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Executive summary of the Impact Assessment

Accompanying the document

Proposal for a Directive of the European Parliament and of the Council

on the fight against fraud to the Union's financial interests by means of criminal law

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1. Problem definition 3
2. Analysis of the subsidiarity principle 4
3. Main policy objectives 4
4. Policy options 5
4.1. Assessment of the policy options' impacts 6
4.2. The preferred option 7
4.3. Monitoring and evaluation 8

1. PROBLEM DEFINITION

The EU and the Member States have an obligation to counter fraud and any other illegal activities affecting the financial interests of the Union. This obligation is laid down in Art. 310(6) of the Treaty on the Functioning of the European Union (TFEU). Article 325 TFEU further requires the adoption of measures which should act as a deterrent and afford a level playing field.

The EU already has a set of legal instruments requiring Member States to establish minimum criminal law rules for the protection of EU financial interests (in particular the Convention on the protection of the Communities' financial interests of 1995, on fraud, and protocols on corruption and money laundering). Nevertheless, those instruments have proved insufficient for achieving the desired protection, thus affecting EU's credibility in its budgetary restraint efforts. In particular, they only cover a limited sub-section of illegal conduct at the expense of EU financial interests, therefore missing out on many relevant phenomena which have been regularly encountered in practical experience.

The current framework is not yet strong enough to curb the loss of taxpayer money allocated to the EU, both on revenue and expenditure side. A good example of this fact is that a total of 13,631 cases of illegal activities involving EU funds (so-called "irregularities") took place in 2010. These reported cases caused a cumulated volume of wrongfully collected and spent EU public money of approximately € 2 billion.

The various deficiencies in the means of protecting EU public money relate to the following aspects:

- insufficient deterrent effect of provisions protecting EU financial interests;
- enforcement gaps of existing prohibitions, stemming from low detection capacities of criminal activities and low follow-up levels, as the outcomes of judicial proceedings are on avarage remarkably modest; and
- low recovery rates of money gone astray.

From a substantive criminal law perspective, the underlying causes of the abovementioned problems are varied.

- Firstly, there is an insufficient breadth of existing criminal offences aimed at protecting EU financial interests, in terms of determining who is subject to liability and the necessary jurisdictional rules to prosecute crimes committed abroad.
- Secondly, the set of criminal offences is incomplete, not only due to an insufficient implementation of existing definitions, but also to an insufficient number of offences at all defined at EU level, which can lead even to a total lack of protection against certain types of illegal conduct.
- Thirdly, the types and levels of sanctions are often too low, and in any event strongly diverging across the Member States. In addition to the resulting lack of deterrence and the unfairness of sanctioning discrepancies, the lack of level playing field also reduces mutual

trust of judicial authorities who need to cooperate to solve cross-border cases relating to EU financial interests.

- Finally, there are excessive impediments to the application of criminal law. In particular, despite the complex financial investigations which justify the time taken for prosecution, cases have become time-barred and had to be closed while trial was already ongoing.

The financial interests of the EU have been negatively affected because money due to the EU is not collected for it, or is misallocated in breach of legal rules. Illegal activities are serious and frequent enough to warrant additional safeguards.

For all the reasons described above, a resolute response is required in order to set a common and proportionate level of protection by deterrence. This will strengthen the effectiveness of EU budgetary and financing rules and ultimately benefit the overall credibility of EU finance, and criminal justice, by setting a level playing field throughout the EU.

2. ANALYSIS OF THE SUBSIDIARITY PRINCIPLE

The EU financial interests relate to assets and liabilities managed by or on behalf of the EU. As they are by nature, placed at EU level, they cannot reasonably be protected by the Member States alone. Anti-fraud is a shared responsibility of the EU and the Member States.

The EU is best placed to evaluate which measures are needed and proportionate to protect its financial interests, taking into account the specific EU rules which apply in this field.
This applies also to the extent that criminal law provisions for the protection of EU financial interests are to be harmonised. Only the EU is in a position to develop a level playing field through binding legislation with effect throughout the Member States, and thus to create a legal framework which would contribute to overcoming the weaknesses of the current situation.
The particular added value of EU provisions on criminal law in this area could reside in the novelty of defining relevant additional offences and sanction types and levels, which would apply equivalently throughout the Member States, thus completing and learning the lessons from monitoring the implementation of the Convention on the protection of the Communities' financial interests.

