THE CRIMINALISATION OF CORRUPTION OF PUBLIC OFFICIALS AS A MECHANISM FOR THE PROTECTION OF THE EUROPEAN UNION'S FINANCIAL INTERESTS

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ABSTRACT

This paper is aimedat studying the process of Europeanisation of the fight against corruption through criminal law as a mechanism for the protection of the financial interests (PIF) of the European Union. The criminalisation of corruption is an obligation imposed to Member States by the PIF Directive. Additionally, the paper explores the challenges faced by Member States in the transposition of the PIF Directive and the interlink with the implementation of the EPPORegulation (European Public Prosecutor's Office). The article concludes that the PIF Directive constitutes a progress in a comprehensive strategy for the protection of the Union's financial interests as it foresees several provisions concerning harmonisation of criminal law measures, but the complete harmonisation is still far to be achieved since the PIF Directive leaves a wide leeway to Member States concerningissues such as the criminal sanctions and the limitation periods. The EPPO will clearly contribute to improve the EU strategy against corruption and other conducts affecting the EU budget, but a number of problems may arise due to the diverse legislations in the Member States.

Keywords: Corruption, Criminal Law, EPPO (European Public Prosecutor's Office Financial Interests, PIF Directive

1. INTRODUCTION

Protecting the financial interests of the European Union has been one of the main concerns for years[2]. Among the conducts more likely to damage the Union's financial

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interests, corruption deserve a special mention, as pointed out by the Preamble of the Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter, PIF Directive)[3]. Indeed, bribery to public officials managing the EU budget is a practice that may cause devastating effects on the financial interests of the European Union and endanger the existence of the European Union itself[4]. For this reason, the EU has adopted a number of legal documents to fight against these practices of corruption that may damage the EU budget. These instruments consider criminal law as a necessary mechanism to achieve the goal of combating such practices due to the deterrent effect of the criminal penalty.

The first legal instrument imposing criminal law obligations to Member States to protect the budget of the European Communities was the so-called PIF Convention (Convention on the protection of the European Communities' financial interests[5]), adopted in 1995. However, the PIF Convention did not take into consideration that the financial interests of the European Communities could be damaged through practices of corruption (bribery to public officials). To overcome this gap, a Protocol was added to the PIF Convention in 1996[6] (hereinafter, First Protocol). This Protocol required the criminalisation of corruption of Community officials and officials of any Member State, provided that these conducts damaged or were likely to damage the European Communities' financial interests. The need to strengthen the fight against bribery of public officials triggered the adoption of a new instrument in 1997: the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[7] (hereinafter,

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[3]EUROPEAN PARLIAMENT & COUNCIL (2017). 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, OJ L 198 of 28.7.2017.

[4]MANACORDA, S. (1999). *La corruzione internazionale del pubblico agente. Linee dell'indagine penalistica.* Napoli: Casa Editice Dott. Eugenio Joeve

[5] 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, of 26 July 1995, OJ C 316 of 27.11.1995. Entry into force: 17.10.2002. .

[6]Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, of 27 September 1996, OJ C 313 of 23.10.1996. Entry into force: 17.10.2002

[7] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, of 26 May 1997, OJ C 195 of 25.6.1997. Entry into force: 28.9.2005.

EU Convention on corruption). The Convention imposes Member States the obligation of sanctioning through criminal law any practice of corruption irrespective of the damage to the financial interests, having a broader scope of application.

Member States were, however, reluctant to ratify the aforementioned legal documents, which took years to enter into force. Therefore, it was necessary to give a new impulse to the fight against practices that damage the EU budget. After intense debate and negotiation, the result was the PIF Directive, passed in 2017, which replaces the PIF Convention and its Protocols. The PIF Directive gives a new impetus to the protection of the Union's financial interests. It imposes Member States the obligation of sanctioning by means of criminal law a number of offences, which may put the EU budget at risk. Additionally, it foresees other measures regarding criminal law, like harmonisation of criminal penalties and limitation periods.

The adoption of the PIF Directive is parallel to the adoption of the Regulation (EU) 2017/1939 on the establishment of the European Public Prosecutor's Office (EPPO)[8] since the offences within the material competence of the EPPO are those contained in the PIF Directive.

This paper is aimed at studying the process of Europeanisation of the fight against corruption through criminal law as a mechanism for the protection of the financial interests of the European Union, and the challenges faced by Member States in the transposition of the PIF Directive and the interlink with the implementation of the EPPO Regulation. The paper is structure in four sections. After the introduction, the first summarises the existing EU legal documents on corruption. The second explores the obligations of the PIF Directive. The third explain briefly other obligations of the PIF Directive concerning other criminal conducts. The forth focuses on the EPPO and the problems regarding the prosecution of PIF crimes. Finally, some conclusions are offered.

2. ANTI-CORRUPTION LEGAL DOCUMENTS BINDING TO MEMBER STATES

The first anti-corruption legal documents binding to Member States were adopted within the third pillar, in particular, on the basis provided by Article K.3 of the Treaty of

[8]EUROPEAN COUNCIL (2017). 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 of 31.10.2017.

Maastricht, which offered the legal framework to draw up conventions in areas of common interests, such as combating fraud on a supranational scale. For this reason, at the beginning, the fight against corruption was linked to the protection of the financial interests of the European Communities.

The aforementioned PIF Convention required Member States to consider fraud as a criminal offence when it might put the financial interests of the European Communities at risk. Fraud is defined as any act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which had as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities; non-disclosure of information in violation of a specific obligation, with the same effect, and the misapplication of such funds for purposes other than those for which they were originally granted (Article 1).

