

HARMONIZATION OR UNIFICATION? – INSTRUMENTS FOR A MORE EFFECTIVE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

HARMONIZÁCIA ALEBO UNIFIKÁCIA? – NÁSTROJE NA ZEFEKTÍVNIENIE OCHRANY FINANČNÝCH ZÁUJMOV EURÓPSKEJ ÚNIE

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ABSTRACT

The objective of the article is to analyse the efforts of the European Union for the protection of its financial interests. The first part of the paper sets out the brief historical development of the criminal law protection of the financial interests of the European Union with particular emphasis on the strengthened and reinforced legal framework provided by the Treaty of Lisbon. The second part of the study focuses to the newly adopted Directive of the EU on the fight against fraud to the Union's financial interests by means of criminal law. However, the paper does not intend to analyse the provisions of the Directive in details, it only aims to examine whether it can provide for an effective and unified protection to the financial interests of the European Union.

ABSTRAKT

Cieľom tohto článku je analyzovať snahy Európskej únie o ochrany jej finančných záujmov. Prvá časť článku predstavuje stručný historický vývoj trestnoprávnej ochrany finančných záujmov Európskej únie s osobitným dôrazom na posilnený právny rámec, ktorý poskytuje Lisabonská zmluva. Druhá časť štúdie sa zameriava na novoprijatú smernicu EÚ o boji proti podvodom, ktoré poškodzujú finančné záujmy Únie, prostredníctvom trestného práva. Článok však nemá za cieľ podrobne analyzovať ustanovenia smernice, iba sa zameriava na preskúmanie, či môže poskytnúť účinnú a jednotnú ochranu finančných záujmov Európskej únie.

I. THE FINANCIAL INTERESTS OF THE EUROPEAN AS A SUPRANATIONAL LEGAL INTEREST

The European Union has an *own budget independent from the Member States* of approximately *150 billion euro* per year. This huge amount necessarily attracts the attention of criminals, who seek to obtain more or less money from the EU budget with illicit means. The budget of the European Union has therefore become the target of a wide variety of highly diverse criminal behaviour, which has forced the Union to ensure the protection of its financial interests.

Fraud and other irregularities (e.g. corruption, money laundering, misappropriation of funds) affecting the financial interests of the European Union cause *significant loss* for the EU budget, which also results in the reduction of the amount of resources that can be redistributed. Therefore, these crimes endanger the effective implementation of the different EU policies. The

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magnitude of the problem is well illustrated by the fact that – according to some estimation – the overall damage caused by these criminal conducts can reach 10-20% of the EU budget.² It can therefore be seen, that the European Union suffers a significant damage as a result of these crimes. Furthermore, since a part of the budget of the European Union is indirectly financed by the taxpayers of the Member States, these criminal offences harm them as well.³

However, the establishment of the supranational framework for the fight against criminal offences affecting the financial interests of the European can be justified not only with economic but with *political reasons* as well. In a long term, the increasing number of the crimes against the financial interests can negatively affect the *credibility, confidence and political acceptance of the EU*. Therefore, these criminal offences may seriously *slow down the process of European integration*.⁴

The European Union has also realized the risks of these crimes and tried to create a *coherent and effective framework to combat criminal offences against its financial interests*. In order to achieve this objective, the Union can use naturally a number of non-criminal instruments, in particular administrative and civil law measures. However, the seriousness of the criminal offences affecting the financial interests requires the application of *criminal sanctions* as well.⁵

The financial interests of the European Union can be regarded as a *supranational legal interest*. It means that this legal interest goes beyond the interests of the Member States and is directly linked to the European Union as a supranational entity.⁶ The specialty of the supranational legal interests is that they *cannot be protected solely by the national criminal law of the Member States*, since its scope often does not extend to the protection of the financial and other interests of other states or international organizations.⁷ Furthermore, another problem is caused by the fact that the *national criminal law provisions of the Member States are different*. Because of these differences, it can easily occur that the same act is regarded as a criminal offence in one Member State, as an administrative offence in another Member States and is not punishable at all in a third Member State.⁸ This results that perpetrators can choose for the commitment of

