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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**Second report 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 2017¹. For the Member States bound by it², the PIF Directive replaces the 1995 Convention on the protection of the European Communities' financial interests and its protocols (the 'PIF Convention')³.

The PIF Directive was adopted on the basis of Article 83(2) of the Treaty on the Functioning of the European Union (TFEU) and is thus part of the legal instruments of the Area of Freedom, Security and Justice. It also forms part of the Commission's overall anti-fraud strategy⁴. Moreover, there is a strong interdependence between the upholding of EU common values stipulated in Article 2 TEU and the protection of the EU's financial interests. For example, the latter requires that judicial authorities are able to perform their tasks in an independent way, without interference from the executive⁵.

The PIF Directive sets minimum 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. The harmonisation also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO)⁶, because the EPPO's material competence is defined by reference to the PIF Directive⁷, as implemented by national law.

As the PIF Directive requires the Member States to criminalise offences related both to the revenue and expenditure of the Union budget, its transposition affects not only the own resources of the EU (customs duties and VAT) but also the substantive policies where EU expenditure is used for the achievement of these policy aims. A correct transposition of the Directive is thus not

¹ OJ L 198, 28.7.2017, pp. 29-41.

² 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.

³ 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.

⁴ *Commission Anti-Fraud Strategy: enhanced action to protect the EU budget*, COM (2019) 196 final, 29.4.2019.

⁵ Court of Justice of European Union, Judgment of the Court (Grand Chamber) of 27 May 2019, Joined Cases C-508/18 and C-82/19 PPU, *Minister for Justice and Equality v OG and PI*, ECLI:EU:C:2019:456; Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 24 November 2020, Case C-510/19, *Openbaar Ministerie*, ECLI:EU:C:2020:953; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I of 22.12.2020, pp. 1-10.

⁶ 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.

⁷ Article 22(1) of Regulation (EU) 2017/1939.

only key for the protection of the Union budget but also for all EU policies for which EU money is used, and is especially relevant in the context of the Recovery and Resilience Facility (RRF)⁸.

a. PIF Directive

The criminal offences covered by Articles 3 and 4 of the PIF Directive ('PIF offences') are:

- (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least EUR 10 million⁹;
- (ii) money laundering¹⁰;
- (iii) active and passive corruption¹¹; and
- (iv) misappropriation¹².

Article 5 of the PIF Directive obliges Member States to criminalise: (i) incitement, aiding and abetting of any of these offences; and (ii) the attempt to commit fraud and misappropriation. Articles 6 and 9 of the PIF Directive furthermore oblige Member States to provide for the liability of, and sanctions for legal persons for any of the criminal offences committed for their benefit:

- (i) by persons having a leading position within the legal person; or
- (ii) by any person under the authority of these persons having a leading position, due to the lack of supervision or control of the latter

In addition, Article 7 of the PIF Directive establishes minimum rules on criminal penalties for natural persons, including minimum-maximum sanctions of at least four years for the criminal offences involving considerable damage or advantage.

Moreover, Article 11 of the PIF Directive obliges Member States to:

- (i) establish their jurisdiction over PIF offences 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 offence¹³; and
- (ii) avoid making the exercise of jurisdiction over PIF offences committed abroad by their nationals subject to certain conditions.¹⁴

⁸ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.

⁹ PIF Directive, Article 3.

¹⁰ PIF Directive, Article 4(1).

¹¹ PIF Directive, Article 4(2).

¹² PIF Directive, Article 4(3).

¹³ In accordance with Article 11(2) of the PIF Directive, 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.

¹⁴ PIF Directive, Article 11.

Furthermore, Article 12 of the PIF Directive obliges Member States to:

- (i) prescribe limitation periods for a sufficient period of time after committing PIF offences 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 enforced¹⁵.

Finally, the PIF Directive aims at facilitating the recovery of misused EU funds¹⁶ by means of criminal law¹⁷.

b. Transposition, including infringement proceedings

The deadline for transposition of the Directive into national law expired on 6 July 2019. In accordance with Article 18(1) of the PIF Directive, the Commission was required to submit a first implementation report to the European Parliament and the Council two years after the transposition deadline. The relevant report was adopted in September 2021¹⁸. This report concluded that all Member States have transposed the PIF Directive's main provisions. However, it also highlighted the need for the transposition of the Directive to be improved, notably to ensure the consistent transposition of the definitions of criminal offences and the liability of – and sanctions for – legal persons and natural persons. Finally, the report highlighted the need to properly transpose the provisions on the exercise of jurisdiction and limitation periods.