Nevertheless, the PIF Convention did not mention corruption as a conduct likely to put the Communities' financial interests at risk, which is difficult to explain since it is clear that corruption of public officials managing EU funds may affect the financial interests. This fact should have been stated by the PIF Convention. With the aim of filling this gap, a Protocol was added to the Convention, as pointed out in the introduction to this paper. ThisFirst Protocol established the first criminal law obligations concerning corruption to be implemented by Member States. The Protocol, being aware that "the financial interests of the European Communities may be damaged or threatened by other criminal offences, particularly acts of corruption by or against national and Community officials, responsible for the collection, management or disbursement of Community funds under their control" (Preamble), obliged Member States to consider corruption of any national official as a criminal offence, including any official of another Member State, and Community officials if the conduct damaged or was likely to damage the European Communities' financial interests.

Only one year after the adoption of the Protocol, a new instrument on corruption came to light: the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. Inspired by the Protocol, the Convention requires Member States to criminalise corruption involving the aforementioned officials, but it has a broader scope of application since it does not restrict the punishment of such conducts to attacks on the financial interests of the EU.

Neither the PIF Convention nor the Protocol dealt with some crucial issues in the fight against fraud and corruption affecting the financial interests of the former European Communities, namely, money laundering, liability of legal persons and assets recovery. Therefore, a Second Protocol concerning these issues was added to the PIF Convention in 1997[9] (hereinafter, Second Protocol).

Despite the fact of having passed a number legal binding instruments to combat fraud and corruption affecting the EU budget through criminal law, the problem was far to be solved. Initially, Member States were reluctant to ratify the PIF Convention and its accompanying Protocols, and the EU Convention on corruption too[10]. This is the reason why the PIF Convention entered into force seven years after its adoption, the First Protocol six years and the Second Protocol twelve years. The EU Convention on corruption took eight years to enter into force. Therefore, it was necessary to give a new impulse to the fight against practices damaging the Union's financial interests, among them, the practices of bribery. With this purpose it was adopted the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations[11], which points out the necessity of developing an integrated approach to combat fraud and corruption through criminal law. In the same sense, the European Parliament Resolution on the EU's efforts to combat corruption[12] calls the Commission to act on the basis of Article 83 (1) of the Treaty of Functioning of the European Union concerning the adoption of minimum rules on the definition of and sanctions for conducts of corruption as part of the new strategy in the fight against fraud at the EU level.

[9] Second Protocol drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, of 19 June 1997, OJ C 221 of 19.7.1997. Entry into force: 19.5.2009

[10]ARNONE, M. & BORLINI, L. S. (2014). *Corruption: Economic Analysis and International Law*. Northampton: Edward Elgar; DI FRANCESCO MAESA, C. (2018). Directive (EU) 2017/1371 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal. *European Papers*, Vol. 3, No 3, p. 1455-1469; SZAREK-MASON, P (2010). *The European Union's Fight against Corruption. The Evolving Policy towards Member States and Candidate Countries*. Cambridge: Cambridge University Press.

[11]EUROPEAN COMMISSION (2011). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. On the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money. Brussels, 26.5.2011 COM (2011) 293 final.

[12]EUROPEAN PARLIAMENT (2011). European Parliament Resolution of 15 September 2011 on the EU's efforts to combat corruption.

In 2012, the European Parliament and the Council launched a proposal for a Directive on the Protection of the Union's financial interests[13]. After five years of intense negotiation, the PIF Directive was passed, replacing the PIF Convention and its accompanying Protocols, except for Denmark and the UK. Built upon the *acquis* of the PIF Convention and its Protocols, the PIF Directive tries to give a new impetus to the protection of the Union's financial interests. It imposes Member States the obligation of sanctioning by means of criminal law a number of offences, which may put the EU budget at risk. These offences are fraud, corruption, misappropriation of funds, and money laundering when they damage or are likely to damage the Union's financial interests. Additionally, it foresees other measures regarding criminal law, like harmonisation of penalties and limitation periods.

3. THE OBLIGATION OF CONSIDERING CORRUPTION OF PUBLIC OFFICIALS AS A CRIMINAL OFFENCE

The obligation of considering corruption of public officials as a criminal offence is mainly found in the EU Convention on corruption of 1997. The PIF Directive also requires the punishment of practices of corruption through criminal law, but only when they may affect the Union's financial interests. The elements of the definition of the offence are those provided by the EU Convention on corruption. For this reason, this section will refer not only to the PIF Directive but also to the EU Convention on corruption with the purpose of achieving a better understanding of the elements of the crime. The following sub-sections explore the specific obligations regarding the criminalisation of corruption of public officials.

3.1. Definition of "public official"

One of the classical problems in combating corruption has been the definition of "public official" since it is a concept that may vary from one territory to another. Both the EU Convention on corruption and the PIF Directive deal with this issue.

According to Article 1 (a) of the EU Convention on corruption, the term "official" includes any Community official or national official of another Member State. The Convention defines "Community official" as any employee within the meaning of the Staff Regulation of the European Communities or seconded person carrying out corresponding

[13]EUROPEAN PARLIAMENT & COUNCIL (2012). Proposal for the Directive of the European Parliament and Council on the fight against fraud to the Union's financial interests by means of criminal law. Brussels, 11.7.2012 COM (2012) 363 final.

functions (Article 1 (b)). Nevertheless, the concept of "national official" remains undefined, and it shall be understood by reference to the definition of "official" and "public officer" in the national law of the Member State in which the person in question performs that function (Article 1 (c)) This provision has been criticised because it may have as a consequence that the same conduct may be an offence in one Member State and not in another, depending on the definition of each legislation[14]. This situation may hinder the cooperation between countries. In order to avoid this problem, it is necessary a common definition of public official.

