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**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	PIF: 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 (First reading) = Preparation for the trilogue

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*Background*

The proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF-Directive) was presented in July 2012. A general approach was reached in Council June 2013, whereafter five formal trilogues with the European Parliament were held in 2014 and 2015. The latest negotiation mandate given by Coreper dates from May 2015<sup>1</sup>. The text following this mandate was rejected by the Parliament in a trilogue meeting in June 2015, mainly on the ground that the Parliament could not accept the exclusion of VAT-related fraud from the scope of the Directive.

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<sup>1</sup> Document 8604/15.

On 8 September 2015 the Court of Justice issued its judgement in Case C-105/14 (Taricco) which revived the discussion on the inclusion of fraud with VAT in the draft PIF-Directive, as it was stated that offences of fraud with VAT '*constitute cases of serious fraud affecting the European Union's financial interests*'. After a thorough reflection and analysis of the issue in this light, a solid majority of Member States at the Council (Ecofin) on 11 October and (JHA) on 14 October 2016 expressed readiness to now include cases of serious cross-border VAT fraud in the PIF-Directive, at least under the condition that certain other adjustments of the text would be made. A similar majority also confirmed that the approach proposed in the Annex to the relevant Council document <sup>2</sup> would be a good basis for further work in this sense.

Following the meetings of Friends of Presidency (DROIPEN) on 28 October 2016 and of JHA Counsellors on 9 and 11 November 2016, the Presidency has elaborated a new draft text in line with the conclusions of ministers. The assessment of the Presidency is that there is now broad agreement on the attached text of the draft Directive.

**In this perspective, the Presidency would ask delegations to agree that the Presidency proposes the text in Annex to the European Parliament as a global compromise text on the Directive, in particular on the understanding that the following modifications in relation to the latest text discussed with Parliament, as agreed by Coreper in May 2015, will be introduced:**

- **VAT fraud will be included in the scope of the Directive, as follows from the new draft texts of Articles 2(2) and 3d;**
- **A provision on the continued autonomy of the structure and functioning of national tax administrations will be added in Article 2(3);**
- **The provision on procurement fraud included in Article 4(1) in the document discussed by Coreper in May 2015 will be deleted;**
- **A number of adjustments on the provisions on money laundering and corruption in Article 4 will be made;**
- **A number of modifications mainly corresponding with the changes mentioned above will be introduced in the recitals.**

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<sup>2</sup> Document 12686/1/16 REV 1.

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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83 (2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Court of Auditors<sup>3</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures negatively affecting or threatening to negatively affect its assets, and those of the Member States to the extent they are of relevance to Union policies.

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<sup>3</sup> OJ C , , p. .

- (2) The Convention for the protection of the European Communities' financial interests of 26 July 1995 <sup>4</sup>, including the Protocols thereto of 27 September 1996 <sup>5</sup>, of 29 November 1996 <sup>6</sup> and of 19 June 1997 <sup>7</sup> ('the Convention') establishes minimum rules relating to the definition of criminal offences and sanctions in the area of fraud affecting the Union's financial interests. The Convention was drawn up by the Member States which noted that fraud affecting Union revenue and expenditure in many cases was not confined to a single country and was often committed by organised criminal networks; on that basis, it was already recognised in that Convention that the protection of the Union's financial interests called for the criminal prosecution of fraudulent conduct injuring those interests. In parallel, Council Regulation (EC, Euratom) No 2988/95<sup>8</sup> was adopted. That Regulation lays down general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Union law while, at the same time, referring to sectoral rules in this area, fraudulent actions as defined in the Convention and the application of the Member States' criminal law and proceedings.
- (3) In order to ensure the implementation of the Union policy in the area of the protection of the Union's financial interests which has been the subject of harmonisation measures such as Council Regulation (EC, Euratom) No 2988/95, it is essential to continue to approximate the criminal laws of the Member States by complementing the protection under administrative and civil law for the most serious types of fraud-related conduct in this field, whilst avoiding inconsistencies, both within and among these areas of law.