² See for example: FROMM, Ingo Erasmus: *Der strafrechtliche Schutz der Finanzinteresse der EG. Die Frage der Einführung einer supranationalen Strafrechtskompetenz durch Artikel 280 IV EGV*. Springer Verlag, Berlin–Heidelberg–New York, 2004. p. 13; RASNER, Andreas: *Erforderlichkeit, Legitimität und Umsetzbarkeit des Corpus Juris Florenz*. Duncker & Humblot GmbH, Berlin, 2005. pp. 56-57; SIEBERT, Thomas: *The European Fight against Fraud – The Community's Competence to Enact Criminal Laws and its Power to Approximate National Criminal Law by Directives*. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 16/1, 2008. p. 89; TIEGS, Heiko W. A.: *Betrugsbekämpfung in der Europäischen Gemeinschaft. Eine Bestandsaufnahme des englischen und deutschen Strafrechts zum Schutz der EG-Finanzinteressen*. Berliner Wissenschafts-Verlag, Berlin, 2006. pp. 57-58; WILLIAMS, Aled: *Fighting fraud in the EU: a note on icebergs and evidence*. ERA Forum, Vol. 14/2, 2013. pp. 229-234.

³ HOLÉ Katalin: *Gondolatok az Európai Ügyészségről*. In: Gellér, Balázs (ed.): Györgyi Kálmán ünnepi kötet. KJK-Kerszöv Kiadó, Budapest, 2004. p. 309.

⁴ See: FROMM: *Op. cit.* pp. 16-21; JACSÓ, Judit: *Gondolatok az Európai Unió költségvetésének büntetőjogi védelméről a Lisszaboni Szerződés tükrében*. In: Róth, Erika (ed.): *Tanulmányok Dr.Dr.h.c. Horváth Tibor professor emeritus 85. születésnapja tiszteletére*. Bíbor Kiadó, Miskolc, 2012. p. 66; MURAWSKA, Agnieszka Aleksandra: *Administrative Anti-Fraud Measures within the European Union. Necessity and Means*. Nomos Verlagsgesellschaft, Baden-Baden, 2008. pp. 53-54.

⁵ JUSZCZAK, Adam – SASON, Elisa: *The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive). Laying Down the Foundation for a Better Protection of the Union's Financial Interests?* Eucrium – The European Criminal Law Associations' Forum, 2/2017. p. 82; MADAI, Sándor: *Gondolatok az Európai Közösségek pénzügyi érdekeinek megsértéséről*. Rendészeti Szemle, 2010/2. p. 90.

⁶ KARSAI, Krisztina: *Mozaikkép a közösségi pénzügyi érdekek büntetőjogi védelméről*. Európai Jog, 2002/5. pp. 19-20; LIGETI, Katalin: *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*. Duncker & Humblot GmbH, Berlin, 2005. p. 22.

⁷ KAIAFA-GBANDI, Maria: *The Commission's Proposal for a Directive on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law (COM (2012) 363 final) – An Assessment Based on the Manifesto for a European Criminal Policy*. European Criminal Law Review, Vol. 2/3, 2012. p. 321; SIEBER, Ulrich: *Einführung: Entwicklung, Ziele und Probleme des Europäischen Strafrechts*. In: Sieber, Ulrich – Satzger, Helmut – v. Heintschel-Heinegg, Bernd (ed.): *Europäisches Strafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2014. p. 89.

⁸ HECKER, Bernd: *Sind die nationalen Grenzen des Strafrechts überwindbar? Die Harmonisierung des materiellen Strafrechts in der Europäischen Union*. Juristische Arbeitsblätter, 8-9/2007. p. 562.

the criminal offences the Member State where the chance of the criminal conviction is less likely and where the penalty is the most lenient.⁹ These factors forces the European Union to seek for the *establishment of a unified, supranational framework* in connection with the protection its financial interests.

In a recent Communication, the European Commission also stressed the importance of the unified EU action against these criminal offences. The Commission considers it as an immense problem that – despite the previous attempts of the EU to provide for minimum standards – there is still a *wide variation across the Union* in the definitions of criminal offences affecting the financial interests, in the sanctions which those offences attract, and in the time limitations for these crimes. These shortcomings mostly result from the *variety of legal traditions and legal systems of the Member States* which lead to *divergent judicial practices*. However, because of the different legal regulation of the Member States, the *level of deterrence varies across the Union*, which *hinders the equivalent criminal law protection* across the European Union and leads to differing outcomes in similar individual cases, depending on the applicable national criminal provisions. Therefore, the European Commission concluded that the financial interests of the European Union are not equivalently protected across the EU as regards criminal law and the deterrent effect of the Union's instrument is not sufficient.¹⁰

Therefore, in order to ensure the *effective, proportionate and dissuasive protection* of the Union's financial interests, one of the main objectives of the European Union is to create a *unified or at least harmonized regulation of the criminal offences affecting its financial interests*.