3. MAIN POLICY OBJECTIVES

Based on the problems identified, a series of general, specific and operational objectives may be identified:

General objectives:

- To prevent and reduce loss of money for the EU
- To increase credibility of EU budgetary responsibility

Specific objectives:

- To appropriately increase deterrence of prohibitions relating to the EU financial interests, in compliance with the EU Charter of Fundamental Rights

- To better enforce the prohibitions of certain conducts illegally affecting EU public money by improving investigation results, including identification of suspects and detection of beneficiaries of illegal transactions, in compliance with the EU Charter of Fundamental Rights

- To adequately improve levels recovery of EU public money subject to illegal acts, in compliance with the EU Charter of Fundamental Rights

- To ensure equivalence and fairness of provisions protecting EU financial interests across the EU

- To contribute to increasing mutual trust between the Member States' judiciaries

- To increase awareness of the rules governing the protection of EU financial interests among investigators and potential perpetrators

Operational objectives:

- It should provide sufficiently wide scope to cover the groups of perpetrators which most seriously and/or frequently damage EU public money

- It should adequately enlarge the number of offences so as to cover the most seriously damaging and/or frequent types of conduct affecting EU pubmic money

- It should provide for sanction types and levels sufficient to ensure fairness in the protection of EU public money everywhere in the EU, whilst ensuring proportionality

- It should contain clear and appropriate flanking rules to facilitate enforcement

4. POLICY OPTIONS

Five options have been considered in detail:

Option 1: Retention of the status quo (base-line scenario) as combined with a continued monitoring of the implementation of existing instruments.

Option 2: Non-legislative action to raise awareness of relevant provisions among potential perpetrators and practitioners, and facilitate their understanding and application including by an exchange of best practices and case information.

Option 3: A legislative instrument converting the PIF Convention and its protocols into an instrument under the new Treaty rules, while improving consistency of the provisions contained therein.

Option 4: A legislative instrument requiring Member States to approximate their criminal law rules with a view to appropriate expansion of the scope, introduction of specific new offence types, strengthening of minimum sanction types and levels for the protection of EU financial interests.

Option 5: A legislative instrument with directly applicable substantive criminal law provisions for the protection of EU financial interests, including precise sanction brackets (with minimum and maximum levels).

4.1. Assessment of the policy options' impacts

Option 1: The effectiveness of this option in meeting the purported objectives is, however, very low, if not inexistent. This policy option is not expected to impact upon fundamental rights, the domestic justice systems, or the economic and financial fields more than the current legal framework.

Option 2: The effectiveness of this option is deemed to be low because additional deterrence and enforcement effects cannot be created where criminal law now does not apply. The impact on fundamental rights is expected to be low to medium.The economic and financial impacts are estimated to be + € 37 million at EU level due to more efficient follow-up of cases by Member State judiciaries leading to better recovery levels, with € 3 million extra costs, in particular for training measures, for the Commission. This policy option fulfils the proportionality requirement.

Option 3: This policy option is only modestly effective and is not expected to impact upon fundamental rights, nor on the domestic justice systems, substantially more than the current framework. A positive impact on EU budget of an estimated € 17 million as a result of better enforcement and recovery in return for an estimated € 3 million cost of the legislative process at Member States level can be estimated. Balancing the great structural relevance for the integrity, spending capacity and reputation of the EU and the minimal additional intrusiveness compared to the existing framework, it is possible to assert that the measure is proportionate to the objective pursued. However, its added value for the protection of the taxpayer's money is very limited.

Option 4: This option can be expected to have medium to high effectiveness in reducing losses of EU money and in restoring credibility of budgetary restraint efforts, without however taking all theoretically possible criminal law measures nor fully harmonising the sanction types and levels. Wider definitions of existing offences improve equivalence of the sanctioning playing field across the EU, mutual trust between the judiciaries is improved and thus facilitate **enforcement** and **recovery** in cross-border cases. Defining broader and new relevant criminal offence types, as well as and more stringent sanction types and levels concerning the losses of EU financial resources, will mean that **deterrence** from such acts is likely to be very high. These common definitions and minimum sanction rules also improve equivalence of the sanctioning playing field across the EU and thus mutual trust between the judiciaries, which facilitates **enforcement** and **recovery** in cross-border cases.
The option would have a medium impact on fundamental rights , in that new criminal offences and extended scope of application for existing offences are defined, while the minimum sanction types and levels are being strengthened. These measures serve to meet objectives of general interest recognised by the Union (see Article 52 para. 1 of the Charter), and in particular to provide effective and deterring measures for the protection of EU financial interests. In the context of increasing amounts of irregularities and fraud suspicion and in light of the ineffectiveness of the current measures under the PIF Convention, the measures do not go beyond what is necessary to achieve this objective.
A high return of € 471 million at EU level is estimated due to better deterrence (reducing the money lost), enforcement and recovery (increasing the money returned), for a relatively low

organisational and administrative cost of € 29 million, in particular for legislative work, at Member State level.
Given the weighing between the great structural relevance of protecting EU public money for the integrity, spending capacity and reputation of the EU, on one hand, and the adequate increased coverage by criminal offence definitions and credible minimum sanction levels, on the other hand, the proportionality criterion is respected.
As this policy option considerably impacts on deterrence, enforcement capabilities and recovery levels, it is deemed to have medium to high effectiveness.