As regards the criminal offences, with respect to fraud, the conformity issues identified included the narrower scope of national legislation. Moreover, in several Member States, an additional aspect – “breach of duties” – is required for 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. In addition, as regards misappropriation, conformity issues concerned a narrower transposition of this offence or a lack of transposition altogether.

With respect to the liability of and sanctions for legal persons, conformity issues concerned:

- a lack of transposition of Article 6(1) related to criminal offences committed by persons having a leading position within the legal person;
- only covering the criminal acts of persons committed within the scope of the activities of the legal person; and
- the exclusion of corporate liability in case of some predicate offences.

¹⁵ PIF Directive, Article 12.

¹⁶ PIF Directive, Article 13. 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 2020, 1 056 irregularities were reported as fraudulent, involving EUR 374 million (Report from the Commission to the European Parliament and the Council, 32nd Annual Report on the protection of the European Union's financial interests – Fight against fraud – 2020, COM(2021) 578 final, 20.09.2021, pp. 33-34.

¹⁷ PIF Directive, Article 13.

¹⁸ 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, COM (2021) 536 final of 6.9.2021.

In reference to Article 9, the Commission emphasised that corporate liability should not be made dependent on the final conviction of a natural person, as is the case in one Member State, because this undermines the possibility to impose “effective, proportionate and dissuasive” sanctions on legal persons.

As regards criminal penalties for natural persons, conformity issues were identified in a quarter of the Member States. 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 prior to or during criminal proceedings. Such provisions could make sanctions ineffective and prevent them from being dissuasive. Yet other conformity issues related to the national legislation’s failure to meet the sanctions’ threshold of four years.

As for the establishment of jurisdiction on the basis of territoriality, a particular conformity issue concerned the fact that certain Member States impose the condition that prosecution for PIF offences can be initiated only following a report made by the victim in the place where the criminal offence was committed or require a complaint from the injured party (if such a complaint is required for prosecution under the law of the Country where the offence was committed). A specific transposition issue related to limitation periods concerns the provision of a limitation period for the execution of a judgment that is shorter than the five years required by Article 12.

Without prejudice to further action against other Member States, following the adoption of the first implementation report, Letters of Formal Notice have so far been sent to seventeen Member States: to eight Member States in December 2021¹⁹; to a further five Member States in February 2022²⁰; and to another four Member States in May 2022²¹. The Commission is currently assessing the replies to the Letters of Formal Notice received so far in view of potential further action.

1.2. Scope and methodology of this second implementation report

In accordance with Article 18(4) of the PIF Directive, the Commission is adopting this second implementation report in order to assess, with regard to the general objective to strengthen the protection of the Union's financial interests, whether:

- (a) the VAT threshold indicated in Article 2(2) is appropriate;
- (b) the provisions relating to limitation periods as referred to in Article 12 are sufficiently effective;
- (c) the PIF Directive effectively addresses cases of procurement fraud.

¹⁹ December infringements package: key decisions, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201

²⁰ February infringements’ package: key decisions, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601

²¹ May infringement package: key decisions, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548

In accordance with Article 18(5) of the PIF Directive, this report also assesses the need for a revision of the PIF Directive, notably to include a specific provision on procurement fraud.

This report is primarily based on the information that Member States provided to the Commission through their notification of national measures transposing the PIF Directive, followed by systemic exchanges with the Member States, including those in the context of the ongoing infringement proceedings.

Furthermore, it is based on annual statistics on the PIF offences, including the incitement, aiding and abetting of any of these offences and attempt to commit fraud or misappropriation, submitted by Member States to the Commission pursuant to Article 18(2)²². These statistics notably concern:

(a) the number of criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction and ongoing; and

(b) the amounts recovered following criminal proceedings and the estimated damage.

However, for 2021, the Commission only received statistics from about one third of the Member States, and only incomplete statistics from another third of Member States. In a majority of Member States, statistics are generally not collected at central level.

Furthermore, not all offences are covered by the statistics submitted and, very often, they relate to broader criminal offences rather than referring to the specific criminal offences covered by the PIF Directive. In addition, Member States' data does not differentiate between offences affecting the EU's or Member States' financial interests.

Moreover, in the majority of Member States, there is no separate data available regarding aiding and abetting of any of these offences and attempt to commit fraud or misappropriation.

