundering as described in Article 1(3) of Directive (EU) 2015/849 involving property derived from the criminal offences covered by this Directive constitutes a criminal offence.
2. Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.
 - (a) For the purposes of this Directive, 'passive corruption' means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, 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 a way which damages or is likely to damage the Union's financial interests.

(b) For the purposes of this Directive, 'active corruption' means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind 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 a way which damages or is likely to damage the Union's financial interests.

3. 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 the action of a 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 in any way which damages the Union's financial interests.

4. For the purposes of this Directive, 'public official' means:

(a) a Union official or a national official, including any national official of another Member State and any national official of a third country:

(i) 'Union official' means a person who is:

- an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68⁽¹⁾ (the 'Staff Regulations'); or
- seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.

Without prejudice to the provisions on privileges and immunities contained in Protocol Nos 3 and 7, Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them;

(ii) '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 carries out his or her functions.

Nevertheless, in the case of proceedings involving a national 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 that 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 or 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 fraud and other criminal offences 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, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences.

⁽¹⁾ OJ L 56, 4.3.1968, p. 1.

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 Article 4(3) 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 of this Article has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Articles 3, 4 or 5 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not exclude the possibility of 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.

Article 7

Sanctions with regard to natural persons

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

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are 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 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage.

The damage or advantage resulting from the criminal offences referred to in points (a), (b) and (c) of Article 3(2) and in Article 4 shall be presumed to be considerable where the damage or advantage involves more than EUR 100 000.

The damage or advantage resulting from the criminal offences referred to in point (d) of Article 3(2) and subject to Article 2 (2) shall always be presumed to be considerable.

Member States may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law.

4. Where a criminal offence referred to in point (a), (b) or (c) of Article 3(2) or in Article 4 involves damage of less than EUR 10 000 or an advantage of less than EUR 10 000, Member States may provide for sanctions other than criminal sanctions.

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 where a criminal offence referred to in Article 3, 4 or 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA, this shall be considered to be an aggravating circumstance.

*Article 9***Sanctions with regard to 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 criminal offence.

*Article 10***Freezing and confiscation**

Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Articles 3, 4 and 5. Member States bound by Directive 2014/42/EU of the European Parliament and of the Council⁽¹⁾ shall do so in accordance with that Directive.

*Article 11***Jurisdiction**

1. Each Member State shall take the necessary measures to establish its jurisdiction over the criminal offences referred to in Articles 3, 4 and 5 where:

- (a) the criminal offence is committed in whole or in part within its 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 criminal offences referred to in Articles 3, 4 and 5 where the offender is subject to the Staff Regulations at the time of the criminal offence. Each Member State may refrain from applying the rules on jurisdiction established in this paragraph or may apply them only in specific cases or only where specific conditions are fulfilled and shall inform the Commission thereof.

3. A Member State shall inform the Commission where it decides to extend its jurisdiction to criminal offences referred to in Article 3, 4 or 5 which have been committed outside its territory in any of the following situations:

- (a) the offender is a habitual resident in its territory;
- (b) the criminal 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 in his or her official duty.

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

*Article 12***Limitation periods for criminal offences affecting the Union's financial interests**

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.

⁽¹⁾ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39).

2. Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 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.

3. By way of derogation from paragraph 2, Member States may establish a limitation period that is shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of 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 the case of a criminal offence which is punishable by a maximum sanction of at least four years of imprisonment,

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

Article 13

Recovery

This Directive shall be without prejudice to the recovery of the following:

(1) at Union level of sums unduly paid in the context of the commission of the criminal offences referred to in point (a), (b) or (c) of Article 3(2), or in Article 4 or 5;

(2) at national level, of any VAT not paid in the context of the commission of the criminal offences referred in point (d) of Article 3(2), or in Article 4 or 5.

Article 14

Interaction with other applicable legal acts of the Union

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 Regulation (EC, Euratom) 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 do 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.

TITLE IV

Final provisions

Article 15

Cooperation between the Member States and the Commission (OLAF) and other Union institutions, bodies, offices or agencies

1. Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, the Member States, Eurojust, the European Public Prosecutor's Office 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 provide such technical and operational assistance as the competent national authorities 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 law on access to information, a Member State may, to that end, when supplying information to the Commission, set specific conditions covering the use of information, whether by the Commission or by another Member State to which the information is passed.

3. The Court of Auditors and auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties, and the budgets managed and audited by the institutions, shall disclose to OLAF and to other competent authorities any fact of which they become aware when carrying out their duties, which could be qualified as a criminal offence referred to in Article 3, 4 or 5. Member States shall ensure that national audit bodies do the same.

Article 16

Replacement of the Convention on 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, is hereby replaced by this Directive for the Member States bound by it, with effect from ... *[two years after the date of adoption of this Directive]*.

For the Member States bound by 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 after the date of adoption of this Directive]*, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission. They shall apply those measures from ... *[two years after the date of adoption of this Directive]*.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that, for the Member States bound by this Directive, references in existing laws, regulations and administrative provisions to the Convention replaced by this Directive shall be construed as references to this Directive. 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 ... *[four years after the date of adoption of this 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.

2. Without prejudice to reporting obligations laid down in other Union legal acts, Member States shall, on an annual basis, submit the following statistics on the criminal offences referred to in Articles 3, 4 and 5 to the Commission, if they are available at a central level in the Member State concerned:

- (a) the number of criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction and ongoing;
- (b) the amounts recovered following criminal proceedings and the estimated damage.

3. The Commission shall, by ... *[seven years after the date of adoption of this Directive]* and taking into account its report submitted pursuant to paragraph 1 and the Member States' statistics submitted pursuant to paragraph 2, 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.

4. The Commission shall, by ... *[five years after the date of adoption of this Directive]* and on the basis of the statistics submitted by Member States, pursuant to paragraph 2, submit a report to the European Parliament and to the Council, assessing, with regard to the general objective to strengthen the protection of the Union's financial interests, whether:

- (a) the threshold indicated in Article 2(2) is appropriate;
- (b) the provisions relating to limitation periods as referred to in Article 12 are sufficiently effective;
- (c) this Directive effectively addresses cases of procurement fraud.

5. The reports referred to in paragraphs 3 and 4 shall be accompanied, if necessary, by a legislative proposal, which may include a specific provision on procurement fraud.

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 ...,

For the European Parliament

The President

For the Council

The President
