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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of 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

1. INTRODUCTION

1.1. Background

Directive (EU) 2017/1371 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 'PIF Directive') was adopted on 5 July 2017[1] as part of the Commission's overall anti-fraud strategy[2]. For the Member States bound by it[3], the PIF Directive replaces the 1995 Convention on the protection of the European Communities' financial interests and its protocols ('the PIF Convention')[4].

Based on Article 83(2) of the Treaty on the Functioning of the European Union (TFEU), the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, and limitation periods of certain criminal offences affecting those interests. These criminal offences (the 'PIF offences') are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least EUR 10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO)[5], because the EPPO's powers are defined by reference to the PIF Directive[6], as implemented by national law. The PIF Directive also facilitates the recovery of misused EU funds[7] by means of criminal law.

The deadline for transposition of the Directive into national law expired on 6 July 2019. Only 12 Member States had notified full transposition of the Directive by that date. Therefore, the Commission launched infringement procedures against the remaining 14 participating Member States by sending them letters of formal notice in September 2019. As of April 2021, the number of notified complete transpositions had gone up to 26, which means that all Member States bound by the Directive have now notified its full transposition into national law.

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[1] OJ L 198, 28.7.2017, pp. 29-41.

[2] *Commission Anti-Fraud Strategy: enhanced action to protect the EU budget*, COM (2019) 196 final, 29.4.2019.

[3] In accordance with Protocol 22 to the Treaties, Denmark did not take part in the adoption of the PIF Directive and is therefore not bound by it or subject to its application. However, Denmark remains bound by the PIF Convention. Ireland, on the other hand, did exercise its right to take part in the adoption and application of the PIF Directive in accordance with Protocol 21 to the Treaties.

[4] 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, OJ C 316, 27.11.1995, pp. 49-57.

[5] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, pp. 1-71.

[6] Article 22(1) of Regulation (EU) 2017/1939.

[7] In this regard, the number of irregularities reported as fraudulent (which includes cases of suspected or established fraud) and the associated amounts are not a direct indicator of the level of fraud affecting the EU budget. They are, first and foremost, an indication of the level of detection and reporting of potential fraud by Member States and EU bodies. In 2019, 939 irregularities were reported as fraudulent, involving about EUR 461.4 million (*Report from the Commission to the European Parliament and the Council, 31st Annual Report on the protection of the European Union's financial interests —Fight against fraud – 2019*, COM(2020) 363 final, 3.9.2020, p. 13).

1.2. Main aspects of the PIF Directive

Article 1 sets out the subject matter of the PIF Directive, while Article 2 sets out its scope and provides a definition of the notion of 'Union's financial interests'. In addition, the Directive obliges the Member States:

- to criminalise fraud affecting the EU's financial interests, both in respect of any act or omission relating to: (i) procurement-related expenditure and non-procurement-related expenditure; and (ii) revenue arising from VAT own resources and revenue other than that arising from VAT own resources (Article 3);
- to criminalise other offences affecting the Union's financial interests (money laundering, corruption and misappropriation) and to define 'public official' with a view to protecting Union funds adequately from corruption and misappropriation (Article 4);
- to criminalise: (i) incitement, aiding and abetting of any of the offences referred to in Articles 3 and 4; and (ii) the attempt to commit those offences referred to in Articles 3 (fraud) and 4(3) (misappropriation) (Article 5);
- to provide for the liability of, and sanctions for: (i) legal persons for any of the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by other persons having a leading position within the legal person; or (ii) due to the lack of supervision or control of these other persons, by any person under their authority (Articles 6 and 9);
- to draw up minimum rules on criminal penalties for natural persons, including minimum-maximum sanctions for the criminal offences referred to in Articles 3 and 4 when these offences involve considerable damage or advantage (Article 7);
- to take the necessary measures to ensure that, where a criminal offence referred to in Articles 3, 4 or 5 is committed within a criminal organisation, this will be considered to be an aggravating circumstance (Article 8);
- to: (i) establish their jurisdiction over the criminal offences referred to in Articles 3, 4 and 5 where the offence is committed in whole or in part within their territory or the offender is one of their nationals, and where the offender is subject to the Staff Regulations at the time of the criminal offence;[8] and (ii) avoid making the exercise of jurisdiction over PIF offences committed abroad by their nationals subject to certain conditions (Article 11);
- to: (i) prescribe limitation periods for a sufficient period of time after committing the criminal offences referred to in Articles 3, 4 and 5, in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to those offences that are punishable by a maximum sanction of at least 4 years of imprisonment; and (ii) take the necessary measures to enable penalties to be enforced (Article 12); and
- to provide statistical data on criminal proceedings for the criminal offences referred to in Articles 3, 4 and 5, and their outcome (Article 18(2)).