II. THE CRIMINAL LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

1. Historical development before the Treaty of Lisbon

Although the European Union promptly recognized the need for the unified action for the protection of its financial interests, the first criminal law measures were adapted as a result of a long development.

The *Founding Treaties of the European Communities* originally did not contain any criminal law provisions in connection with the protection of financial interests. The main reason of this is that the competences of the European Communities did not cover the field of criminal law in the first few decades of the history of the European integration, since criminal law was

⁹ LIGETI: *Op. cit.* p. 22.

¹⁰ 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 [COM(2011) 293, 26.5.2011.]. Apart from the problems resulting from the differences between the criminal law systems of the Member States, the Communication of the European Commission also lists several other shortcomings in connection with procedural questions. Criminal investigations of fraud and other crimes against the financial interests of the Union are characterized by a patchy legal and procedural framework: police, prosecutors and judges in the Member States decide on the basis of their own national rules whether and, if so, how they intervene to protect the EU budget. Under the current framework, such criminal investigations are handled by individual Member States' prosecution services acting under their respective criminal law. However, the competent authorities of Member States do not always appear to have sufficient legal means at their disposal and appropriate structures in place to adequately prosecute cases affecting the EU. In a certain number of cases involving fraud against the EU budget, national criminal investigative authorities refrain from opening investigations. The protection of the EU budget often involves investigating cross-border cases and enforcing decisions abroad, however, the cooperation mechanisms between the Member States are not effective. Judicial authorities of the Member States are reluctant to trigger mutual legal assistance measures, because of their complexity, the lengthy procedures and the uncertainty of the results. Even where mutual legal assistance between administrative and judicial authorities of Member States is requested, it is often not followed up with sufficient expediency. The results of EU administrative investigations frequently remain unused by national criminal courts because of restrictive procedural rules which include limits on the use of evidence collected in a foreign jurisdiction. The use of such evidence is often not considered sufficient to open criminal investigations.

considered as one of the *main symbols and the last rampart of the national sovereignty*.¹¹ Therefore, the actions of the European Union aiming at the combatting of the illicit actions against the EU budget have been limited to the *administrative law measures* for a long time. However, despite the explicit authorization by the primary law, the European Community relatively early recognized that administrative means are not sufficient for the effective protection of the financial interests against fraud and other illicit activities. Therefore, the *use of criminal law instruments* as a final mean, *ultima ratio* is also necessary.¹²

The importance of the criminal law protection of financial interests of the European Communities was significantly increased in the 1970s, when the *system of the Communities' budget of the was restructured, the own resources of the budget were introduced and the common agricultural policy was created*. Due to these factors new financial resources has been opened, which enabled significant abuses.¹³ Recognizing the danger, the European Commission drew up a *Draft Convention*¹⁴ in 1976, in order to ensure the uniform criminal law protection of the Communities' financial interests. However, the draft ultimately failed due to the resistance of the Member States, which considered that the protection of national interests is more important than the protection of Communities' interests, and regarded national law as appropriate for the protection of national and supranational interests. Therefore, the Member States did not feel the Community legislation to be justified at this time.¹⁵ Due to the lack of the criminal competence of the European Communities, criminal sanctioning of the unlawful acts against its financial interests therefore *remained within the competence of the Member States*, and the Community legislator used primarily *administrative means* to protect these supranational interests until the 1990s.¹⁶

The judgement of the European Court of Justice in the so-called *Greek Maize case* in 1989 can be considered as an important milestone in the history of the protection of the financial interests. According to the ruling, the Member States are required – by virtue of Article 5 of the EEC-Treaty¹⁷ – to *penalize any persons who infringe Community law in the same way as they penalize those who infringe national law*. The choice of penalties remains within the discretion of the Member States; however, they must ensure that infringements of Community law are

¹¹ See for example: ALBRECHT, Hans-Jörg: *A büntetőjog európaizálása és a belső biztonság Európában*. Belügyi Szemle, 2000/3. p. 27; FARKAS, Ákos: *Büntetőjogi együttműködés az Európai Unióban*. Osiris Kiadó, Budapest, 2001. p. 23; HILDEBRANDT, Mireille: *European criminal law and European identity*. Criminal Law and Philosophy, Vol. 1/1, 2007. pp. 66-67; JUNG, Heike: *'L'Etat et moi': Some Reflections on the Relationship between the Criminal Law and the State*. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 6/3, 1998. pp. 210-211.