The PIF Directive offers a similar definition of public official, but with the reference to "Union official" in Article 3 (a). The Directive also specifies that

> "[m]embers of the Union 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 do not apply to them".

When it comes to the definition of "national official", although the first provision of the Directive refers to the national law of the Member States or third countries, then, Article 3 (a) (ii) offers an autonomous definition. According to Article 3,

> "[t]he 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 or local level shall be assimilated to a national official".

The concept of "national official" includes officials of a Member State as well as officials of a third country, which is a novelty in the EU legislation in this matter. Moreover, the definition of "public official" in the PIF Directive is completed in Article 3 (b) with a reference to a *functional* or *material* concept, according to which, public official is also

> "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".

[14]BENITO SÁNCHEZ, D. (2019). The European Union Criminal Policy against Corruption: Two decades of Efforts. *Política Criminal*, Vol. 15, No. 27: 520-548; KAIAFA-GBANDI, M. (2010). Punishing Corruption in the Public and the Private Sector: The Legal Framework of the European Union in the International Scene and the Greek Legal Order. *European Journal of Crime, Criminal Law and Criminal Justice* 18-2: 139-183; WOLF, S. (2007). Der Beitrag internationaler und supranationaler Organisationen zur Korruptionsbekämpfung in den Mitgliedstaaten, *Speyerer Forschungsberichte* 253.

The new concept of public official enshrined by the PIF Directive is undoubtedly one of its strengths since it offers an autonomous concept of EU law. Once the Member States transpose the Directive into national legislation, it will avoid the current problems derived from the disparity of legislations.

3.2. The criminalisation of passive and active corruption

Both the EU Convention on corruption and the PIF Directive employ the same definition as regards the offence of corruption. However, the Directive removes the element "breach of duties".

Article 2 (a) of the PIF Directive defines passive corruption as

> "the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, 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 a way which damages or is likely to damage the Union's financial interests".

Article 2 (b) of the PIF Directive defines active corruption as

> "the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind 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 a way which damages or is likely to damage the Union's financial interests".

With respect to these definitions, it is necessary to make some clarifications concerning the constituent elements of the crime that Member States must have into consideration when transposing them into national legislation. First, the conduct may be carried out "directly or through an intermediary". This phrase is very relevant in this scope because the presence of a third party is not unusual in this kind of behaviours since it can be difficult to access directly the person who can benefit whosoever with his action or omission[15]. The responsibility of the third party, that is, the intermediary, will depend upon his knowledge on the offence. In any case, secondary participants in the offence must also be punished, as explained below.

[15]NIETO MARTÍN, A. (2004). La corrupción en las transacciones comerciales internacionales. En NIETO MARTÍN, A. (coord.). *Estudios de Derecho Penal*. Ciudad Real: Ed. Universidad de Castilla-La Mancha.

Second, the EU Convention on corruption put an end to the traditional discussion in many Member States related to the term "advantage". It must include not only material objects (e.g. money, precious objects) but also intangible advantages (e.g. privileges, promotions). This idea is reflected in the PIF Directive too.

Third, it is understood that there is also an offence of corruption although the advantage is not for the official but for a third party, such as a relative, a close friend or even a legal entity (e.g. a political party). That is, it is not necessary that the bribery benefits the official in question, although it does seem to be necessary the existence of a relationship between the person who ultimately receives the benefit and the official who acts or refrains from acting motivated by the bribery.

Fourth, the request, acceptance, giving or promise of the bribery must, in principle, predate the official's act or omission. Therefore there is not the obligation on Member States to criminalise such conducts when the advantage is received after an act has been performed without the existence of a prior agreement. However, the EU Convention on corruption specifies to this respect that it only contains minimum rules (Article 11), so that Member States may opt for the criminalisation of further conducts, such as subsequent corruption.[16]

Fifth, the EU Convention on corruption applies to performance of, or abstention from performing, any act within the powers of the holder of the office or function by virtue of any law or regulation (official duty) in so far as the acts are carried out "in breach of the official's duties". However, as pointed out in the Explanatory Report to the EU Convention on corruption[17], the provision also covers cases where an official, contrary to his official duty to act impartially, receives an advantage in return for acting in accordance with this function (e.g. by giving preferential treatment by accelerating or suspending the processing of a case). The PIF Directive opts for this alternative and removes the element "in breach of the official's duties" from the definition of the offence, in the understanding that there must be a criminal offence when the civil servant requests or receives the bribe "to act or refrain from acting in accordance with his duty or in the exercise of his functions". The PIF Directive follows the

[16] This is the case of Spain (Article 421 of the Criminal Code).

[17]EUROPEAN COUNCIL (1998). Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 391 of 15.12.1998

path of other international legal documents on corruption such as the Council of Europe Criminal Law Convention on Corruption and the United Nations Convention on Corruption[18].

The last element of the objective part of the definition of the offence is the damage or the likelihood to damage the Union's financial interests. It is not necessary that the conduct actually damages the financial interests, being enough that the conduct is likely to damage them ("dangerousness offence"). Member States' legislation, however, typically criminalise corruption offences in a general way, without the reference to the Union's financial interests.