[8] In accordance with Article 11(2), Member States may refrain from applying this rule, or may apply it only in specific cases or only where specific conditions are fulfilled, and must inform the Commission if they take this course of action.

1.3. Scope and methodology of the report

Based on Article 18(1) of the PIF Directive, this report assesses the extent to which Member States have taken the necessary measures to comply with the PIF Directive. In particular, this report assesses whether Member States have implemented the Directive and whether national legislation achieves the objectives and fulfils the requirements of the Directive. The report does not affect the powers of the Commission under Articles 258 TFEU to assess the compliance of individual national transposition measures.

This assessment is primarily based on the information that Member States provided to the Commission through their notification of national measures transposing the PIF Directive. This information was complemented by external research commissioned by DG JUST under its framework contract. On the basis of this assessment, the Commission launched systematic exchanges with the Member States. The further information and explanations provided by the Member States during these exchanges allowed the Commission to refine its analysis as regards the most pertinent conformity issues. These issues will be presented in more detail in Sections 2 and 3 below.

2. GENERAL ASSESSMENT

The Commission's objective is to ensure that all Member States have transposed the Directive in a clear, precise and correct manner, by setting effective, proportionate and dissuasive criminal penalties to protect the Union's financial interests.

A detailed assessment of notified transposition measures confirmed that all Member States have transposed the PIF Directive's main provisions. However, there are outstanding conformity issues to be addressed, including issues that must be addressed to enable effective investigations and prosecutions by the EPPO. Conformity issues mostly concern deficiencies in national legislation transposing the criminal definitions in Articles 3, 4 and 5 for:

- the definition of fraud affecting the Union's financial interests (Article 3) in about half of the Member States;
- the definition of aspects of Article 4(1) (money laundering), Article 4(2) (corruption) and Article 4(3) (misappropriation) in several Member States;
- the definition of 'public official' (Article 4(4)) in about a half of the Member States; and
- incitement, aiding and abetting of any of the offences referred to in Articles 3 and 4; and the attempt to commit those offences referred to in Articles 3 and 4(3) (Article 5) in a few Member States.

In addition, the Commission identified a number of conformity issues in a quarter of the Member States in relation to the liability of legal persons and sanctions for natural persons in accordance with Articles 6, 7 and 9. For sanctions on natural persons (Article 7), the Commission also identified conformity issues in a quarter of the Member States. Some of

these issues may undermine the effective, dissuasive and proportionate character of these sanctions.

The Commission also identified conformity issues in a few Member States in relation to the exercise of jurisdiction based on the territoriality principle and the active personality principle (Article 11(1)). Moreover, a few Member States place conditions on the prosecution of PIF offences that are not in conformity with Article 11(4). A transposition issue with Article 12 identified in some Member States relates to the provision for a limitation period for the execution of a judgment imposed following a final conviction for a criminal offence referred to in Articles 3, 4 or 5 that is shorter than the 5 years required by the PIF Directive.

Finally, based on the information shared, the Commission discovered that an explicit and specific, annual obligation to report statistical data to the European Commission (Article 18(2)) is contained in the legislation of only a few Member States. In the absence of sufficient data, it might be more difficult for the Commission at a later stage to assess whether the Directive achieved its general objective of strengthening the protection of the Union's financial interests and whether (certain aspects of) the Directive will need to be reviewed[9].

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Definitions and scope (Article 2)

Article 2(1) of the PIF Directive defines 'Union's financial interests' and 'legal person'. Moreover, Article 2(2) sets a threshold for the applicability of the Directive to revenue arising from VAT own resources. The PIF Directive only applies in cases of serious offences against the common VAT system. Offences against the common VAT system must be considered to be serious where the intentional acts or omissions laid down in Article 3(2)(d) of the PIF Directive are connected with the territory of two or more Member States of the Union and involve total damage of at least EUR 10 million.