¹² FARKAS, Ákos: *Egy lehetséges Európai Unió büntetőjog fejlődésének állomásai*. In: Farkas, Ákos (ed.): *Emlékkönyv Kratochwill Ferenc (1933-1993) tiszteletére*. Bíbor Kiadó, Miskolc, 2003. p. 106; JACSÓ: *Op. cit. (2012)* pp. 69-70; MADAI: *Op. cit. (2010)* p. 90.

¹³ KARSAI: *Op. cit. (2002)* p. 14; MADAI: *Op. cit. (2010)* p. 91; JACSÓ, Judit: *Europäisierung des Steuerstrafrechts am Beispiel der gesetzlichen Regelungen in Deutschland, Österreich und Ungarn*. Bíbor Verlag, Miskolc, 2017. p. 82.

¹⁴ Draft for a Treaty I. amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties II. amending the Treaty establishing a Single Council and a Single Commission of the European Communities so as to permit the adoption of common rules on the liability and protection under criminal law of officials and other servants of the European Communities [OJ C 222, 22.9.1976, pp. 2-17.].

¹⁵ KARSAI, Krisztina: *Az európai büntetőjogi integráció alapkérdései*. KJK-Kerszöv Kiadó, Budapest, 2004. p. 46; KILLMANN, Bernd-Roland – SCHRÖDER, Jens: *Betrugs- und Finanzdelikte (inkl. Steuerstraftaten)*. In: Sieber, Ulrich – Satzger, Helmut – von Heintschel-Heinegg, Bernd (ed.): *Europäisches Strafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2014. p. 306.

¹⁶ FARKAS, Ákos: *Az OLAF szerepe az EU csalások elleni fellépésében*. In: Farkas, Ákos (ed.): *Az Európai Csalás elleni Hivatal (OLAF) az Európai Unió bünygyi együttműködési rendszerében*. KJK-Kerszöv Kiadó, Budapest, 2005. p. 11.

¹⁷ Article 5 of the EEC-Treaty – currently Article 4(3) TEU – regulates the so-called principle of sincere cooperation. Pursuant to this principle, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties; the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union; and the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

penalized under *conditions*, both *procedural and substantive*, which are *analogous* to those applicable to *infringements of national law of a similar nature and importance* and which, make the penalty *effective, proportionate and dissuasive*. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the *same diligence* as that which they bring to bear in implementing corresponding national laws.¹⁸

As it can be seen, the so-called *assimilation principle* formulated in the ruling of the ECJ obliges the Member States to *extend the scope* of the criminal offences protecting the national legal interests to the *supranational interests of a similar nature and importance*.¹⁹ Accordingly, if a Member State provides for criminal law sanctions for offences against its own budget under national law, it must also penalize acts committed against the same supranational legal interests, i.e. against the EU budget.²⁰ In this respect, the principle of assimilation has imposed an explicit *criminalization obligation* on Member States for the first time in the history of the European integration.

The *principle of assimilation* elaborated by the European Court of Justice was incorporated by the *Maastricht Treaty* signed in 1992, which established the so-called *three pillar structure of the European Union*. According to the provisions of the Treaty, the Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. Furthermore, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud and they shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.²¹ As a result of the Treaty of Maastricht, the fight against fraud became the *part of the primary law of the European Union*.

The regulation of the Treaty of Maastricht was taken over and significantly expanded by the *Treaty of Amsterdam* in 1997. One of the significant modifications of the Treaty was that the Council has been invested with a *legislative power* to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. The limits of the legislative competence of the Council were that the adopted measures could concern neither the application of national criminal law nor the national administration of justice.²² Because of this restriction, the majority of the opinions in the legal literature argued that the competence of the European Union under Article 280(4) of the EC-Treaty was *limited to non-criminal measures* and that the Treaty did not empower the Union to adopt supranational criminal law provisions within the framework of the first pillar.²³

¹⁸ Judgment of the Court of 21 September 1989 in Case 68/88 *Commission of the European Communities v Hellenic Republic*, ECR 2965, paras 22-25.

¹⁹ AMBOS, Kai: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe*. C. H. Beck Juristischer Verlag, München, 2014. p. 567; SAFFERLING, Christoph: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht*. Springer Verlag, Heidelberg–Dordrecht–London–New York, 2011. p. 459.