In addition, data regarding criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction and ongoing is not uniform across the Member States.

Finally, information regarding amounts recovered and the estimated damage is available only in a limited number of Member States.

The EPPO's 2021 Annual Report provides relevant – even if limited - data, relating to the EPPO's first 7 months of operational activities²³. According to the Report, 31.8% of the EPPO investigations concerned suspected non-procurement fraud (313 investigations) in the form of 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. This type of fraud is to be found mainly in agricultural subsidies and direct payment, rural development, maritime and fisheries

²² In accordance with Article 18(2), each Member State is required to submit such statistics, if they are available at the central level of the Member State concerned.

²³ It ought to be noted that, at the time of writing, 22 Member States participate in the enhanced cooperation on the establishment of the EPPO, while the PIF Directive is binding on 26 Member States.

development programmes, infrastructure, human resources development programmes, Covid-19 related recovery funds, training services, construction, research and innovation, local infrastructure development, care services, youth and unemployed integration into the labour market, water infrastructure and support for small to medium-sized enterprises. In the case of agricultural subsidies in particular, the EPPO investigates fraud based on false, incorrect or incomplete statements, false declarations concerning the size of cultivated land and/or the amount of cattle ('ghost cattle'), as well as the activity of criminal groups submitting false documents for fictitious farming businesses of all kinds.

Procurement expenditure fraud accounted for 11.2% of the EPPO investigations (110 cases). The fraud was committed usually through the use or presentation of false, incorrect or incomplete statements or documents. This type of fraud was mainly found in construction, waste and wastewater infrastructure subsidies, technology (green waste, recycling) and human resources development programmes.

Given the limited amount of information available, it is difficult to assess the appropriateness and effectiveness of the PIF Directive's provisions and the need for a revision of the Directive on this basis. The Commission urges the Member States to collect and submit the data in a timely manner, in line with the requirements provided for by Article 18(2) of the PIF Directive.

The information obtained from the Member State and other sources for the first transposition report was complemented by further external research. This research consisted of:

- a more in-depth analysis of the Member States' transposition of the articles of the PIF Directive concerning the VAT threshold, public procurement fraud and limitation periods;
- additional data collection on relevant criminal proceedings and their outcome; and
- interviews with key stakeholders, including practitioners at EU and national level.

2. SPECIFIC POINTS OF ASSESSMENT IN ACCORDANCE WITH ARTICLE 18(4) OF THE PIF DIRECTIVE

2.1. VAT threshold (Article 2(2))

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 serious where:

1. they concern intentional fraudulent acts or omissions laid down in Article 3(2)(d) of the PIF Directive²⁴;

²⁴ PIF Directive, Article 3(2)(d): "(d) 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."

2. they are connected with the territory of two or more Member States of the Union; and
3. they involve total damage of at least EUR 10 million.

This notion is mostly aimed at capturing carousel 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.

Damage

Member States' approaches in relation to the amount of the damage caused by cross-border VAT fraud can be categorised as follows:

- Member States requiring the damage to reach at least EUR 10 million;
- Member States requiring a threshold that is lower than EUR 10 million;
- Member States not defining a financial threshold.

Due to the EUR 10 million-threshold, a significant amount of fraudulent activity which concerns the territory of two or more Member States but with a total damage of less than EUR 10 million (e.g. the majority of tobacco smuggling and diesel laundering cases) is not covered by the PIF Directive.

The threshold is one of the most important factors impacting the EPPO's activities with regard to VAT fraud cases. In particular, recurrent questions arise on the calculation of the total damage, depending on the different interpretations of the Member States on the method to apply (notably whether the damage occurring in several Member States should be aggregated) and the minimum number of countries involved (are at least two participating Member States required? Or are two Member States - not necessarily participating in the EPPO - enough?).

Furthermore, those Member States with smaller economies have a higher number of cases with amount of damages that does not reach the EUR 10 million-threshold. This may lead to an imbalance between the Member States in the number of cases that the EPPO is competent to pursue.

In addition, there is a significant amount of fraudulent activity related to VAT which concerns the territory of two or more Member States but with a total damage of less than EUR 10 million. The threshold is also not dissuasive, as the EPPO handles only the grand scale VAT fraud, potentially allowing perpetrators to seek for the weakest jurisdictions to evade the grasp of both national authorities and the EPPO.

