

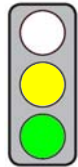
COMBATTING FRAUD BY MEANS OF EU CRIMINAL LAW

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KEY ISSUES

Objective of the Directive: The Commission wishes to create EU criminal law for offences that have a detrimental effect on the EU budget.

Parties affected: All citizens and companies, public officials; criminal prosecution authorities.



Pros: (1) Harmonising the relevant offences and sanctions increases legal certainty and facilitates prosecution.

(2) Dishonest conduct of tenderers in public procurement is to be criminalised.

Cons: In order to preclude the possibility of double jeopardy, the relationship between the Directive and other potential sanctions should be stated more precisely.

CONTENT

Title

Proposal COM(2012) 363 of 11 July 2012 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**

Brief Summary

Note: The articles and pages quoted refer to the Proposal COM(2012) 363.

► Background and targets

- Fraud and related illegal activities are causing severe damage to the EU budget each year. For instance, in 2010 there were altogether 600 suspected fraud cases with a total damage volume of approximately 600 million euros.
- The provisions for such crimes differ considerably from Member State to Member State (see overview, p. 2 et sq.), both in terms of criminal liability itself and the level of sanctions. Furthermore, the conviction rate also varies significantly between the Member States.
- Therefore, the Commission wishes to harmonise the relevant offences and prescription periods for prosecution and to introduce minimum sanctions. This should lead to a more consistent prosecution practice in Member States and thus improve the protection of the EU's financial interests.

► Scope

The following "financial interests of the Union" shall be protected by criminal law (Art. 2):

- all revenues and expenditures listed in the EU budget;
- all revenues and expenditures listed in budgets of EU institution and agencies;
- the collection of value added tax revenues by Member States (Recital No. 4; Explanation, p. 8).

► Offences

– Fraud

Punishable is any intentional fraud that leads to funds being either granted or retained in error by any act of provision, omission or non-disclosure of information in violation of a specific obligation (Art. 3).

– Subsidy fraud

Punishable is the misappropriation of funds by the recipient (Art. 3).

– Obstruction of public procurement procedures

Punishable is the dishonest conduct during public procurement procedures (Art. 4 (1)), namely the use of unduly obtained information from the tendering body (Recital No. 6; Explanation, p. 8 et sq.).

– Corruption

Punishable are the active and passive corruption of public officials (Details: Art. 4 (3)).

– Qualified embezzlement

Punishable is the abusive award of funds by public officials (Art. 4 (4)).

– Money laundering

Punishable are also the follow-up utilization activities of all offences (Art. 4 (2)).

► Public officials

- Public official is any person holding a legislative, administrative or judicial office and thereby exercising a public service function for the EU, a Member State or a third country (Art. 4 (5)).
- A public official can also be any other person exercising a public service function for the EU, a Member State or a third country without holding such an office. This includes employees working for public administration and contractors managing EU funds. (Recital No. 8)

► **Participation and attempt**

- Punishable are also incitement and aiding and abetting (Art. 5 (1)).
- Punishable is also attempted fraud and qualified embezzlement (Art. 5 (2)). Regarding the other offences, this depends on whether the criminal offence itself covers “elements of attempt” (Explanation, p. 9).

► **Criminal liability of legal persons**

- Legal persons are held liable for criminal offences committed for their own benefit (Art. 6 (1), (2))
 - if the acting person has a leading position within the legal person, or
 - if the lack of control by a person in a leading position allowed for the criminal offence.
- The definition of a legal person and, consequently, whether or not it can be held liable for criminal offences is subject to the Member States’ applicable law (Art. 6 (4)).
- The liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences (Art. 6 (3)).
- Excluded from liability are states or public bodies in the exercise of state authority and public international organisations (Art. 6 (4)).