²⁰ KARSAL, Krisztina: *Az Európai Bíróság szerepe az európai büntetőjog alakításában*. In: Kondorosi, Ferenc – Ligeti, Katalin (ed.): *Az európai büntetőjog kézikönyve*. Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008. p. 724.

²¹ Article 209a of the EEC-Treaty.

²² Article 280(4) of the EC-Treaty.

²³ See for example: CALLIESS, Christian: *Die neue Europäische Union nach dem Vertrag von Lissabon*. Mohr Siebeck Verlag, Tübingen, 2010. p. 457; ROSENAU, Henning: *Zur Europäisierung im Strafrecht. Vom Schutz finanzieller Interessen der EG zu einem gemeineuropäischen Strafgesetzbuch?* Zeitschrift für Internationale Strafrechtsdogmatik, 1/2008. pp. 14-15; SATZGER, Helmut: *Das Strafrecht als Gegenstand europäischer Gesetzgebungstätigkeit*. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 1/2008. p. 21; SICURELLA, Rosaria: *Some reflections on the need for a general theory of the competence of the European Union in criminal law*. In: Klip, André (ed.): *Substantive Criminal Law of the European Union*. Maklu Publishers, Antwerp–Apeldoorn–Portland, 2011. p. 236; SIEBER: *Op. cit.* p. 75; ZÖLLER, Mark A.: *Europäische Strafgesetzgebung*. Zeitschrift für Internationale Strafrechtsdogmatik, 7/2009. pp. 342-343.

However, within the framework of the *third pillar of the European Union*²⁴, the Treaty of Maastricht declared that the Member States regard – among others – the *fight against fraud on an international scale* as matters of common interest, for the purposes of achieving the objectives of the Union and without prejudice to the powers of the European Community.²⁵ In accordance with the provisions of the Treaty, the Council was empowered to adopt special *third pillar legal instruments* (joint positions, joint actions, conventions and later framework decisions) in this field.²⁶ This opened the way for the EU legislator to adopt *criminal law measures* – within the framework of the third pillar cooperation, in specific sources of law – in respect of the protection of the financial interests for the first time in the history of integration.

Based on the authorization of the Treaty, the Member States of the European Union signed a Convention on the protection of the European Communities' financial interests on the 26th June 1995.²⁷ The so-called *PIF Convention*, which laid down the cornerstones of the coherent and united EU action against criminal offences affecting the financial interests, set out the *definition of fraud affecting the European Communities' financial interests* and required Member States to *criminalize the described conducts* and to impose *effective, proportionate and dissuasive sanctions*.²⁸ Three Additional Protocols were later added to the PIF Convention, which prescribed the sanctioning of other criminal offences affecting the financial interests of the European Union (corruption and money laundering) and regulated the responsibility of legal persons.²⁹ The PIF Convention and its Additional Protocols were undoubtedly important steps in the fight against illegal offences detrimental to the Union's financial interests, since they were the first documents which explicitly provided for criminal sanctions for crimes affecting the EU budget. However, due to *prolonged ratification* and the *incomplete or inadequate transposition* of the PIF instruments by Member States³⁰, they could not be able to contribute sufficiently to the harmonization of criminal justice systems of the Member States and therefore they could little provide for a more effective protection of the financial interests of the EU.³¹

2. The protection of the financial interests of the EU in the Treaty of Lisbon

The *Treaty of Lisbon* entered into force in 2009 was an important milestone in the development of the European criminal integration as well as in the history of the protection of the financial interests of the European Union. The Treaty of Lisbon *abolished the pillar system*, as a result of which the former third pillar has disappeared and the judicial cooperation in

²⁴ Cooperation in the fields of Justice and Home Affairs.

²⁵ Point 5 of Article K.1 of the EU-Treaty.

²⁶ Article 3(2) of the EU-Treaty.

²⁷ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, pp. 48-57.] (hereinafter referred to as: PIF Convention)

²⁸ It also has to be mentioned that parallel with the PIF Convention, the European Union also adopted a Regulation which contains the administrative means of the protection of the financial interests. See: 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, pp. 1-4.].

²⁹ Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests [OJ C 313, 23.10.1996, pp. 1-11.]; Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [OJ C 151, 20.5.1997, pp. 1-14.]; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [OJ C 221, 19.7.1997, pp. 11-22.].

³⁰ See: Report from the Commission: Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols [COM(2004) 709, 25.10.2004.]; Second Report from the Commission: Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols [COM(2008) 77, 14.2.2008.].