Finally, as regards the*mens rea* element, there is a minimum difference between the EU Convention on corruption and the PIF Directive. This is the absence of the word "deliberate" in the definition of the offence in the PIF Directive. This change shall not be considered very relevant because it is commonly accepted that the offences of corruption are always deliberated (with knowledge), not negligent.

3.3. Participation forms and inchoate crimes

The EU Convention on corruption foresees the punishment of any form of participation in a corruption offence, apart from the principal or perpetrator. It expressively mentions participating and instigating. However, it does not require the criminalisation of the attempt (inchoate crime). Probably the reason is that the definition of the elements of the offence of corruption includes conducts that consist in making promises irrespective of whether such promises are actually kept or fulfilled. That is, in other words, the attempt to bribe.

The PIF Directive also requires the criminalisation of any form of participation, mentioning "aiding and abetting" and "incitement". Additionally, it does require the criminalisation of the attempt. Since the PIF Directive refers not only to corruption offences but to fraud, misappropriation and money laundering too, so the punishment of attempt refers to these offences too.

[18] The legislations of several Member States distinguish the offences of corruption depending on the conduct of the public official violates or not the official duties. See German Criminal Code: § 332 Bestechlichkeit (breach of duty), § 331 Vorteilsannhame (not breach of duty). Italian Criminal Code: Article 319 corruzione per un atto contrario ai doveri d'ufficio (breach of duty), Article 318 corruzione per l'esercizio della funzione (not breach of duty). Spanish Criminal Code: Article 419 cohecho propio (breach of duty), Article 420 cohecho impropio (not breach of duty).

The problem is the lack of definitions concerning the terminology, just like the lack of instructions concerning the applicable criminal sanction for these situations, which may lead to differences in the implementation of the Directive[19]. In any case, it must be assumed that it is highly complicate to establish harmonised rules in this respect since the concept of "participation forms" and "inchoate crimes" have a long tradition in the criminal law systems of the Member States, which in some cases comes from the ninetieth century. Therefore, it will not be easy to unify criteria. Member States would probably show great reluctance to alter these well-established notions.

3.4. Criminal sanctions for corruption offences

The PIF Protocol initiated the way for harmonising criminal sanctions for corruption offences (Article 5(1)). The EU Convention on corruption follows his path. Its Article 5 (1) establishes that offences of passive and active corruption, as well as participation and instigation, shall be punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition. This attempt at harmonisation is, however, misleading because, in the end, Member States are the ones that have to decide what criteria or elements will determine the seriousness of an offence in the light of their respective legal traditions, which can give as a result an uneven ranking of penalties[20].

The PIF Directive insists on the harmonisation of sanctions, and it is more precise than the EU Convention on corruption. The new Directive orders Member States to foresee penalties of imprisonment (not fines) and to foresee a maximum penalty of at least four years of imprisonment when the offence involves considerable damage or advantage (Article 7 (3)). It shall be considered "considerable damage or advantage" when it involves more than 100.000€. Actually, this is only a minimum rule, and national legal systems usually foresee higher penalties. The PIF Directive, however, does not offer rules concerning minimum criminal penalties, which may hinder any desired harmonisation and may constitute, therefore, a serious problem as regards the functioning of the EPPO.

[19]DI FRANCESCO MAESA, C. (2018). Directive (EU) 2017/1371 on the Fight against Fraud…, *op. cit.*

[20]CARRERA HERNÁNDEZ, F. J. (2001). La persecución penal de la corrupción en la Unión Europea. *Cooperación Jurídica Internacional*. Madrid: BOE. For instance, the imprisonment penalty for the most serious offence of passive corruption (in breach of official duties) is 6 months to 5 years in Germany, 6 to 10 years in Italy, and 3 to 6 years in Spain; in short, very different situations concerning penalties.

3.5. The aggravating circumstance of "criminal organisation"

The European Union has been concern about organised crime for many years, as proved by a number of legal initiatives adopted in this matter. In 1999, the conclusions of the European Council of Tampere on the creation of an area of freedom, security and justice in the European Union included the fight against organised crime as one of the priorities of the Union. Likewise, the Hague Programme: Strengthening Freedom, Security and Justice in the European Union[21], and the Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens[22] insist on the necessity of combating organised crime. In 2008, the Framework Decision 2008/841/JHA on the fight against organised crime was adopted[23], requiring Member States the criminalisation of conducts related to participation in a criminal organisation.

However, the EU Convention on corruption in 1997 does not mention the link between organised crime and corruption. The PIF Directive does recognize in its Preamble that attacks to the Union's financial interests are often committed by organised criminal networks (recital 2). For this reason, it requires Member States to foresee an aggravating circumstance when the offence, in this case, the offence of bribery, is committed by a criminal organization in the sense of the aforementioned Framework Decision 2008/841/JHA (Article 8). The PIF Directive, however, does not specify any provision concerning the criminal penalty for those cases where there is an aggravating circumstance. In addition, the Directive does not explain either if the obligation contained in Article 8 concerning the aggravating circumstance can be fulfilled in that case in which the national criminal law considers the participation in a criminal organisation as a separate offence. The text of the PIF Directive does not say anything to this respect. The Preamble of PIF Directive does point out this possibility but, as known, the Preamble is not a valid legal basis for this claim. Consequently, differences in the punishment of criminal behaviour among Member States may be very significant. The Directive could arguably have contained more precise provisions to allow for the complete harmonisation of penalties, thus preventing that legislative divergences at the national level become a relevant

[21]EUROPEAN COUNCIL (2005). The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53 of 3.3.2005.