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<sup>4</sup> OJ C 316, 27.11.1995, p. 48.

<sup>5</sup> OJ C 313, 23.10.1996, p. 1.

<sup>6</sup> OJ C 151, 20.5.1997, p. 1.

<sup>7</sup> OJ C 221, 19.7.1997, p. 11.

<sup>8</sup> Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ L 312, 23.12.1995, p. 1).

- (4) The protection of the Union's financial interests calls for a common definition of fraud falling within the scope of this Directive and covering fraudulent conduct with respect to expenditure and revenues and assets at the expense of the general budget of the European Union (the 'Union' budget), including financial operations such as borrowing and lending activities. The notion of serious offences against the common VAT system as established by Council Directive 2006/112/EC refers to the most serious forms of VAT fraud, in particular carousel fraud, fraud through missing traders and VAT fraud committed within a criminal organisation which creates serious threats to the common VAT system and thus, to the Union budget. Offences against the common VAT system should be considered serious when they are connected with the territory of two or more Member States of the Union, result from fraudulent scheme whereby these offences are committed in a structured way with the aim to take undue advantage of the common VAT system and involve a total damage caused by the offences exceeds the threshold of EUR 10 millions. The notion of total damage refers to the estimated damage, both for the financial interests of the Member States concerned and for the Union, which results from the entire fraud scheme. This excludes interests rates or penalties. This Directive aims to contribute to the efforts to fight these criminal phenomena.
- (4a) When the Commission implements the budget under shared or indirect management, it may delegate budget implementation tasks to the Member States, or entrust them to agencies or bodies established pursuant to the Treaties or certain other entities and persons. In any of these cases, the Union's financial interests should enjoy the same level of protection as under direct management by the Commission.
- (4b) 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 No 966/2012<sup>9</sup> on financial rules applicable to the general budget of the Union.

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<sup>9</sup> Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 20.10.2012, p. 1.

- (5) The Union money laundering legislation is fully applicable to the laundering of proceeds of criminal offences referred to in this Directive. A reference made to that legislation should ensure that the sanction regime introduced by this Directive applies to all serious cases of criminal offences against the Union's financial interest.
- (6) Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. As any public official has the duty to exercise judgment or discretion impartially, giving bribes in order to influence the public official's judgment or discretion and taking such bribes should fall under the definitions of corruption irrespective of the law or regulations of the particular official's country or international organisation.
- (7) The Union's financial interests can be negatively affected by certain types of conduct of a public official who is entrusted with the management of funds or assets, be it in charge or in a supervisory function, which aim at misappropriating funds or assets contrary to the intended purpose, where the Union's financial interests are thereby damaged. There is therefore a need to introduce a precise definition of offences covering such conduct.
- (8) As regards the offences of passive corruption and misappropriation, there is a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union in the Member States or in third countries. Private persons are increasingly involved in the management of Union funds. In order to adequately protect Union funds from corruption and misappropriation, the definition of 'public official' therefore needs to cover also persons who do not hold a formal office, but nonetheless are assigned and exercising, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.
- (9) With regard to the criminal offences provided for in this Directive, the notion of intention must apply to all the elements constituting those offences. The intentional nature of an act or omission may be inferred from objective, factual circumstances. Offences by natural persons which do not require intention are not covered by this Directive.

- (10) This Directive does not oblige Member States to provide for sanctions that consist of imprisonment for perpetrators of criminal offences that are not of a serious nature, in cases where intent is presumed under national law.
- (11) Some offences against the Union's financial interests are in practice often closely related to the offences covered by Article 83 (1) of the Treaty and Union legislation based on that Article. Coherence between such legislation and this Directive should therefore be ensured in the wording of the provisions.
- (12) In as much as the Union's financial interests can also be damaged or threatened by conduct attributable to legal persons, they should be liable for the criminal offences, as defined in this Directive, committed on their behalf.
- (13) In order to protect the Union's financial interests equivalently through measures which should act as a deterrent throughout the Union, Member States should further provide for certain types and levels of sanctions when the criminal offences defined in this Directive are committed. The levels of sanctions should not go beyond what is proportionate for the offences.
- (14) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests.
- (15) This Directive does not affect the proper and effective application of disciplinary measures or penalties other than of a criminal nature. Sanctions of another nature, that cannot be equated to criminal penalties, and which are already imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence defined under this Directive. For other sanctions, the principle of ne bis in idem should be fully respected. This Directive does not criminalise behaviour which is not also subject to disciplinary penalties or other measures concerning a breach of official duties, in cases where such disciplinary penalties or other measures can be applied to the persons concerned.

