

Statement of the Council's reasons: 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

(2017/C 184/02)

I. INTRODUCTION

The Commission on 12 July 2012 presented a proposal ⁽¹⁾ for a Directive on the protection of the Union's financial interests by means of criminal law.

The Council agreed on a general approach on 8 June 2013 ⁽²⁾, thereby giving the Presidency a mandate to enter into trilogues with the European Parliament.

The European Parliament adopted its Opinion on the draft Directive at first reading on 16 April 2014 ⁽³⁾.

The European Parliament, at the level of the Budgetary Control Committee (CONT) and the Civil Liberties, Justice and Home Affairs Committee (LIBE) confirmed an agreement on the compromise text resulting from the negotiations in the trilogues on 12 January 2017.

At its meeting on 7 February 2017, the Council reached a political agreement on the draft Directive. On 25 April 2017, the Council adopted its Position at first reading which is fully in line with the compromise text on the Directive agreed in the informal negotiations between the Council and European Parliament.

II. OBJECTIVE OF THE PROPOSAL

The objective of the draft Directive is to establish minimum rules concerning the definition of criminal offences and sanctions in the field of the fight against fraud and other illegal activities affecting the Union's financial interests, with a view to contributing effectively to a stronger protection against crime affecting those financial interests, in line with the *acquis* of the Union in this field. Compared to the Convention on the protection of the European Communities' financial interests ⁽⁴⁾, which the Directive will replace for the Member States bound by the Directive, the latter will provide more stringent rules on a number of important issues, in particular as regards the sanctions regime.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

A. **General observations**

On the basis of the proposal for a Directive by the Commission, the European Parliament and the Council have conducted informal negotiations with a view to reaching a political agreement. The text of the Council Position at first reading fully reflects the compromise reached between the two co-legislators, assisted by the European Commission. Against that background, references to the Council Position at first reading should be understood as references to the compromise reached in the trilogues.

The Council Position at first reading maintains the objectives of the Convention on the protection of the European Communities' financial interests ⁽⁵⁾ and of the Commission proposal. The text of the draft Directive contains clearer and more detailed provision on many of the issues mentioned in the Convention, and also introduces completely new provisions, for example on prescription periods.

B. **Legal basis**

The Commission proposal was based on Article 325(4) TFEU. However, the co-legislators agreed that Articles 83(1) and 83(2) TFEU are exclusive legal bases for establishing minimum rules with regard to the definition of criminal offences and sanctions, including with regard to criminal offences in the field of the fight against fraud affecting the financial interests of the Union. The Directive will therefore be adopted on the basis of Article 83(2) TFEU.

Ireland has notified its wish to take part in the adoption and application of this Directive. Ireland has opted in to the Directive. The United Kingdom and Denmark are not taking part in the adoption of this Directive and are not bound by it or subject to its application.

⁽¹⁾ 12683/12

⁽²⁾ 10729/13

⁽³⁾ 9024/14

⁽⁴⁾ OJ C 316, 27.11.1995, p. 48.

⁽⁵⁾ OJ C 316, 27.11.1995, p. 48.

C. Key policy issues

1. The definition of the Union's financial interests and the scope of the Directive

Article 2 in the Directive gives a definition of the Union's financial interests. In the general approach, Council proposed to exclude all offences against the common value added tax (VAT) system, which would *a priori* be covered by the definition, from the scope of the Directive. Following negotiations with the Parliament, offences against the common VAT systems have finally been included in the Directive. A specific definition of fraud with revenue arising from VAT has been added in Article 3. However, the scope of the Directive is limited, as the Directive will be applicable only when the offences are serious. The offences shall be considered serious when they are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million.

2. The definition of the criminal offences

Article 3 defines the criminal offences covered by the Directive. The definitions of fraud and active and passive corruption have been slightly updated and are largely in line with the definitions of the Convention and its protocols. A new offence of misappropriation, which covers conduct by public officials that does not constitute fraud in a stricter sense, has been introduced.

3. Sanctions for natural persons

The Council's Position at first reading lays down a set of rules on minimum penalties for natural persons in Article 7. In relation to the Convention, these rules introduce new detailed rules on the level of sanctions. Offences involving considerable damages or advantages will be punishable more severely, i.e. by a maximum penalty of at least 4 years of imprisonment.

4. Prescription

The Convention did not include any explicit rules on prescription. Indeed, the Directive in Article 12 introduces the first detailed binding rules on prescription in Union criminal law. Member States are obliged to provide for a prescription period that enables law enforcement for a sufficient period of time to tackle the offences effectively, and provides for a minimum prescription period of at least 5 years in cases of serious offences. A rule on prescription of the enforcement of penalties has also been introduced.

5. Cooperation between the Member States, the European Commission and agencies and the Court of auditors

Article 15 introduces new rules on the obligation of Member States, some agencies such as Eurojust and the Commission to cooperate within their respective competences, in the fight against the criminal offences laid down in the Directive. An obligation for the Court of Auditors and other audit bodies to disclose relevant facts has also been introduced.

IV. CONCLUSION

The Council Position at first reading reflects the compromise reached in negotiations between the Council and the European Parliament, facilitated by the Commission. By approving the Council Position at first reading without amendments, the European Parliament establishes, together with the Council, the Directive.