[22]EUROPEAN COUNCIL (2010). Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ C 115 of 4.5.2010.

[23]EUROPEAN COUNCIL (2008). Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008.

factor when potential criminals decide in which Member State(s) the offence against the EU's financial interests will be committed.

3.6. Liability of legal entities involved in corruption cases

The main actors of the most serious cases of bribery are not usually individual persons, but companies. This is why all international legal documents on corruption demand sanctions for legal persons involved in corruption cases. At the EU level, the first obligations in this respect were found in the Second Protocol to the PIF Convention in 1997. Article 3 (1) of this document obliged Member Stated to take measures to ensure liability of legal entities with respect to the offences mentioned in it (fraud, corruption and money laundering), and Article 4 specified that sanctions for legal persons should be effective, proportionate and dissuasive, and include criminal or non-criminal fines. It also mentioned a list of other sanctions, not compulsory, that the PIF Directive has completed.

The PIF Directive insists on the issue of the liability of legal entities involved in corruption cases (Article 6) and requires the application of effective, proportionate and dissuasive sanctions too (Article 9), which shall include fines, criminal or not criminal, and may include others. As example of other sanctions, the Directive mentions: (a) exclusion from entitlement to public benefits or aid, (b) exclusion from public tender procedures, (c) disqualification from the practice of commercial activities, (d) placing under judicial supervision, (e) judicial winding-up, and (f) closure of establishments which have been used for committing the criminal offence, in this case, bribery. Actually, the provisions concerning liability of legal persons largely correspond to the ones contained in the Second Protocol, with the exception of some new sanctions (lit. b, f).

The PIF Directive, as the Second Protocol when it was in force, shows respect for the national systems in which legal entities cannot be considered responsible from the point of view of the criminal law. In these systems, based on the Roman aphorism *societas delinquere non potest*, nevertheless, other sanctions must be imposed, having equivalent effect[24].

The problem with this regulation concerning the responsibility of legal persons is the broad margin left to Member States. They can choose, firstly, between criminal and non-criminal sanctions. Secondly, only the penalty of fine is a compulsory sanction according to the

[24]KLIP, A. (2012). *European Criminal Law*. 2nd ed. Cambridge: Intersentia.

PIF Directive, while the other sanctions are optional for Member States. In this situation, harmonisation seems to be very distant in this matter. In addition, the diversity of systems will in future be an obstacle to the EPPO in prosecuting offences, since as a prosecutor, it will only have competences with respect to persons that may be held *criminal* liable.

3.7. Corruption as a predicate offence to money laundering

Corruption and money laundering are two related offences[25]. When a civil servant receives an amount of money as a bribe, he cannot simply use it. He need to "clean" that money. Money laundering is a process through which, money or any other asset coming from an offence is separated from its criminal origin and incorporated into the legal economy. The Union's concern about money laundering started decades ago. Indeed, the first Directive on money laundering was passed in 1991[26]. The need to tackle jointly corruption and money laundering was firstly exposed by the Second Protocol to the PIF Convention in 1997. The PIF Directive imposes the same obligations by requiring Member States to consider the offence of corruption as "predicate offence", that is, an offence whose proceeds may become the subject of a money laundering offence.

As regards the details of the definition of the offence of money laundering, the PIF Directive refers to the Fourth Anti-Money Laundering Directive[27]. The recently passed Fifth Anti-Money Laundering Directive[28] does not change anything since, as pointed out by its Article 1 (2), the new Directive "does not apply to money laundering as regards property derived from criminal offences affecting the Union's financial interests, which is subject to specific rules laid down in Directive (EU) 2017/1371".

3.8. Recovery of assets coming from corruption offences

[25] CHAIKIN, D. & SHARMAN, J. C. (2009). *Corruption and Money Laundering. A Symbiotic Relationship*. New York: Palgrave Macmillan.

[26]EUROPEAN COUNCIL (1991). Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166 of 28.6.91.

[27]EUROPEAN PARLIAMENT & COUNCIL (2015). Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141 5.6.2015.

[28]EUROPEAN PARLIAMENT & COUNCIL (2018). Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, OJ L 284 of 12.11.2018.

Assets recovery is an essential mechanism in the fight against corruption and other crimes with an economic component. A comprehensive strategy against economic crime should go beyond preventive and punitive measures as prosecuting, condemning, and eventually imprisoning criminals[29]. It is essential the recovery and return of assets obtained by criminal means. Indeed, the United Nations Convention on Corruption considers assets recovery a "fundamental principle" of the Convention (Article 51). The Second Protocol to the PIF Convention already tackled this issue in 1997, and imposed Member States the obligation of taking measures to enable the seizure, confiscation or removal of instruments and proceed of corruption, fraud and money laundering. However, assets recovery still faces big problems, not only at the EU level, but at the international level too, because criminal use sophisticated financial schemes to conceal the illegal gains. Thus, it is not easy to follow the money and to recover it. Some international initiatives try to facilitate this task, such as like StAR (Stolen Assets Recovery Initiative), created with the support of the World Bank Group and the United Nations Office on Drugs and Crime.