► **Penalties**

- Penalties for natural persons are graded according to the severity of the offence:
 - In the case of damages or an advantage of less than 10,000 Euro, criminal sanctions – fines or imprisonment – must not necessarily be applied; instead, “other than criminal penalties” may suffice, for instance administrative fines (Art. 7 (2)).
 - In the case of damages or an advantage of more than 10,000 and less than 30,000 Euro, a fine or imprisonment is to be imposed (Art. 7 (1)).
 - In the case of damages or an advantage
 - of more than 30,000 Euro in the case of money laundering and corruption, or
 - more than 100,000 Euro in all other cases,
 a minimum of a six-month term of imprisonment is to be imposed (Art. 8 (1)).
 In such cases, a European Arrest Warrant can be issued because of the level of sanctions (Recital No. 14; Explanation, p. 10; Art. 2 (1) Framework Decision 2002/584/JI)
 - Offences committed within a “criminal organisation” must be punished by a penalty of at least 10 years of imprisonment (Art. 8 (2)).
 - A criminal organisation is a structured association, established over a period of time, of at least three persons whose purpose it is to commit crimes (Art. 1 (1) Framework Decision 2008/841/JI).
- Sanctions for legal persons can comprise (Art. 9):
 - fines and administrative fines;
 - exclusion from entitlement to public benefits;
 - temporary or permanent disqualification from the practice of commercial activities;
 - placing under judicial supervision;
 - judicial winding-up;
 - temporary or permanent closure of establishments which have been used for committing the offence.
- Sanctions which are not penalties or are not equal to penalties may be imposed along with penalties (cf. Art. 14; Recitals Nos. 13, 16 and 20). This applies for instance to disciplinary measures (Art. 7 (3)).

► **Freezing and confiscation**

- Proceeds and instrumentalities from the offence are to be frozen and confiscated (Art. 10) pursuant to the general provisions [see Proposal COM(2012) 85].
- Freezing means the preliminary prohibition of using the assets or their preliminary custody [Art. 2 (5) COM(2012) 85].
- Confiscation means the final confiscation of assets through a criminal court [Art. 2 (4) COM(2012) 85].

► **Prescription and enforcement**

- Offences become statute-barred not earlier than five years after being committed (Art. 12 (1)).
- In the case of the effective beginning of investigation or prosecution or any act of a competent national authority, the prescription period shall commence anew. Such an interruption in the prescription period is possible for at least ten years after the offence was committed. (Art. 12 (2))
- Final convictions are enforceable for at least ten years (Art. 12 (3)).

Statement on Subsidiarity by the Commission

The EU’s financial interests are “by nature” placed at EU level and therefore cannot be protected by the Member States alone. The EU, however, is “best placed” to ensure consistent standards throughout the EU. [SWD(2012) 196, p. 4]

Policy Context

The Directive replaces the 1995 Convention on the protection of the European Communities' financial interests, along with its corresponding protocols (Art. 16). It was preceded by a Communication on the "integrated policy to safeguard taxpayers' money" in 2011 [COM(2011) 293], which amongst other things called for the minimum harmonisation of substantive criminal law now being undertaken.

The Directive complies with the Commission's latest efforts to combat tax fraud and tax evasion [see Communication COM(2012) 351 and COM(2012) 722].

The Draft Directive COM(2001) 272 becomes obsolete with the new proposal and is therefore withdrawn [see Commission Work Programme 2013, COM(2012) 369, Vol. 2/2, Annex III No. 11].

Legislative Procedure

11 July 2012	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice (leading), DG Taxation and Customs Union
Committees of the European Parliament:	Budget Control (leading), rapporteur: N. N.; Economic and Monetary Affairs; Legal Affairs; Civil Liberties, Justice and Home Affairs
German Federal Ministries:	Justice (leading)
Committees of the German Bundestag:	Legal Affairs (leading); EU Affairs
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 325 (4) TFEU (Protecting the financial interests of the EU)
Form of legislative competence:	Shared competence (Art. 4 (1), (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Corruption and fraud always cause damage to the efficiency of an economy and therefore to its wealth. Hence, they must be combatted as effectively as possible. **A harmonisation of the relevant offences and sanctions increases legal certainty and thus facilitates prosecution.** The extent of penalty is not the only relevant factor for the risk assessment of potential offenders – it is not even a matter of priority. What is more decisive is the likelihood of being caught and punished. However, for this it would be necessary to intensify criminal prosecution in Member States, and the EU cannot accomplish that alone.