- (16) The sanctions for natural persons should in certain cases provide for a maximum penalty of imprisonment of at least four years. These should at least include cases involving considerable damages done or advantages gained, whereby the damages or advantages should be presumed to be considerable when involving more than EUR 100 000. However, for the offences against the common VAT system the threshold over which an offence should be considered serious is, in conformity with the Directive, EUR 10 million. Those Member States whose legal systems do not in legislation provide for an explicit threshold for considerable damage or advantage as a basis for maximum penalty should ensure that the amount of damage or advantage is duly taken into account by their courts in the determination of sanctions for fraud and fraud related offences. The Directive does not prevent Member States from providing for other elements which would indicate a serious nature of an offence, for instance when the damage or advantage is potential, yet of very considerable nature.

The introduction of minimum levels of maximum imprisonment sanctions is necessary in order to guarantee that the Union's financial interests are given an equivalent protection throughout the Union. The sanctions will serve as a strong deterrent for potential criminals, with effect all over the Union.

- (17) Member States should ensure that when the offence was committed within a criminal organisation in the sense of Council Framework Decision 2008/841/JHA<sup>10</sup>, this should be considered an aggravating circumstance in accordance with the applicable rules established by their legal systems. They should ensure that this aggravating circumstance is available for judges to consider when sentencing offenders, although there is no obligation for judges to apply those aggravating circumstances. Member States are not obliged to provide for the aggravating circumstance when in national law the offences in the sense of Council Framework Decision 2008/841 are criminalised as a separate offence and may lead to more severe sanction levels.

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<sup>10</sup> OJ L 300, 11.11.2008, p. 42.



- (18) Given in particular the mobility of perpetrators and of proceeds stemming from illegal activities at the expense of the Union's financial interests, as well as the complex cross-border investigations which this entails, all Member States should establish their jurisdiction in order to enable them to counter these activities. Member States should thereby ensure that their jurisdiction includes situations where an offence is committed by means of information and communication technology accessed from their territory.
- (18a) Given the possible multiple jurisdictions for cross-border offences falling under the scope of this Directive, the Member States should ensure that the principle of *ne bis in idem* is respected in full in the application of national law transposing this Directive.
- (19) Member States should lay down rules concerning periods of limitation necessary in order to enable them to counter illegal activities at the expense of the Union's financial interests. In cases of offences punishable by a maximum sanction of at least four years of imprisonment, the period of limitation should be at least five years from the time when the offence was committed. This is without prejudice to those Member States which do not set periods of limitation for investigation, prosecution and enforcement.
- (21) Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters and to other rules under Union law, in particular under Regulation (EU, Euratom) No 883/2013<sup>11</sup> of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), there is a need for appropriate provision to be made for cooperation between Member States and the Commission to ensure effective action against the criminal offences defined in this Directive affecting the Union's financial interests, including exchange of information between the Member States and the Commission as well as technical and operational assistance lent by the Commission to the competent national authorities as they may need to facilitate coordination of their investigations.

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<sup>11</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

The assistance by the Commission should not entail the participation of the Commission in the investigation or prosecution procedures of individual criminal cases conducted by the national authorities. The Court of Auditors and auditors responsible for auditing the budgets of the institutions, bodies and agencies should disclose to OLAF and to other competent authorities any fact which could be qualified as a criminal offence under this Directive, and Member States should ensure that national audit bodies, as defined in Article 59 of Regulation 966/2012<sup>12</sup>, do the same, in accordance with Article 8 in Regulation 883/2012.