At the EU level, the Decision 2007/845/JHA[30] required Member States to set up a national Asset Recovery Office (ARO), its function being the facilitation of the tracing and identification of proceeds of crime (Article 1). To achieve this, the idea is that national AROs exchange information with respect to assets coming from crime (Article 3). The general legal regime of asset recovery at the EU level is provided by the Directive 2014/42/EU[31], which enshrines minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters, while leaving recovery procedures to Member States. The PIF Directive refers to this general regime when it obliges Member States to take measuring concerning freezing and confiscation of assets pertaining to the offences referred in the Directive (Article 10).

[29]RODRÍGUEZ GARCÍA, N. (2017). *El decomiso de activos ilícitos*. Pamplona: Aranzadi. BERDUGO GÓMEZ DE LA TORRE, I; FABIÁN CAPARRÓS, E y RODRÍGUEZ GARCÍA, N. (2017) (dir.). *Recuperación de activos y decomiso. Reflexiones desde los sistemas penales iberoamericanos*. Valencia: Tirant lo Blanch.

[30]EUROPEAN COUNCIL (2007). Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ L 332, 18.12.2007.

[31] EUROPEAN PARLIAMENT & COUNCIL (2014). Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127 of 29.4.2014.

The idea behind the two Directives is that the strategy on assets recovery must have a transnational nature. Merely national initiatives are not sufficient to overcome the problem. It is therefore necessary the cooperation and coordination of all Member States. However, the two Directives have an important limit as regard the geographical coverage because two Member States, United Kingdom and Denmark, do not take part in both Directives (recitals 43 and 44 Directive 2014/42/EU, recital 37 and 38 PIF Directive). This fact may seriously hinder the recovery of illegal assets when they are located in those territories.

3.9. Limitation period for corruption offences

Discovering a corruption case is a very complex task because, by nature, it is a crime that remains hidden to authorities. It is not like traditional crimes (injuries, theft, robbery, etc.), with respect to which the victim reports to police or other authorities. Corruption is a "victimless crime", in criminological terminology: "offenses that do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities"[32]. For this reason, authorities may need years to discover the perpetration of the crime and to identify the perpetrator(s).

The problem is that if the legislation foresees a short limitation period for the criminal offence, once the authorities discover the case, the limitation period may have expired, which has as a consequence the impunity of the person(s) involved.

To solve this problem, the PIF Directive pays special attention to the limitation period for the offences mentioned in it, including corruption. The former legal instruments on the protection of the Union's financial interests did not set any rule concerning prescription periods. According to Article 12 of the PIF Directive, Member States shall ensure a "sufficient period" after the commission of the offence, and in the case of offences punishable by maximum sanction of at least four years of imprisonment, the limitation period shall be at least five years.

This is an attempt at harmonising limitation periods in the national law of the Member States, an essential measure after the creation of the EPPO, to enable effective investigation and prosecution of the offences under its competence. However, the rules concerning harmonisation in this point are very vague. Firstly, because the expression "sufficient period"

[32]PACKER, H. (1968). *The limits of the criminal sanction*. Stanford: Stanford University Press, p. 151.

may be understood by Member States in a very different sense. Secondly, because the PIF Directive does not establish any period of prescription for those offences in which there is not a "considerable damage or advantage". Thirdly, even for those cases in which the PIF Directive advocates for a limitation period of 5 years, this is only a minimum threshold, so Member States can foresee very different rules for prescription of offences. Consequently, the current disparity among national legislations may persist in the future[33].

3. OTHER CONDUCTS AFFECTING THE UNION'S FINANCIAL INTERESTS

Beyond bribery, there are other conducts that affects the Union's financial interests, and with respect to which the PIF Directive also imposes the obligation of considering them as criminal offences. These are fraud, misappropriation of funds and money laundering.

In 1995, the PIF Convention required Member States the criminalisation of fraud that damages or is likely to damage the financial interests of the European Communities. The PIF Directive emphasises the idea of making use of criminal law resources to fight against fraud due to the deterrent effect of the criminal law sanctions[34]. Moreover, the Directive offers an updated definition of fraud, which includes a clear language on VAT fraud[35].

Like the PIF Convention, the PIF Directive distinguishes between fraud in respect of expenditures and revenues. With respect to expenditures, the definition has been formulated by making a distinction between non-procurement-related expenditure, such as like grants or other financial instruments, and procurement-related expenditure. The first follows the definition of the PIF Convention (Article 1 (2) (a)). The second, however, requires acting "in order to make an unlawful gain for the perpetrator or another person by causing a loss to the Union's financial interests" (Article 1 (2) (b)). In the last case, the damage must actually have been caused; it is not sufficient the risk of damaging[36].

[33]BENITO SANCHEZ D. (2019). The Directive on the Fight against Fraud to the Union's Financial Interests and its Transposition into the Spanish Law. *Perspectives on Federalism*, Vol. 11, issue 3, p. 122-154.

[34]EUROPEAN COMMISSION (2012). Impact Assessment (Part I). Accompanying the document Proposal for a Directive of the European Parliament and Council on the protection of the financial interests of the European Union by means of criminal law. Brussels, 11.7.2012, SWD (2012) 195 final.

[35]JUSZCZAK, A.; SASON, E. (2017). The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive), *Eucrim (the European Criminal Law Associations' Forum)* 2: 80-87.