Legal Assessment

Competence

Legislative competence is based on Art. 325 (4) TFEU, according to which the EU may take legislative action "in the fields of the prevention of and fight against fraud affecting the financial interests of the Union". The term "fraud" must be seen in connection with "any other illegal activities affecting the financial interests of the Union" (Art. 325 (1) TFEU) and therefore understood in a broader sense. In particular, it is not limited to fraud in the narrow sense of the word (cf. § 263 German Criminal Code) but will cover any actions which can be accused subjectively of going against the financial interests of the Union. As the earlier restriction to non-criminal measures (Art. 280 (4) 2 TEC) was dropped by the Treaty of Lisbon, the "prevention" of fraud now also covers criminal sanctions. Including VAT fraud is in line with the case law of the ECJ (cf. ECJ, C-539/09, Commission / Germany, para. 59 et sqq. on auditing through the European Court of Auditors pursuant to Art. 287 TFEU).

Subsidiarity

Unproblematic. The provisions are limited to the financial interests of the EU.

Proportionality

Unproblematic. In particular, the legal form of a Directive is a less severe and more appropriate means with regard to the target of minimum harmonisation.

Compatibility with EU Law

EU and Member States are expressly obliged to combat fraud and other illegal activities affecting the financial interests of the Union (Art. 310 (6), 325 (1) TFEU).

Imposing disciplinary measures along with criminal sanctions is admissible (cf. European Union Civil Service Tribunal, F-30/08, Nanopoulos / Commission, para. 187). **Imposing administrative sanctions along with**

criminal sanctions is problematic in view of the ne bis in idem principle under EU law (Art. 50 CFREU; cf. ECJ, C-238/99 P et al., Limburgse Vinyl Maatschappij et al. / Commission, para. 59). In order **to preclude the possibility of double jeopardy, the Directive should be more precise** in this issue.

Compatibility with German Law

According to the Lisbon judgement of the German Federal Constitutional Court (FCC), TFEU's enabling powers concerning criminal law are in principle to be treated restrictively and limited to cross-border offences (FCC, 2 BvE 2/08 et al., paras. 358, 253). However, this addresses in particular the protection of different cultural values (FCC, 2 BvE 2/08 et al., paras. 253, 355), for instance in the case of abortion or freedom of expression. With regard to penalising fraud, corruption and related offences, national values are not very likely to differ significantly. The Court anyway acknowledges explicitly the special importance of combating corruption (FCC, 2 BvE 2/08 et al., para. 359) and neither considers nor even mentions Art. 325 TFEU as a potential enabling clause for criminal lawmaking.

German procurement criminal law must be adjusted to the Directive and must **criminalise dishonest conduct of the tenderer**. To date, German law has essentially recognised the criminal liability of anti-competitive agreements (§§ 263, 298 German Criminal Code); laundering offences (§ 261 German Criminal Code) must also be extended accordingly.

In future, corrupt delegates must be punished in connection with EU budget offences **as strictly as officeholders**. The same applies to the bribers. Until now, under German law (§ 108e German Criminal Code) the penalty imposed upon members of the Bundestag, the Federal States' parliaments and the European Parliament for being bribed as well as the penalty for the persons bribing them has been far less strict. Now this national path should also come under increased domestic pressure. With regard to the corruption of foreign members of legislature, stricter rules apply anyway [Art. 2 § 2 Law to Combat International Corruption].

Unlike many other legal systems, **German criminal law traditionally does not provide for any criminal penalty for legal persons**. However, **the principle of fault according to German constitutional law** (Art. 1 (1), 2 (1), 20 (1), 79 (3) German Basic Law) **does not preclude the introduction of criminal sanctions for legal persons**.

Conclusion

Harmonising the relevant criminal offences and sanctions increases legal certainty and facilitates prosecution. In order to preclude the possibility of double jeopardy, which would infringe EU law, the relationship between the Directive and other potential sanctions should be stated more precisely. German law traditionally does not provide for any sanctions against legal persons, but it does not preclude their introduction either. With regard to German criminal law, further changes are necessary: Procurement criminal law must sanction dishonest conduct of tenderers. Corrupt delegates must in future be punished in the same way as officeholders.