Moreover, competent investigative authorities do not often have a full picture of the nature of the criminal activity at the initial stage of the investigation (i.e., whether it is a carousel fraud and therefore connected with the territory of two or more Member States) and of the amount of the damage concerned. Waiting until the EUR 10 million threshold has been reached may have a detrimental effect on the investigation. Finally, the threshold might create lack of clarity on

whether national authorities or the EPPO should take up a VAT fraud case and when the case would need to be transferred to the EPPO.

Most Member States that apply a financial threshold apply a cumulative approach in line with Recital 4 to the PIF Directive²⁵, taking into account the overall damage caused in several Member States by the same VAT fraud scheme. However, authorities in some Member States only calculate the damage on a per Member State basis.

However, the Commission currently does not have sufficient information and data to arrive to a definitive view on this question, which will be reconsidered in the future.

2.2. Limitation periods (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 that enables the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 of the PIF Directive for a sufficient period after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.

For crimes that are punishable by a maximum sanction of at least four years of imprisonment, the limitation period must be at least five years from the time when the offence was committed (Article 12(2)). Article 12(3) gives Member States the option to provide for a limitation period shorter than five years but not less than three years if the period may be interrupted or suspended in the event of specified acts. The term ‘specified acts’ leaves a wide margin of interpretation. Thus, Member States may adopt shorter limitation periods (no less than three years in any case) in relation to the offences for which the PIF Directive requires a maximum sanction of at least four years imprisonment, as long as it provides for interruption and suspension causes. 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)).

An assessment of whether the provisions on limitation periods are ‘sufficiently effective’ first requires an appreciation of what this notion means. On the basis of the case law of the Court of Justice one may deduce the limitation period should be long enough to ensure effective and dissuasive enforcement in cases concerning PIF offences²⁶. It should also be noted that by their nature limitation periods are required to balance effectiveness with the fundamental right to, *inter alia*, a fair trial. Recital 28 to the PIF Directive expressly notes this, and states that it “seeks to ensure full respect for those rights and principles and must be implemented accordingly”. Of course, what Article 18(4) requires is not an assessment of whether the limitations themselves are sufficiently effective, but whether the provisions related to the limitation periods are sufficiently effective.

²⁵ PIF Directive, Recital 4: “The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties.”

²⁶ Court of Justice of the European Union, Judgement of the Court (Grand Chamber) of 8 September 2015, C-105/14, *Taricco and Others*, ECLI:EU:C:2015:555, paragraphs 49-58, Judgment of the Court (Grand Chamber) of 5 December 2017, C-42/17, *M.A.S. and M.B.*, paragraphs 39, 41, 59 and 62, ECLI:EU:C:2017:936.

Therefore, one may rephrase the question ‘are the provisions related to limitation periods as referred to in Article 12 sufficiently effective?’ to ‘are the provisions related to limitation periods as referred to in Article 12 sufficiently effective to ensure the proper investigation, prosecution, trial and judgment of the offences covered by Articles 3, 4 and 5 of the PIF Directive?’. If the answer would be that PIF offences are less likely to be investigated, prosecuted, tried and punished in some Member States than others due to the application of limitation periods, this might be regarded as an indication that the provisions are not sufficiently effective.

However, Member States were only obliged to transpose the PIF Directive three years before the present report was written, which is a shorter time period than the limitation periods provided by Article 12 of the PIF Directive. Thus, at this stage it is difficult to tell the extent to which the provisions in the PIF Directive concerning limitation periods have had an actual effect.

Furthermore, as mentioned above, only limited statistical data have been provided by Member States pursuant to Article 18(2). Thus, it is not possible at this stage to compare the number of criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction among Member States, nor link these findings to the length of the limitation periods in the Member States.

Therefore, this assessment is based primarily on the legal situation in the Member States (as shown from the national measures transposing the provisions on limitation periods) and the practical situation in the Member States.

In this regard, it may be considered desirable to lengthen the limitation periods, due to the time-consuming nature of investigations of PIF offences. Certain offences may take years to detect and may require significant efforts to be investigated due to their cross-border nature.

Nonetheless, since the limitation periods provided for in the PIF Directive were, in any event, set at the lower limit of the limitation periods provided for at national level for similar offences, the effect of the PIF Directive on the limitation periods at national level has been relatively small.

This does not suggest that the relevant provisions of the PIF Directive are as such ineffective. At least, the provisions of the Directive ensure a certain minimum level, thus providing legal certainty, by guarding against subsequent reductions of limitation periods in any Member States.

