



# **Introduction to the Directive on the fight against fraud to the Union's financial interests by means of criminal law ("PIF Directive")**

Investigating and prosecuting offences in cooperation with the EPPO

ERA – Trier, 14 March 2018

# History: PIF Convention (1)

- "PIF" = protection des intérêts financiers
- Council Act of **26 July 1995** drawing up the **Convention** on the protection of the financial interests of the European Communities [OJ C 316, 27.11.1995].
- Fraud affecting both expenditure and revenue must be **punishable by effective, proportionate and dissuasive** criminal penalties in every Member State.
  - Linked to **Greek Maize** jurisprudence (C-68/88, Commission v. Greece, 21.9.1989)

## History: PIF Convention (2)

- The **Convention entered into force on 17 October 2002**, along with its **First Protocol (on corruption)** and the Protocol on its interpretation by the Court of Justice (**ECJ Protocol**).
- The **Second Protocol** aimed in particular at the liability of legal persons, confiscation, money laundering and cooperation for the purpose of protecting the EU's financial interests and protecting personal data related thereto.
- Since 2005, candidate countries acceded to this Convention and its Protocols by virtue of the Act of Accession.

# Lisbon Treaty – Article 325 TFEU

- The **Union and the Member States** shall counter fraud and any other illegal activities affecting the financial interests of the Union [...]
- Member States shall take the **same measures** to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.
- The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, **shall adopt the necessary measures** in the fields of prevention of and fight against [PIF fraud] [...] → compare Article 280(4) TEC!

# History: PIF Directive (1)

- Legal basis: Art. 83(2) TFEU (COM proposal: Art. 325).
- In order to ensure the implementation of the Union policy in the area of the protection of the Union's financial interests, 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. (Recital 3)
- 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. (Recital 16)

## History: PIF Directive (2)

- Directive (EU) **2017/1371** of 5 July 2017 [OJ 2017 L 198, 29].
- The new directive **replaces** the PIF Convention and its three protocols (exc. for UK and DK).
- MS have until **6 July 2019** to transpose the Directive into national law.
- As candidate countries have previously aligned their national legislation with the PIF Convention, they now need to align it to the PIF Directive. Candidate countries are invited to provide an update to the Commission upon adoption of the required legal changes (table of concordance).

# PIF Directive: main differences with PIF Convention (1)

**VAT:** The directive clarifies that VAT fraud is covered, as regards cross-border cases involving a damage of at least EUR 10 Million.

- PIF Convention: the Council had interpreted the Convention as excluding VAT (not in line with ECJ judgment in C-105/14 Taricco).

Fraud: **Distinction** (i) non-procurement-related expenditure; (ii) procurement-related expenditure; (iii) revenue in general ; (iv) VAT revenue.

- PIF Convention: only distinction expenditure/revenue.

# PIF Directive: main differences with PIF Convention (2)

**Money laundering:** reference to Directive (EU) 2015/849 ('AMLD4').

- PIF Convention: reference to Directive 91/308/EEC, related to the proceeds of fraud, at least in serious cases.

Broader definition of **corruption**: Definition of officials; the definition now also covers private actors who exercise functions equivalent to those performed by EU officials and MEPs/national MPs.

- PIF Convention: the definition of EU officials was left to national law.

New offence: **misappropriation**



# PIF Directive: main differences with PIF Convention (3)

Some further harmonisation on **sanctions**: The directive provides for a harmonisation of the maximum penalty which in certain cases should, at a minimum, be 4 years of imprisonment

- The PIF Convention only provided for a sentence "including... deprivation of liberty" in serious cases.

Introduction of **prescription** periods

- PIF Convention: prescription periods were not harmonised at all, which led to divergences between Member States → but see ECJ Taricco!

# Fraud: Expenditure fraud (Art. 3(2)(a) and (b))

- 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;
- Non-disclosure of information in violation of a specific obligation, with the same effect;
- Misapplication of such funds or assets for purposes other than those for which they were originally granted.
- Procurement-related: additional elements (unlawful gain & loss to the Union; damage).

# Fraud: Revenue fraud (Art. 3(2)(c) and (d))

- 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;
- Non-disclosure of information in violation of a specific obligation, with the same effect;
- Misapplication of a legally obtained benefit, with the same effect.
- Revenue arising from VAT own resources: additional elements (cross-border fraudulent schemes; correct VAT-related statements).
- Article 2(2): scope of application of the Directive in respect of VAT fraud: transnational / 10M euro damage

# Other Offences: Money laundering (Art. 4(1))

- Each Member State shall take the necessary measures to ensure that money laundering as described in Art. 1(3) of AMLD4 involving property derived from the criminal offences covered by the PIF Directive constitutes a criminal offence.

## Other Offences: Corruption (Art. 4(2) and (4))

- Each Member State shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitutes a criminal offence.
- Definition of passive and active corruption.
- Definition of 'public officials' includes Union officials, persons holding an executive, administrative or judicial office at national, regional or local level; legislative offices assimilated; any other person assigned and exercising a public service function.

# Other Offences: Misappropriation (Art. 4(3))

- Each Member State shall take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence.
- Official entrusted with management of funds or assets;
- Commit or disburse funds/appropriate or use assets contrary to the purpose;
- Damage to the Union's financial interests.

# Sanctions (1)

- Natural persons: Article 7
  - All offences: effective, proportionate and dissuasive
  - Artt. 3 and 4: maximum penalty to include imprisonment (Art. 5: not mandatory)
  - Art. 3 and 4: maximum has to be at least 4 years if "considerable damage or advantage": 100.000 euro, VAT
- Minor offences: non-criminal sanctions possible
- Administrative/ criminal penalties (see also Art. 14) → ne bis in idem?

## Sanctions (2)

- Legal persons (Art. 9)
  - Criminal or non-criminal fines
  - May include other sanctions
- Aggravating circumstance (Art. 8): facts committed within a criminal organization



# Procedural elements

- Freezing and confiscation (Art. 10) – now alignment to Directive 2014/42/EU
- Jurisdiction (Art. 11)
  - Always for cases of territoriality and nationality
  - Default for EU staff (MS may decide not to)
  - Optional for extraterritorial
- Statute of limitation (Art. 12)
  - Investigation, prosecution, trial, judicial decision: 5 years (or 3 years with interruptions)
  - Enforcement of prison sentences: 5 years



# Thank you!

Luca De Matteis

OLAF, Directorate D - Policy  
Unit D.1 Policy Development & Hercule

[https://ec.europa.eu/anti-fraud/home\\_en](https://ec.europa.eu/anti-fraud/home_en)

*European  
Anti-Fraud  
Office*