This threshold is mostly aimed at capturing carrousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation, all three of which create serious threats to the common VAT system and thus to the Union budget. In one Member State, Article 2(1) has not been transposed in conformity with the Directive.

3.2. Fraud (Article 3)

Article 3 of the PIF Directive states that Member States must take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally. For that purpose, it sets out four categories of conduct constituting fraud affecting the Union's financial interests. These four categories relate to acts or omissions concerning: (i) non-procurement-related expenditure (Article 3(2)(a)); (ii) procurement-related expenditure (Article 3(2)(b)); (iii) revenue other than revenue arising

[9] Articles 18(3) and 18(4).

from VAT own resources (Article 3(2)(c)); and (iv) revenue arising from VAT own resources (Article 3(2)(d)), as described in Section 3.1 above.

In roughly half of the Member States, the Commission identified conformity issues in the transposition of the main aspects of these offences. In particular, the Commission identified conformity issues in the more narrow scope of national legislation dealing with fraud related to non-procurement-related expenditure (Article 3(2) (a)) and fraud related to procurement-related expenditure (Article 3(2)(b)). Other issues relate to the transposition of any act or omission relating to:

- 'the use of false, incorrect or incomplete statements' only covering written documents and 'assets from the Union budget or budgets managed by the Union, or on its behalf' not being covered;
- 'non-disclosure of information', which is either not transposed or transposed by a more limited notion; and
- 'the misapplication of such funds or assets for purposes other than those for which they were originally granted' being transposed by narrower wording.

For revenue other than revenue arising from VAT own resources (Article 3(2)(c)) and revenue arising from VAT own resources (Article 3(2)(d)), the Commission also identified conformity issues, again due to the more narrow scope of national legislation. Other issues relate to the transposition of any act or omission relating to:

- 'false, incorrect or incomplete statements or documents' and 'false, incorrect or incomplete VAT-related statements or documents' not being covered;
- 'resources of the Union budget' being transposed by a more limited notion;
- 'budgets managed by the Union, or on its behalf' not being covered;
- 'non-disclosure of information' and 'non-disclosure of VAT-related information' either not transposed or transposed by a more limited notion;
- 'misapplication of a legally obtained benefit' being transposed by more narrow wording; and
- 'the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds' either not transposed or transposed by a more limited notion.

3.3. Other related offences (Article 4)

3.3.1. Money laundering, corruption and misappropriation (Articles 4(1), 4(2) and 4(3))

Article 4(1) of the PIF Directive states that Member States must take the necessary measures to ensure that money laundering as described in Article 1(3) of Directive (EU) 2015/849[10] involving property derived from the criminal offences covered by the Directive constitutes a

[10] 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 (Text with EEA relevance), OJ L 141, 5.6.2015, pp. 73-117.

criminal offence. In several Member States, this provision has not been fully transposed, due either to some deficiencies in the definition of money laundering itself or to the lack of a criminal offence covered by the PIF Directive among the predicate offences.

Moreover, under Article 4(2) of the Directive, Member States must take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences. In several Member States, an additional aspect – 'breach of duties' – is required in both active and passive corruption. This additional aspect significantly narrows the scope of the PIF Directive's definitions of corruption and makes its prosecution dependent on proving such a breach of duty.

On 'passive corruption', a conformity issue concerns one of the aspects of the offence, namely: 'refrain[ing] from acting in accordance with his duty'. In a small number of Member States, this aspect is not covered by national legislation. On 'active corruption', conformity issues relate to the scope of the definition, as some of the aspects ('promises, offers or gives, directly or through an intermediary, an advantage' and 'for a third party') are missing or not transposed correctly in some Member States.

Furthermore, Article 4(3) of the Directive states that Member States must take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence. Conformity issues concern a more narrow transposition of this offence or a lack of transposition altogether.