- (22) The Commission should report to the European Parliament and the Council on the measures taken by Member States to comply with the Directive. The report may be accompanied, if necessary, by proposals taking into consideration possible evolutions, in particular regarding the financing of the Union budget.
- (23) The Convention for the protection of the European Communities' financial interests of 26 July 1995<sup>13</sup> and the Protocols thereto of 27 September 1996<sup>14</sup> and 29 November 1996<sup>15</sup> and of 19 June 1997<sup>16</sup> should be replaced by this Directive in relation to Member States participating in the adoption of this Directive.
- (23a) For the application of Article 3(4)(d) of Directive 2015/849, the reference to serious fraud affecting the Union's financial interests as defined in in Article 1(1) and Article 2(1) of the Convention on the protection of the European Communities' financial interests, should be construed as fraud affecting the Union's financial interests as defined in Article 3 and in Article 7(4) or, as regards offences against the common VAT system, in Article 2(2) of this Directive.

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<sup>12</sup> Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

<sup>13</sup> OJ C 316, 27.11.1995, p. 48.

<sup>14</sup> OJ C 313, 23.10.1996, p. 1.

<sup>15</sup> OJ C 151, 20.5.1997, p. 1.

<sup>16</sup> OJ C 221, 19.7.1997, p. 11.

- (24) Proper implementation of this Directive by the Member States includes the processing of personal data among the competent national authorities, and its exchange between Member States, on the one hand, and between competent Union bodies on the other hand. The processing of personal data at the national level between national competent authorities should be regulated by the *acquis*. The exchange of personal data between Member States should meet the requirements of Council Framework Decision 2008/977/JHA<sup>17</sup>. To the extent personal data are processed by Union institutions, bodies, agencies and offices, they should comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>18</sup> and with the applicable rules concerning the confidentiality of judicial investigations.
- (25) The intended dissuasive effect of the application of criminal law sanctions requires particular caution with regard to fundamental rights. This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to liberty and security, the protection of personal data, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of the legality and proportionality of criminal offences and sanctions, as well as the prohibition of being tried or punished twice in criminal proceedings for the same criminal offence. This Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.

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<sup>17</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60).

<sup>18</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

- (25a) Member States should take the necessary measures to ensure the prompt recovery of such sums and their transfer to the Union budget, without prejudice to the relevant Union sector-specific rules on financial corrections and recovery of amounts unduly spent.
- (25b) Administrative measures and penalties play an important role in the protection of the Union's financial interests. This Directive does not exempt Member States from the obligation to apply and implement administrative Union measures and penalties within the meaning of Article 4 and 5 of Regulation (EC, Euratom) No 2988/95.
- (25c) This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the acts of Fraud and fraud related criminal offences affecting the Union's financial interests to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases. Member States may in principle continue to apply administrative measures and penalties in parallel in the area covered by the Directive. In the application of national law transposing this Directive, Member States should however ensure that the imposition of criminal sanctions of offences in accordance with this Directive and of administrative measures and penalties does not lead to a breach of the Charter of Fundamental rights.
- (25d) This Directive should not affect the competences of Member States to structure and organise their tax administration as they see fit to ensure the correct determination, assessment and collection of value added tax, as well as the effective application of VAT legislation.
- (26) This Directive will apply without prejudice to the provisions on the lifting of the immunities contained in the Treaty, the Protocol on the Privileges and Immunities of the European Union, the Statute of the Court of Justice and the texts implementing them, or similar provisions incorporated in national law. In the transposition of this Directive into national law as well as in the application of national law transposing this Directive, those privileges and immunities, including the respect of the freedom of Members' mandate, are fully taken into account.
- (27) This Directive is without prejudice to the general rules and principles of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case.

- (28) Since the objective of this Directive cannot be sufficiently achieved by the Member States alone and but can rather therefore, by reasons of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (29) In accordance with Article 3 and 4a(1) of the Protocol (No 21) on the position of United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of this Directive.
- (30) In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (31) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

## **Title I: Subject matter and definition**

### *Article 1*

#### *Subject matter*

This Directive establishes 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.