2.3.Public Procurement Fraud (Article 3(2)(b))

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 from VAT own resources (Article 3(2)(c)); and

- (iv) revenue arising from VAT own resources (Article 3(2)(d)).

a. Notion of ‘procurement-related expenditure’

However, the notion of ‘procurement-related expenditure’ is not further defined in Article 3(2) (b) of the PIF Directive. Recital 6 does provide that: “For the purposes of this Directive, procurement-related expenditure is any expenditure in connection with the public contracts determined by Article 101(1) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council”. The external research conducted for the Commission has found, in several instances, that this has led to an inaccurate interpretation of the law, in the sense of excluding from the scope of Article 3(2)(b) the situations at national level where EU funds are allocated by national agencies/administrations contracting with national/private actors.

As Regulation No 966/2012 is no longer in force, the reference to it is to be read as “determined by Article 2(51) of Regulation (EU, Euratom) 2018/1046²⁷”. It follows from Article 2(51) of Regulation 2018/1046 that procurement-related expenditure covers any expenditure in connection with public contracts such as building contracts, supply contracts, works contracts, or service contracts between economic operators and the EU contracting authority.

Taking into account the provisions of Article 325 TFEU as interpreted by the Court of Justice of the European Union, and in particular the meaning of the wording ‘any illegal activity’²⁸ (which, given the importance of the protection of the financial interests of the Union, cannot be interpreted in a restrictive manner), it is to be considered that procurement fraud committed by national authorities and affecting the Union’s financial interests falls within the scope of the PIF Directive.

b. Impact of the requirement “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 interest”

Article 3(2)(b) of the PIF Directive provides for the following procurement fraud offences:

1. 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;
2. non-disclosure of information in violation of a specific obligation, with the same effect; or
3. 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.

²⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 PE/13/2018/REV/1, OJ L 193, 30.7.2018, p. 1–222.

²⁸ Court of Justice of the European Union, judgment of 21 December 2021 in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 et C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034, paragraph 184.

It should be noted that similar offences are listed in relation to non-procurement related fraud in Article 3(2)(a). The offences under both Article 3(2)(a) and 3(2)(b) require intent (as per Article 3(1)) and an act or an omission. However, Article 3(2)(b) contains an additional qualification: “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 interest”. The causal link to a loss to the Union’s financial interests is quite apparent, as the Directive is aimed at the harmonisation of the criminal law protection of these financial interests and thus dealing with the PIF offences. In other words, procurement fraud comes into the scope of the Directive under the condition that it causes a loss to the Union’s financial interests.

This requirement may raise the threshold significantly for prosecuting procurement fraud cases versus non-procurement cases. However, the words “at least”, also need to be taken into account. They left a margin of discretion to the Member States regarding the definition of procurement fraud.

In this regard, a number of Member States require evidence of loss to the Union’s financial interest as a condition for prosecution. Some Member States require the identification of unlawful gain for the perpetrator or another person, but do not include the causal link to loss. However, a majority of Member States criminalise any intentional commission of an act or omission of the offences set out in Article 3(2)(b) or transpose them by broader national provisions in conformity with the PIF Directive. Furthermore, a large number of Member States do not make any distinction between the Union’s and national financial interest.

Therefore, the breadth of the definition of procurement fraud, and consequently the evidence requirements to comply with in order to prosecute such offences, varies significantly across Member States. These differences may lead to the uneven protection of the Union’s interests, where certain fraudulent activities are not being investigated or prosecuted in certain Member States, while being investigated and prosecuted in others.

3. CONCLUSIONS

The PIF Directive was adopted with the aim of strengthening protection of 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, there is a need for the transposition of the Directive to be improved, notably to ensure the consistent transposition of the definitions of criminal offences and the liability of – and sanctions for – legal persons and natural persons. Member States also need to step up efforts to properly transpose the provisions on the exercise of jurisdiction and limitation periods. This has led to the opening of infringement proceedings against 17 Member States so far.

The main focus of this second transposition report has been an assessment of whether:

- (a) the VAT threshold indicated in Article 2(2) is appropriate;
- (b) the provisions relating to limitation periods as referred to in Article 12 are sufficiently effective;
- (c) the PIF Directive effectively addresses cases of procurement fraud.