[36]*Ibid.*

When it comes to revenue, during the negotiations, the most controversial point was the inclusion of the VAT fraud. On the one hand, the Council did not want to include it among the PIF crimes on the argument that VAT fraud was only a national matter, not affecting the EU budget. On the other hand, the Commission and the Parliament did want to include it. The Court of Justice of the European Union shed light in this matter, confirming the Commission and Parliament's opinion that VAT fraud falls under the scope of the definition of fraud *ex* Article 1 of the PIF Convention[37]. Finally, negotiators reached a "compromise solution"[38] whereby VAT fraud would be included in the PIF Directive (Article 3(2) (d)) while making its criminalisation conditioned upon two additional requirements: fraud should be cross-national (linked to two Member States at least) and its produce be at least EUR 10 million (Article 2 (2)).

Summarising, the definition of VAT fraud in Article 3 (2) (d) of the PIF Directive, read jointly with Article 2 (2), encompasses the gravest forms of VAT fraud, such as carousel fraud, Missing-Trader-Intra-Community (MTIC) fraud and fraud committed by a criminal organisation[39].

Along with corruption and fraud affecting the Union's financial interests, the PIF Directive obliges Member State to consider misappropriation of funds as a criminal offence. This is a true improvement with respect to former legal documents on the protection of EU budget since all of them had ignored these practices, despite de significant annual losses to the EU budget. The impact assessment of the proposal for the PIF Directive estimated such losses at EUR 15.1 million[40].

Although the definition of this crime may vary from one legislation to another, the key element is the *diversion* of money, that is, the management or use of public funds contrary to

[37] Taricco Case. European Court of Justice, Judgment of the Court (Grand Chamber), 8 September 2015, case C-105/14, Ivo Taricco and Others, para. 41.

[38]ANGHEL-TUDOR, G. (2019). Criminalizing fraud affecting the European Union's financial interests by diminution of VAT resources. Juridical Tribune, Vol. 9, No. 1: 141.

[39]JUSZCZAK, A.; SASON, E. (2017). The Directive on the Fight against Fraud…, *op. cit.*

[40]EUROPEAN COMMISSION (2012). Impact Assessment (Part I). Accompanying the document Proposal for a Directive of the European Parliament and Council on the protection of the financial interests of the European Union by means of criminal law. Brussels, 11.7.2012, SWD (2012) 195 final.

the purpose for which it was intended. As defined by Article 4 (3) of the PIF Directive, misappropriation is

> "theaction of a 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 in any way which damages the Union's financial interests".

It is true that some forms of misappropriation may be understood as included in the definition of fraud of Article 3 of the PIF Directive since it mentions "the misappropriation or wrongful retention of funds or assets from the Union budget" and "the misapplication of such funds or assets for purposes other than those for which they were originally granted". Article 4 (3), however, covers other types of conduct carried out by a public official, for instance, the use of a credit card linked to a bank account where EU funds are deposited to fund public projects for personal purchases[41].

4. THE EPPO AND THE PROSECUTION OF OFFENCES AFFECTING THE UNION'S FINANCIAL INTERESTS

At the EU level, there is sufficient legal basis to combat by criminal means conducts that affect the Union's financial interests, as explained in the foregoing sections. It is time for the Member States to transpose and enforce all the obligations contained in the aforementioned legal instruments. At the beginning, Member States were reluctant to ratify the documents adopted under the third pillar to protect the financial interests of the European Communities. This fact provoked a significant delay in the entry into force of such documents, and consequently, a significant delay in the implementation of the obligations imposed by them. Then, most Member States implemented such obligations in an acceptable way, but now they must transpose the further requirements of the PIF Directive.

The further requirements include the adoption of measures to ensure harmonisation of definitions, penalties and longer limitation periods as an essential element for investigating and prosecuting the PIF crimes, which are the functions of the EPPO.

Apart from this, Member States must concentrate efforts in the enforcement of the measures adopted. It seems to be that enforcement of anti-fraud and anti-corruption measures

[41] *Ibid.*

has big lacks at the EU level. For instance, as regards anti-corruption rules, the EU Anti-corruption report of 2014 stated that they "are not always vigorously enforced" by EU Member States, mainly because relevant institutions in this matter do not always have sufficient capacity to enforce the rules[42]. In 2017, combating corruption was a priority in the European Semester, and several country reports included an assessment and recommendation to improve the fight against corruption[43].With respect to anti-fraud measures, it is true that Member States have make progress, but fraud to EU budget continues to be a problem at the EU level. Fraud to the Union's financial interests involvedEUR 467 million in 2017[44], more than the previous year (EUR 391 million)[45].

It is clear that EU Member States need to do an enormous progress in the enforcement of the criminal law measures to protect the Union's financial interests. A clear improvement in the matter is the creation of the EPPO through the aforementioned Regulation (EU) 2017/1939. Indeed, the first lines of the Regulation point out that the offences that fall within the scope of the Regulation "are currently not always sufficiently investigated and prosecuted by the national criminal justice authorities"[46]. To overcome this problem, the EPPO is created with the function of

> "investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation…" (Article 4 of the Regulation).

[42]EUROPEAN COMMISSION (2014). Report from the Commission to the Council and the European Parliament. EU Anti-corruption Report. Brussels, 3.2.2014, COM (2014) 38 final, p. 2.

[43] Available at

https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en(last access 20.01.2020).

[44]EUROPEAN COMMISSION (2018). Report from the Commission to the European Parliament and the Council. 29th Annual Report on the Protection of the European Union's financial interests – Fight against fraud – 2017. Brussels, 3.9.2018, COM (2018) 553 final.