### *Article 2*

#### *Definition of the Union's financial interests and scope of the Directive*

1. For the purposes of this Directive, 'the Union's financial interests' means all revenues, ~~and~~ expenditures and assets covered by, acquired through, or due to:
  - (a) the Union budget;
  - (b) the budgets of institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.
2. In respect of revenue arising from VAT own resources, this Directive shall only apply in cases of serious offences against the common VAT system. For the purposes of this Directive, offences against the common VAT system shall be considered serious when the intentional acts or omissions defined in Article 3(d) are connected with the territory of two or more Member States of the European Union and involve a total damage of at least EUR 10 million.
3. The structure and functioning of the tax administration of the Member States are not affected by this Directive.

## Title II: Criminal offences in the field of fraud affecting the Union's financial interests

### Article 3

#### *Fraud affecting the Union's financial interests*

Member States shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence, when committed intentionally. For the purposes of this Directive, *fraud affecting the Union's financial interests* shall consist of:

- (a) in respect of non-procurement related expenditure, any act or omission relating to:
  - (i) 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,
  - (ii) non-disclosure of information in violation of a specific obligation, with the same effect, or
  - (iii) the misapplication of such funds for purposes other than those for which they were originally granted;
- (b) in respect of procurement related<sup>19</sup> expenditure, any act or omission relating to:
  - (i) 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,
  - (ii) non-disclosure of information in violation of a specific obligation, with the same effect, or

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<sup>19</sup> The concept of public procurement is already regulated in EU legislation, for example the Financial Regulation or the public procurement directives, contrary to the concept of “aids”.

(iii) the misapplication of such funds for purposes other than those for which they were originally granted, which damages the Union's financial interests;

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 interests;

(c) in respect of revenue other than revenue arising from VAT own resources that referred to in point (d), any act or omission relating to:

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf,

(ii) non-disclosure of information in violation of a specific obligation, with the same effect,

(iii) misapplication of a legally obtained benefit, with the same effect.

(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;

(iii) the presentation of correct VAT-related statements for the purposes of fraudulent disguising of non payment or of wrongful creation of rights to VAT refunds.



*Article 4*

*Fraud related criminal offences affecting the Union's financial interests*

1. Member States shall take the necessary measures to ensure that money laundering as defined in Articles 1 (3) of Directive 2015/849 of the European Parliament and of the Council<sup>20</sup> involving property derived from the offences covered by this Directive, constitutes a criminal offence.
2. Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.
  - (a) For the purposes of this Directive, passive corruption means the action of a public official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the Union's financial interests;
  - (b) For the purposes of this Directive, active corruption means the action of whosoever promises, offers or gives, directly or through an intermediary, an advantage of any kind whatsoever to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the Union's financial interests;
3. Member States shall take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence.

For the purposes of this Directive, misappropriation means an act by any public official who is directly or indirectly entrusted with the management of funds or assets, to commit or disburse funds or appropriate or use assets, contrary to the purpose for which they were intended, and which damages the Union's financial interests.

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<sup>20</sup> OJ L 141, 5.6.2015, p. 78.

4. For the purpose of this Directive 'public official' means:
- (a) any 'Union' or 'national' official, including any national official of another Member State and any national official of a third country;

- (i) the term 'Union' official shall mean:

any person who is an official or other contracted employee within the meaning of the Staff Regulations of Officials of the European Union or the Conditions of Employment of Other Servants of the European Union,

any person seconded to the European Union by the Member States or by any public or private body, who carries out functions equivalent to those performed by European officials or other servants.

Without prejudice to the provisions on privileges and immunities contained in Protocols 3 and 7 annexed to the TEU and the TFEU, Members of institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations of the European Union or the Conditions of Employment of Other Servants of the European Union do not apply to them;

- (ii) the term 'national official' shall be understood by reference to the definition of 'official' or 'public official' in the national law of the Member State or third country in which the person in question performs the function.