3.3.2. Public officials (Article 4(4))

Article 4(4) provides a definition of 'public official' with a view to protecting Union funds adequately from corruption and misappropriation. Some aspects of the definition of 'public official' have not been transposed into the legislation of about half of the Member States. The Commission identified conformity issues in this area relating to:

- a lack of coverage of 'national official of another Member State and any national official of a third country' generally or as regards the offence of misappropriation only;
- the definition of 'Union official' not including: (i) persons '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'; or (ii) the 'Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies';
- subjecting the definition of 'national official' to additional conditions, only covering public officials of other Member States when the crime has been committed within the territory of that Member State,[11] and a lack of coverage of 'any person holding an executive, administrative … office' generally, or in relation to the offence of misappropriation only;

[11] This means that Member State A would only prosecute officials of other Member States (B, C etc.) if they commit a crime within the territory of Member State A.

- Finally, Article 4(4)(b) referring to 'any other person assigned and exercising a public service function', has not been transposed in some Member States.

3.4. Inchoate offences (Article 5)

Article 5 of the PIF Directive states that: (i) Member States must 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 of the Directive are punishable as criminal offences (Article 5(1)); and (ii) any attempt to commit any of the criminal offences referred to in Article 3 and Article 4(3) of the Directive is punishable as a criminal offence (Article 5(2)). In a few Member States, the Commission identified non-conformity issues as regards Article 5(2). These issues concern the failure to make a punishable criminal office of: (i) an attempt to commit subsidy abuse; (ii) some customs offences; and (iii) misappropriation.

3.5. Liability of – and sanctions for – legal persons (Articles 6 and 9)

Article 6(1) of the PIF Directive requires Member States to 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 of the Directive committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and have 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.

Moreover, in accordance with Article 6(2), Member States are required to 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 Article 6(1) has made it possible to commit, by a person under his or her authority, any of the criminal offences referred to in Articles 3, 4 or 5 of the Directive for the benefit of that legal person.

Finally, in accordance with Article 6(3), the liability of legal persons under Articles 6(1) and 6(2) of the Directive must not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 3 and 4 of the Directive or who are criminally liable under Article 5.

In a quarter of the Member States, a number of conformity issues have been identified. These include:

- a lack of transposition of Article 6(1);
- only covering the acts of persons when committed within the scope of the activities of the legal person; and
- the exclusion of corporate criminal liability for certain predicate offences.

Another compliance issue concerns the conflation of the requirements under Articles 6(1) and 6(2) in national legislation. Here it should be pointed out that Article 6(1) does not require 'the lack of supervision or control' when a PIF offence is committed for the benefit of a legal person by a person 'having a leading position within the legal person'.

Article 9 of the PIF Directive states that Member States must take the necessary measures to ensure that a legal person held liable pursuant to Article 6 of the Directive is subject to effective, proportionate and dissuasive sanctions, which must 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 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.

On compliance, the Commission emphasises that corporate liability should not be made dependent on a final conviction of a natural person, as is the case in one Member State, as this undermines the possibility to impose effective, proportionate and dissuasive sanctions on legal persons.

3.6. Criminal penalties for natural persons (Article 7)

Article 7 of the PIF Directive states that, for natural persons, Member States must ensure that the criminal offences referred to in Articles 3, 4 and 5 of the Directive are punishable by effective, proportionate and dissuasive criminal sanctions (Article 7(1)). The criminal offences referred to must be punishable by a maximum penalty that provides for imprisonment (Article 7(2)). These offences must be punishable by a maximum penalty of at least 4 years of imprisonment when they involve 'considerable damage or advantage' (Article 7(3))[12].

Conformity issues have been identified in a quarter of the Member States. On Article 7(1), the legislation of several Member States contains provisions that allow individuals to escape criminal liability or the imposition of sanctions if they report the crime or repay the damage caused to the Union's financial interests at various stages before or during criminal proceedings. Such provisions could make sanctions ineffective and not dissuasive. Other conformity issues relate to a failure to meet the sanctions' threshold provided in Article 7(3) of the PIF Directive, notably for:

- 'non-disclosure of information' in the context of procurement- and non-procurement-related expenditure fraud;
- preparatory acts for money laundering;

[12] Article 7(3), second and third sentence: '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.'

- passive corruption without an aggravating circumstance;
- active corruption when committed by a public official towards another public official or without a 'breach of duties', which, as described in Section 3.3.1, is not required by Article 4(2)(b) of the PIF Directive; and
- misappropriation.