[45]EUROPEAN COMMISSION (2017). Report from the Commission to the European Parliament and the Council. Protection of the European Union's financial interests – Fight against fraud – 2017 Annual Report. Brussels, 20.7.2017, COM (2017) 383 final.

[46]EUROPEAN COUNCIL (2017). 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 of 31.10.2017, p. 1.

Additionally, the EPPO will be competent for offences regarding participation in a criminal organisation and for any other criminal offence that is inextricably linked to fraud, corruption, misappropriation of funds and money laundering affecting the Union's financial interests (Article 22). However, the concept of "inextricably linked offence" has not been defined by the text of the Regulation, which may lead to divergent interpretation of the same rule across the participating Member States[47].

With respect to these offences, the EPPO will "exercise the functions of a prosecutor, which includes taking decisions on a suspect or accused person's indictment and the choice of the Member State whose courts will be competent to hear the prosecution" (recital 78). Article 26 (4) establishes the criteria to choose the competent Member State. It is here (the choice of the competent Member State) where the main problems of the EPPO may arise if the Member States have not fulfilled the obligations imposed by the PIF Directive regarding harmonisation of criminal sanctions. In such a situation, it could occur that a case of corruption ends with very diverse punishment depending upon the chosen Member State. The difference could be even more if the limitation periods have not been harmonised, since it could happen that the same case had expired according to the legislation of one State, and not in another. For these reasons, it is fundamental to insist on the harmonisation of criminal sanctions and limitations periods.

Second, the definition of the elements of the crimes, especially the "new" crime of misappropriation and the definition of public official may also lead to a different treatment of similar cases. Therefore, harmonisation of definitions is a key point for the good functioning of the EPPO.

Third,another problem that may arise in the protection of the Union's financial interests is the fact that the EPPO does not include all Member States, but only those participating in enhance cooperation, so that one may wonder how the protection of the Union's financial interests will be in States outside the enhance cooperation, like the United Kingdom. Unequal situations could easily happen.

[47]Giuffrida, F. (2017). *The European Public Prosecutor's Office: King without kingdom?*CEPS Research Report No 2017/03.

Fourth, the absence of the EU Criminal Court for which the EPPO should work will make it very difficult to achieve equal treatment of cases affecting the Union's financial interests, but such an ambitious project does not seem to be on the agenda of the EU.

Fifth, as said before, offences of corruption (especially those related to public-procurement), but also offences of fraud and money laundering are typically committed for the intended benefit of a legal entity. Sanctioning legal persons shall be, therefore, a priority in an efficient fight against these practices. However, Member States have different systems as regards the liability of legal entities. Some of them consider that those entities can be *criminal* liable (eg. Austria, France and Spain), while others do not (eg. Germany). At this point, it will be an important problem how the EPPO is going to deal with companies involved in offences against the Union's financial interests since the EPPO is an institutionwhose functions are related to*criminal* law only.

It is clear that the creation of the EPPO isa progress in the cooperation in the investigation and prosecution of offences against the Union's financial interests, but there is still much work to do concerning harmonisation of definitions, sanctions and limitation periods, since uniformity will be key to the proper functioning of the EPPO[48].

5. CONCLUSIONS

Corruption is a practice that may affect the Union's financial interests in a very relevant way. Bribery, as well as fraud and misappropriation of funds, may put in a serious risk the EU budget and, therefore, the existence of the EU itself. For this reason, preventing and sanctioning these practices must be an essential part of the agenda of the EU and the Member States.

This paper has focussed on criminal law measures to combat corruption and other practices that may damage the Union's financial interests. But the EU and the Member States should not forget that other measures are also indispensable in the fight against these practices, like preventive measures (e.g., transparency, whistleblowers protection) and

[48] CSÚRI, A. (2016). The Proposed European Public Prosecutor's Office – from a Trojan Horse to a White Elephant? *Cambridge Yearbook of European Legal Studies* 18: 122-151; DI FRANCESCO MAESA, C. (2018). Directive (EU) 2017/1371 on the Fight against Fraud…, *op. cit.*; ADEN, H..; SÁNCHEZ-BARRUECO, N.; STEPHENSON, P. (2019). *The European Public Prosecutor'sOffice: strategies for coping withcomplexity*. European Parliament. Directorate General for Internal Policies. Policy Department D: Budgetary Affairs.

administrative law sanctions. In any case, as known, criminal law has also a preventive purpose that is achieved by the threat of the punishment.

It is as regards criminal law intervention where the PIF Directive and the EPPO become essential in the fight against practices affecting the EU budget. More than two decades after the adoption of the PIF Convention and its accompanying Protocols, the impulse provided by the PIF Directive is obvious, by offering Member States clearer definitions concerning the concept of financial interests, public official and fraud. Likewise, it is a strength the enlargement of the definition of active and passive corruption to conducts beyond the "breach of the duties", in line with other international legal instruments against corruption. It is also a strength the obligation of criminalising misappropriation of funds by a public official, which had been ignored so far by the EU legal instruments on the protection of the Union's financial interests. Moreover, the aspiration of the PIF Directive of harmonising criminal sanctions and limitation periods (sufficiently longer to enhance investigation and prosecution) must be very welcome in an EU strategy against the aforementioned offences. Additionally, the provisions regarding liability of legal persons must be considered positive, although in this respect it is necessary to take further measures to ensure a true criminal liability of legal persons for the offences committed in their benefit.

However, the extensive leeway of the provisions of the PIF Directive may constitute an important issue in the harmonisation of national legal systems that, consequently, may hinder the functioning of the EPPO.

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