Nevertheless, in the case of proceedings involving an official of a Member State, or a national official of a third country, initiated by another Member State the latter shall not be bound to apply the definition of 'national official' except in so far as the definition is compatible with its national law.

The term 'national official' shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional and local level shall be assimilated to a national official.

- (b) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

**Title III: General provisions relating to the criminal offences in the fields of the fight against fraud affecting the Union's financial interests**

*Article 5*

*Incitement, aiding and abetting, and attempt*

1. Member States shall take the necessary measures to ensure that inciting, aiding or abetting the commission of any of the criminal offences referred to in Articles 3 and 4 is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that an attempt to commit any of the criminal offences referred to in Article 3 and in Article 4 (3), is punishable as a criminal offence.

*Article 6*

*Liability of legal persons*

1. Member States shall 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 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having 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.
2. Member States shall also 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 paragraph 1 has made possible the commission, of any of the criminal offences referred to in Articles 3, 4 and 5 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 3 and 4 or criminally liable under Article 5.
4. For the purpose of this Directive, 'legal person' means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

*Article 7*  
*Sanctions for natural persons*

1. As regards natural persons, Member States shall ensure that the criminal offences referred to in Articles 3, 4 and 5 shall be punishable by effective, proportionate and dissuasive criminal sanctions.
2. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 shall be punishable by a maximum penalty which provides for imprisonment.
3. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 shall be punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damages or advantages. The damages or advantages of the criminal offences referred to in Article 3(a), (b) and (c) and Article 4 shall be presumed to be considerable when involving more than 100 000 euros.

Member States may also provide for a maximum penalty of at least four years of imprisonment on the basis of other serious circumstances defined in national law.

4. In cases of offences referred to in Article 3(a), (b) and (c) and Article 4 involving damages of less than EUR 10 000 and advantages of less than EUR 10 000, Member States may provide instead for other than criminal sanctions.
5. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials.

*Article 8*  
*Aggravating circumstance*

Member States shall take the necessary measures to ensure that it shall be regarded as an aggravating circumstance when a criminal offence referred to in Articles 3, 4 or 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841 of 24 October 2008 on the fight against organised crime.

*Article 9*  
*Minimum sanction types for legal persons*

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall 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 the practice of 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 offence.

*Article 10*  
*Freezing and confiscation*

Member States shall take the necessary measures to enable freezing and confiscation of proceeds and instrumentalities from the offences referred to in Articles 3, 4 and 5. Those Member States participating in bound by Directive 2014/42/EU of the European Parliament and of the Council<sup>21</sup> on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union shall do so in accordance with that Directive.

*Article 11*  
*Jurisdiction*

1. Each Member States shall take the necessary measures to establish its jurisdiction over the criminal offences referred to in Articles 3, 4 and 5 where:
  - (a) the offence is committed in whole or in part within its territory;
  - (b) the offender is one of its nationals.
2. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3, 4 and 5 where the offender is subject to the Staff Regulation or the Conditions of Employment of Other Servants at the time of the offence. Each Member States may refrain from applying or may apply only in specific cases or conditions the jurisdiction rules laid down in this paragraph and shall inform the Commission thereof.
3. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 3, 4 and 5 committed outside its territory where:
  - (a) the offender is a habitual resident in its territory;
  - (b) the offence is committed for the benefit of a legal person established in its territory, or
  - (c) the offender is one of its officials who acts on his or her official duty.

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<sup>21</sup> Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39).

