

Introduction to the PIF Directive and particularities regarding its implementation in the Member States

ERA Workshop

Competences of the EPPO and Cooperation with National Authorities

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European criminal law

•Until the end of the 80s criminal law does not belong to the competence of the EC, but to the States

First evolution

- Need for protection of certain European interests
- Possibility for the Community to request the MS to provide sanctions for the violations of the Community law
- CoJ decision 21.9.1989 in case C-68/88 (Greek mais): the MS must provide sanctions for the violations of the Community law
- The sanctions must be «effective, proportionate and dissuasive»

Maastricht Treaty

- Establishment of the Third Pillar on the judicial cooperation, also in criminal law
- Possible harmonisation of the national substantive criminal law to ensure the judicial cooperation, by mean of Conventions, Common actions, Common positions and later Framework Decisions

Example of harmonisation

- EU Convention on the Protection of the financial interests of the EU (1995) and its protocols (1996 and 1997)
- Extension of the harmonisation: criminal offences, but also at least range of sanctions

Legal issues about the Third Pillar instruments

- Interpretation of the national law in conformity with the FD even when they are not implemented
- Pupino case
- Proceeds of crime

Further step

- CoJ decision 13.9.2005 in case C-176/03 on environmental pollution
- Possibility of a EU intervention also in the First Pillar
- Annulment of a Council Framework decision as in that matter the power of initiative falls into the Commission's competence as one of the EC policies

CoJ decision 13.9.2005

- Paragraph 47-48
- In principle, the criminal law and the procedural criminal law do not fall into the Community's competence
- However, when the application of effective, proportionate and dissuasive criminal sanctions from the MS is necessary to fight against serious environmental violations, the EC may undertake actions with respect to the MS criminal law when it is necessary to ensure the full effectiveness of the EC environmental provisions

The Lisbon Treaty

- Single legal framework
- No pillars anymore
- Article 83 paragraph 1 TFEU
- Article 83 paragraph 2 TFEU
- Article 85 and 86 TFEU
- Article 325 TFEU

Article 83 para 1

- «autonomous» competence of the EU in criminal law
- Not necessarily linked to the judicial cooperation
- Implementation of the Stockholm program
- List of serious cross border crimes
- Possibility of extension to other serious cross border crimes
- Legal instrument: directive

Article 83 para 2

- «ancillary» competence of the EU in criminal law to ensure the effectiveness of the Community provisions in non-criminal area, which have been subject to harmonisation
- Competence linked to the principle of the CoJ decision of 13.9.2005 in case C-176/03 (former First Pillar)
- In the environmental sector: directive 2008/99/CE
- Legal instrument: directive

Article 85

- New provision for Eurojust
- Coordination and cooperation in criminal cases
- New FD on Eurojust 2008
- New regulation 2018

Article 86

- Provision on the establishment of the EPPO
- Area of competence: crimes affecting the EU financial interests
- Possible extension at a later stage to other serious cross border cases
- Structure: Commission's proposal in Spring 2013
- Legal instrument: regulation

Protection of the EU financial interests

- Area of special interest for the creation of a common legal European area of liberty, security and justice
- Article 280 EC Treaty: no intervention in the national criminal laws
- **BUT:** see proposal for a Directive on the criminal-law protection of the Community's financial interests COM/2001/0272 never approved
- OLAF and specific legislation (reg. 1073/99, 2185/96)
- Article 325 TFEU: the restriction of article 280 does not exist anymore
- Proposal of PIF Directive on substantive criminal law
- Legal instrument: no specific provision; theoretically a regulation is possible

Proposal of directive COM(2012)363 of 11 July 2012

- Legal basis: art 325 TFUE
- Reason: better harmonisation
- Definition of “Union financial interests”
- Definition of fraud and fraud related offences
- Sanctions: minimum imprisonment range
- Time limitation

Proposal of directive COM(2012)363 of 11 July 2012

‘the Union's financial interests’ means all revenues and expenditures covered by, acquired through, or due to:

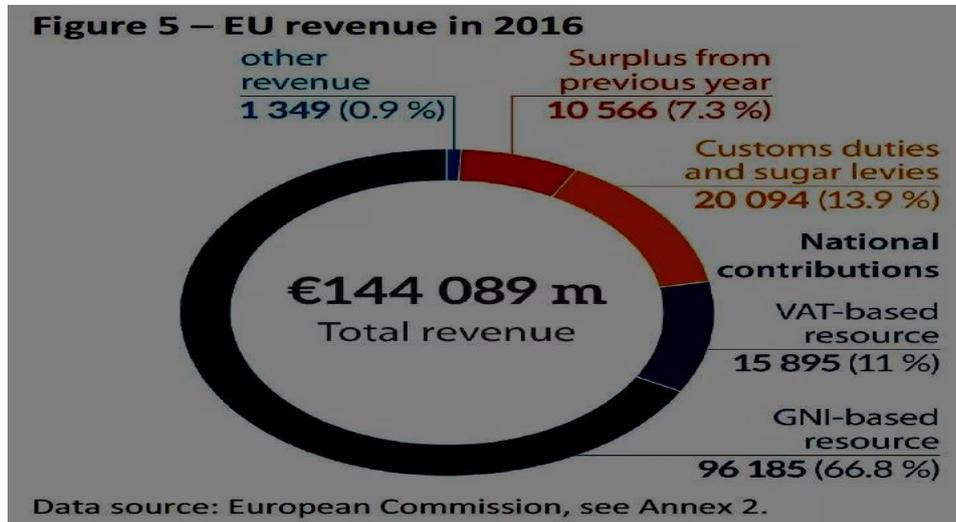
(a) the Union budget;

(b) the budgets of institutions, bodies, offices and agencies established under the Treaties