Option 5: The effectiveness of this option is considered to be as high as option 4 in that it would apply broader and new definitions of offences, provide for sufficient sanctions types and levels and contain rules facilitating application of the criminal offences. This would considerably positively impact upon deterrence, enforcement capabilities and recovery levels.
The impact on fundamental rights and criminal justice systems of this policy option is medium as for option 4, with the additional impact that an EU legislation as such would become directly applicable for criminal prosecution and conviction.
The domestic justice systems would be substantially impacted upon, since national criminal justice authorities would need to directly implement EU criminal law Offences.
Economic and financial impacts are expected to similar as for option 4.
Given the weighing between the great structural relevance of protecting EU public money for the integrity, spending capacity and reputation of the EU, on one hand, and the adequate increased coverage by criminal offence definitions and credible minimum sanction levels, on the other hand, the proportionality criterion should be complied with, although the intrusiveness and fundamental rights impact is higher than in Option 4 for no noticeably higher positive financial impact.

4.2. The preferred option

A comparative assessment of the impacts mentioned above leads to the conclusion that both Options 4 and 5 are effective in achieving all the general and specific objectives. In terms of efficiency, however, option 4 is less intrusive with respect to Member States' judicial systems.

→ The main difference between option 4 and option 5 lies in the varying leeway for Member States, who under option 4 may largely maintain for PIF offences their normal criminal law system and drafting approach and surpass the severity of the EU text, whilst option 5 is characterised by exhaustive rigidity of the EU rules, which would have to be applied as such by the Member States' prosecutors and criminal courts	
Policy Option 4	**Policy Option 5**
• Directive	• Regulation
• would ensure widened protection, **whilst allowing Member States to go further**	• would provide a **single, immovable set of rules** on the criminal law protection of EU financial interests
• would provide **minimum definitions** of offences, on which Member States can expand, for instance by adding serious cases or liability for negligent conduct	• would impose **exhaustive definitions** of the offence types covered
• would contain **minimum rules** on	• would lay down **rigid sanction types and**

sanction types and levels	**levels**
• would contain ancillary provisions to be transposed by the Member States **in keeping with their legal traditions**	• would contain an **exhaustive and isolated set of ancillary provisions**, in some cases possibly different from national criminal legislation traditions, and to be found elsewhere than in the national criminal code
• Member States' prosecutors and courts would apply the **national transposing measures** in the national criminal legislation	• Member States' authorities would apply the provisions of the **Regulation directly**

Therefore, option 4 is the preferred option.

The preferred option would increase the protection of EU financial interests, both by expanding criminal law protection into areas of serious and/or particularly harmful illegal activities which are not now covered by the PIF Convention, and by providing for appropriate minimum sanction levels applicable for both the existing and new offence types, thus ensuring a level playing field and clarity of legislation across the EU.

Option 4 is proportionate in relation to its legitimate objectives, as none of the alternative options display an equal level of efficient combination of limited costs and effectiveness in reaching the objectives identified in section 3 above. Whilst the preferred option of legislative action is likely to require a number of Member States to introduce changes to their criminal laws in order to implement the Directive, there does not appear to be another equally effective means of achieving the general and specific policy objectives.

4.3. Monitoring and evaluation

Potential risks to implementation by Member States in keeping with the transposition period are set out and addressed in an implementation plan accompanying the proposal.

An adequate monitoring and evaluation mechanism is envisaged, whereby Member States would be required to report on the effective implementation of legislative or non-legislative measures based on the nature of the proposed changes. Data provided by the Member States (in accordance with Article 325(5) TFEU) Eurostat, Eurobarometer, the future European Criminal Records System (ECRS) and the Council of Europe will enable the formation of a useful baseline for monitoring the situation, and allow ex post assessment of the impact of this initiative by comparison to figures reported by Member States before its entry into force. Besides quantitative data provided by Member States, other possible sources of qualitative information on legislative and practical compliance will be gathered from the Member States reporting on fraud, the Justice Forum, The European Anti-Fraud Office (OLAF) and Eurojust. A specific empirical study with emphasis on data collection will be carried out by the Commission, one to three years from the date of implementation of the proposal.