4. For the case referred to in point (b) of paragraph 1, Member States shall take the necessary measures to ensure that their jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

#### *Article 12*

##### *Prescription for offences affecting the Union's financial interests*

1. Member States shall take the necessary measures to provide for a prescription period that enables 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 offences, such that those offences may be tackled effectively.
2. Member States shall in cases of offences referred to in Articles 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment take the necessary measures to enable their investigation, prosecution, trial and judicial decision of criminal offences for a period of at least five years from the time when the offence was committed.
3. By derogation of paragraph 2, Member States may establish a prescription period that is shorter than five years, but not less than three years, provided that they shall ensure that the period may be interrupted or suspended upon specified acts.
4. Member States shall take the necessary measures to enable the enforcement of:
  - (a) a penalty of more than one year of imprisonment, or alternatively,
  - (b) a penalty of imprisonment in a case of an offence which is punishable by a maximum penalty of at least four years of imprisonment,imposed following a final conviction for a criminal offence referred to in Articles 3, 4 and 5, for at least five years from the date of the final conviction. This period may include extensions of the prescription period arising from interruption or suspension.

*Article 13*

*Recovery*

This Directive shall be without prejudice to the recovery

- (i) at EU level of sums unduly paid in the context of the commission of the criminal offences referred to in Article 3(1) a, b and c and Articles 4 and 5;
- (ii) at national level of any VAT not paid in the context of the commission of the criminal offences referred in Articles 3(1) d and Articles 4 and 5.



## *Article 14*

### *Interaction with other applicable legal acts of the Union*

The application of administrative measures, penalties and fines as laid down in Union law, in particular those within the meaning of Articles 4 and 5 of Regulation No 2988/95, or in national law adopted in compliance with a specific obligation under Union law, shall be without prejudice to this Directive. Member States shall ensure that any criminal proceedings initiated on the basis of national provisions implementing this Directive shall not unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings, laid down in Union law or national implementing provisions.

## **Title IV: Final provisions**

### *Article 15*

#### *Cooperation between the Member States and the European Commission*

##### *(European Anti-Fraud Office)*

1. Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, the Member States, Eurojust, the European Public Prosecutor's Office and the Commission shall, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in Articles 3, 4 and 5. To that end the Commission, and where appropriate, Eurojust, shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.
2. The competent authorities in the Member States may, within their competences, exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against the criminal offences referred to in Articles 3, 4 and 5. The Commission and the competent national authorities shall take into account in each specific case the requirements of confidentiality and the rules on data protection. Without prejudice to national legislation on access to information, a Member State may, when supplying information to the Commission, to that end set specific conditions covering the use of information, whether by the Commission or by another Member State to which the information may be passed.

2a. The Court of Auditors and auditors responsible for auditing the budgets of the institutions, bodies and agencies established pursuant to the Treaties, or the budgets managed and audited by the institutions, shall disclose to OLAF and to other competent authorities any fact of which they become aware during their mission, which could be qualified as a criminal offence as referred to in Articles 3, 4 and 5. Member States shall ensure that national audit bodies do the same.

#### *Article 16*

##### *Replacement of the Convention for the protection of the European Communities' financial interests*

The Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto of 27 September 1996, of 29 November 1996 and of 19 June 1997 (the "Convention"), is hereby replaced for the Member States bound by this Directive, with effect from [day of application under Art. 17 (1) second sub-paragraph]. For the Member States bound by this Directive, references to the Convention shall be construed as references to this Directive.

#### *Article 17*

##### *Transposition*

1. Member States shall adopt and publish, by [two years from the adoption] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission.

They shall apply those measures from ... .

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## *Article 18*

### *Reporting and assessment*

1. The Commission shall by [24 months after the deadline for implementation of the Directive] submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive.
2. Without prejudice to reporting obligations laid down in other Union legislation, Member States shall annually send the following statistics on the offences referred to in Articles 3 to 5 to the Commission, if they are available at a central level in the Member State concerned:
  - (a) the number of criminal proceedings initiated, the number of proceedings dismissed, the number resulting in an acquittal, the number resulting in a conviction and the number of ongoing proceedings;
  - (b) the amounts recovered following criminal proceedings and the estimated damages.
3. The Commission shall, by [60 months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the impact of national law transposing this Directive on the prevention of fraud to the Union's financial interests. The Commission shall take into account reports pursuant to paragraphs 1 and 2 of this Article. The report shall be accompanied, if necessary, by a legislative proposal.

## *Article 19*

### *Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 20*  
*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

*Article 20*  
*Addressees*

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