This report was primarily based on the information that Member States provided to the Commission, including annual statistics on the PIF offences submitted by Member States to the Commission pursuant to Article 18(2). However, as mentioned, statistics submitted by Member States do not currently offer sufficient evidentiary base to draw definitive conclusions. Moreover, information regarding amounts recovered and the estimated damage is available only in a limited number of Member States. In this context, it is difficult to assess the appropriateness and effectiveness of the PIF Directive's provisions and the need for a revision of the Directive on this basis.

The Commission urges the Member States to collect and submit the data in a timely manner, in line with the requirements in Article 18(2) of the PIF Directive. Where necessary, the Commission can provide further guidance on how Member States should report statistics. It could also follow up with tailor made request to the Member States, which have not submitted complete and comprehensive data according to Article 18(2).

VAT fraud

Regarding the VAT threshold as set out in Article 2(2) of the PIF Directive the damage element was taken into consideration. It was found that due to the EUR 10 million-threshold, a significant amount of fraudulent activity is not covered by the PIF Directive. Furthermore, those Member States with smaller economies have a higher number of cases with amount of damages that does not reach the EUR 10 million-threshold. In addition, there is a significant amount of fraudulent activity related to VAT which concerns the territory of two or more Member States but with a total damage of less than EUR 10 million.. Moreover, competent investigative authorities do not often have a full picture of the nature of the criminal activity at the initial stage of the investigation. Waiting until the EUR 10 million threshold has been reached may have a detrimental effect on the investigation. Finally, the threshold might create lack of clarity on whether national authorities or the EPPO should take up a VAT fraud case and when the case would need to be transferred to the EPPO.

In addition, while most Member States take into account the overall damage caused in several Member States by the same VAT fraud scheme (cumulative approach) in line with recital 4 to the PIF Directive, some calculate the damage on a per Member State basis. Furthermore, among those Member States that apply the cumulative method some only consider the damage occurring in those Member States that have joined the EPPO. These practices are very difficult to reconcile with the wording of Recital 4 to the PIF Directive.

The limits exposed above regarding the amount and the way to define the financial threshold raise doubts as to whether the threshold is sufficiently effective and dissuasive in order to fight serious fraud against the common VAT system. Decreasing the threshold and providing for alternative criteria for considering the serious nature of the crime could be considered in the context of a future revision of the PIF Directive.

Nonetheless, even though at this stage there is not enough data on the application of the EUR 10 million threshold in practice to assess the appropriateness of the amount, where necessary, sufficient guidance should be provided on the calculation method of the threshold.

Public Procurement

The PIF Directive does not include any definition of procurement-related expenditure. While the intention of the legislator can be deduced from other provisions of the PIF Directive, the current cross-reference to another piece of EU legislation in the recitals might lead to a certain level of uncertainty regarding the scope of the definition of procurement fraud, when involving national contracting authorities managing EU funds.

Additionally, as mentioned, the introductory wording of Article 3(2)(b) sets a special qualification for intent (in comparison to the other PIF offences) and states that procurement fraud should be criminalised ‘*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 interest. The margin of interpretation left to Member States regarding the intentional element with the terms ‘at least’ may lead to issues regarding uneven protection of the Union’s interests, as certain fraudulent activities may not being investigated or prosecuted in certain Member States (due to the lack of proven intent), despite being investigated and prosecuted in others.

Amendments to Recital (6) clarifying that procurement involving national contracting authorities managing EU funds indeed also fall within the scope of the Directive and amendments to Article 3(2)(b), reflecting the broader requirement on intention of the other PIF fraud offences, i.e. ‘offences committed intentionally’, might be considered as part of a future revision of the PIF Directive.

Limitation Periods

Further issues in cross-border cases may stem from the lack of uniformity of the national rules applicable to limitation periods, leading to situations where economic operators involved in the same fraudulent activity may benefit from different regimes, depending on the Member States where their case is prosecuted. Hence, the minimum requirement provided in the PIF Directive may not be sufficient to enable the investigation, prosecution, trial, judicial decision and enforcement of penalties of all PIF offences in a uniform manner in all Member States with regard to limitation periods.

However, not enough time has elapsed since the entry into force of the PIF Directive to enable the limitation periods prescribed by Article 12 to have expired in relation to a crime covered by the PIF Directive.

Furthermore, there is no concrete evidence at this stage that PIF offences are less likely to be investigated, prosecuted, tried and punished in some Member States than others, due to limitation periods being too short.

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. The Commission will also intensify its dialogue with the national authorities on the means to improve data gathering so as to be in a position to assess the implementation of the PIF Directive on a more informed basis.