3.7. Jurisdiction (Article 11)

In accordance with Article 11 of the PIF Directive, a Member State must establish jurisdiction over PIF offences where the criminal offence is committed in whole or in part within its territory or where the offender is one of its nationals (Article 11(1)). Member States must take the necessary measures to establish their jurisdiction over PIF offences where the offender is subject to the Staff Regulations at the time of the criminal offence. Member States may refrain from applying this rule, or may apply it only in specific cases or only where specific conditions are fulfilled. They must also inform the Commission if they are not applying it or if they are only applying it in certain cases (Article 11(2)).

Member States must also inform the Commission if they decide to extend their jurisdiction over PIF offences committed: (i) by habitual residents in their territory; (ii) for the benefit of a legal person established in their territory; or (iii) by one of their officials acting in his or her official duty (Article 11(3)).

Finally, in cases where the offender is one of their nationals[13], Member States must not make the exercise of jurisdiction subject to the condition that a prosecution can be initiated only following: (i) a report made by the victim in the place where the criminal offence was committed; or (ii) a denunciation from the State of the place where the criminal offence was committed (Article 11(4)). The Commission has identified conformity issues in a few Member States on these issues. On the establishment of jurisdiction on the basis of territoriality (Article 11(1)), there were two conformity issues. The first related to the lack of jurisdiction on money laundering as defined in Article 4(1) of the Directive. The second related to additional conditions such as that, for incitement or aiding and abetting PIF offences: (i) the main perpetrator should be acting within the territory; or (ii) the punishment provided by national law must be above a certain threshold.

The extension of jurisdiction to offenders subject to the Staff Regulations, with or without imposing specific conditions, in accordance with Article 11(2) has been provided for by the national legislation of 12 Member States.

About half of the Member States extend their jurisdiction over PIF offences committed: (i) by habitual residents in their territory; or (ii) for the benefit of a legal person established in their territory; and/or (iii) by one of their officials acting in his or her official duty (Article 11(3)). Compliance issues with Article 11(4) relate to the imposition of the condition that a prosecution can be initiated only: (i) following a report made by the victim in the place where the criminal offence was committed; or (ii) following a complaint of the injured party (if such a complaint is required for prosecution under foreign law).

[13] In accordance with Article 11(1)(b).

3.8. Limitation period (Article 12)

In accordance with Article 12(1) of the PIF Directive, Member States must take the necessary measures to provide for a limitation period. This period must enable 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. The Directive provides minimum limitation periods for those offences that are punishable by a maximum sanction of at least 4 years of imprisonment (Articles 12(2) and 12(3)). The Directive also provides limitation periods for the enforceability of penalties following a conviction for a criminal offence referred to in Articles 3, 4 and 5 (Article 12(4)). A transposition issue exists in some Member States in the limitation period for executing a judgment imposed following a final conviction for a criminal offence referred to in Articles 3, 4 or 5, which is shorter than the 5 years required by Article 12(4).

4. CONCLUSIONS

The PIF Directive was adopted with the aim of strengthening protection against criminal offences affecting the Union's financial interests. The Directive provides added value by setting: (i) common minimum rules for defining criminal offences; and (ii) sanctions for combating fraud and other illegal activities affecting the Union's financial interests. All Member States have transposed the PIF Directive's main provisions.

However, the assessment shows that the transposition of the Directive still needs to be improved, notably to ensure: (i) the consistent transposition of the definitions of criminal offences referred to in Articles 3, 4 and 5; and (ii) the liability of – and sanctions for – legal persons and natural persons in accordance with Articles 6, 7 and 9. There is also a need to properly transpose the provisions on the exercise of jurisdiction (Article 11) and limitation periods (Article 12).

Proper transposition requires further legislative action by the Member States to fully align their national legislation with the requirements of the PIF Directive. This is especially important to enable the EPPO to conduct effective investigations and prosecutions.

It is also essential for Member States to report statistical data to the European Commission on criminal proceedings and their outcome (Article 18(2)). This reporting is crucial for assessing whether the protection of the Union's financial interests has been achieved based on the PIF Directive.

In accordance with Article 18 of the PIF Directive, the Commission will continue to assess Member States' compliance with the PIF Directive and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.