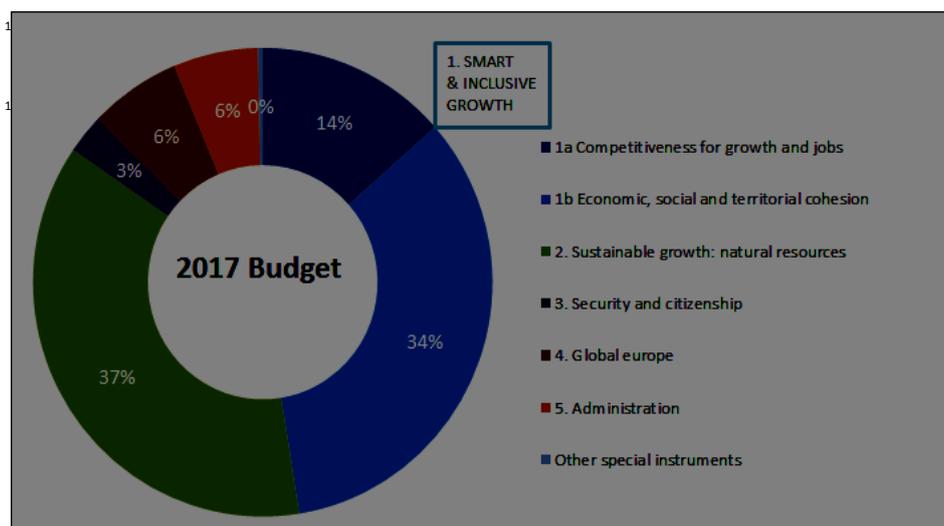
or budgets managed and monitored by them.

Reason of such definition: Agencies, European Social Fund

European annual budget 2016 Revenues



European annual budget 2015 Expenditures



Proposal of directive COM(2012)363 of 11 July 2012

Definition of "fraud"

Member States shall take the necessary measures to ensure that the following conduct, when committed intentionally, is punishable as a criminal offence:

(a) in respect of **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 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 liabilities or expenditure for purposes other than those for which they were granted;

Proposal of directive COM(2012)363 of 11 July 2012

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, or

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

Proposal of directive COM(2012)363 of 11 July 2012

Fraud related criminal offences

Bid-rigging

any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, is punishable as a criminal offence.

Proposal of directive COM(2012)363 of 11 July 2012

Fraud related criminal offences:

Money laundering

Active and passive bribery

Misappropriation by a public official

Proposal of directive COM(2012)363 of 11 July 2012

Definition of “public official”

- (a) any person exercising a public service function for the Union or in Member States or third countries by holding a legislative, administrative or judicial office;
- (b) any other person exercising a public service function for the Union or in Member States or third countries, not holding such an office, participating in the management of or decisions concerning the Union's financial interests.

Proposal of directive COM(2012)363 of 11 July 2012

•criminal offences as referred to in Articles 3 and 4, paragraphs 1 and 4, involving an advantage or damage of at least EUR 100,000 shall be punishable by

•(a) a minimum penalty of at least 6 months imprisonment ;

•(b) a maximum penalty of at least 5 years of imprisonment.

•criminal offences as referred to in Article 4, paragraphs 2 and 3, involving an advantage or damage of at least EUR 30,000 shall be punishable by:

•(a) a minimum penalty of at least 6 months imprisonment;

•(b) a maximum penalty of at least 5 years of imprisonment.

• Member States shall take the necessary measures to ensure that the criminal offences referred to in Title II shall be punishable by a maximum penalty of at least 10 years of imprisonment where the offence was committed within a criminal organisation in the sense of Framework Decision 2008/841.

Proposal of directive
COM(2012)363 of 11 July 2012

- Time limitation
- Member States shall ensure a prescription period within which the investigation, prosecution, trial and judicial decision on offences referred to in Title II, and in Article 5, remain possible, of **at least five years** from the time when the offence was committed.

DIRECTIVE (EU) 2017/1371

- DIRECTIVE (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law
- Legal basis: Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(2) thereof

DIRECTIVE (EU) 2017/1371

•Purpose:

•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.

DIRECTIVE (EU) 2017/1371

•Scope:

•Union's financial interests (see the proposal), **BUT**

•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)

•A) are connected with the territory of two or more Member States of the Union

•B) and involve a total damage of at least EUR 10 000 000.

DIRECTIVE (EU) 2017/1371 Fraud - Expenditures

- in respect of non-procurement-related expenditure
- (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;

DIRECTIVE (EU) 2017/1371 Fraud- Expenditures

- 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
- (i) and (ii) as above
- (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;

DIRECTIVE (EU) 2017/1371 Fraud- Revenues

.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;

DIRECTIVE (EU) 2017/1371 Fraud- Revenues

.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.

DIRECTIVE (EU) 2017/1371 Other criminal offences

- Money laundering
- Active and passive corruption
- Misappropriation
- No bid-rigging
- Definition of public official: divergent to the proposal

DIRECTIVE (EU) 2017/1371 Sanctions to natural person

•Para 3. **maximum** penalty of **at least four years of imprisonment ONLY** 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.

•Compared to the proposal: no minimum threshold

•Para 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.

DIRECTIVE (EU) 2017/1371

Time limitation

- General rule: sufficient period of time
- criminal offences which are punishable by a maximum sanction of at least four years of imprisonment: five years to enable the investigation, prosecution, trial and judicial decision

DIRECTIVE (EU) 2017/1371

Transposition

- By 6 July 2019
- The States must
- Supersede the incompatible provisions with the directive
- Avoiding a non homogeneous implementation of the directive, as it happened with the PFI Convention (see the Commission's reports on the implementation of the PIF Convention in COM (2004) 709 final, of 25.10.2004 and COM(2008) 77 final of 14.2.2008)