³¹ See: JACSÓ: *Op. cit.* (2012) p. 68; ROSENAU: *Op. cit.* p. 10.

criminal matters of the European Union has become an *independent, homogeneous, supranational policy*.³²

The Treaty of Lisbon empowered the European Union with *broad legislative competences in the field of criminal law and of the protection of the financial interests* and enabled the adoption of the *traditional secondary sources of law* (regulations and directives). This was a significant step forward, since – contrary to the previous third pillar legal acts, like the PIF Convention – the Union now has effective tools to *monitor the implementation* of regulations and directives and to *sanction Member States* which fail to comply to implement or infringe the adopted EU legal acts.³³

The criminal law competences of the European Union under the Treaty of Lisbon which can be used for the protection of the financial interests can be divided into four categories.³⁴

1. The *legal harmonization competence* of Article 83(1) TFEU enables the European Union to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of *particularly serious crime with a cross-border dimension*. For the use of the Union's legal harmonization competence two cumulative criteria are required to be met: the *particular seriousness* and the *cross-border dimension* of the crime, which is defined by three alternative requirements: the nature of the crime, the impact of the offence, or the special need to combat the area of crime on a common basis.³⁵ The ten so-called '*eurocrimes*' are listed in the Treaty: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However, the Treaty does not contain an exhaustive enumeration, because on the basis of developments in crime *additional areas of crime* which fulfil the general requirements can be added to the list.³⁶
2. Article 83(2) TFEU provides the Union a mean to ensure the effective implementation of other Union policies through criminal law measures. Based on this *ancillary legal harmonization competence*, the EU can adopt criminal law measures if they are *essential to ensure the effective implementation of a Union policy*. For the application of this competence two requirements have to be fulfilled. On the one hand, there is a *need for previous harmonization measures* in the policy area which the Union legislator intends to criminalize, which means that the criminal harmonization presupposes that other harmonized (non-criminal) rules already exist in the area concerned.³⁷ On the other hand, the criminal sanctions have to be *essential for the effective implementation of the aforementioned harmonized Union policy*, which demands the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned, that criminal law is more efficient than the existing less restrictive measures to achieve the pursued objective and that the disadvantages caused by criminal law are

³² SATZGER, Helmut: *Institutionelle Grundlagen*. In: Sieber, Ulrich – Satzger, Helmut – von Heintschel-Heinegg, Bernd (ed.): *Europäisches Strafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2014. p. 98.

³³ See: Articles 258-260 TFEU.

³⁴ See in details: UDVARHELYI, Bence: *Criminal law competences of the European Union before and after the Treaty of Lisbon*. European Integration Studies, Vol. 11/1, 2015. pp. 53-59; UDVARHELYI, Bence: *Az Európai Unió anyagi büntetőjoga a Lisszaboni Szerződés után*. Patrocínium Kiadó, Budapest, 2019. pp. 117-133, 143-161.

³⁵ See in details: ASP, Petter: *The Substantive Criminal Law Competence of the EU*. Jure Bokhandel, Stockholm, 2012. pp. 86-87; DORRA, Fabian: *Strafrechtliche Legislativkompetenzen der Europäischen Union. Eine Gegenüberstellung der Kompetenzlage vor und nach dem Vertrag von Lissabon*. Nomos Verlagsgesellschaft, Baden-Baden, 2013. pp. 195-200; SIMON, Perrine: *The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy*. New Journal of European Criminal Law, Vol. 3/3-4, 2012. pp. 247-248.

³⁶ See: DORRA: *Op. cit.* pp. 214-215; JACSÓ: *Op. cit.* (2017) pp. 66-67; SAFFERLING: *Op. cit.* p. 414.

³⁷ ASP: *Op. cit.* p. 133.

not disproportionate in relation to the objective of ensuring the effective implementation of a Union policy.³⁸

3. *Article 325 TFEU* focuses directly to the protection of the financial interests of the EU. It obliges the Union and the Member States to *counter fraud and any other illegal activities* affecting the financial interests through *deterrent and effective measures* and it allows the EU legislator to adopt all *necessary measures* in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording *effective and equivalent protection* in the Member States and in all the Union's institutions, bodies, offices and agencies. This provision enables the adoption of *directly applicable, supranational criminal law measures* in this field.³⁹
4. *Article 86 TFEU* provides the legal basis for the establishment of the *European Public Prosecutor's Office*. The European Public Prosecutor's Office is intended to be an *independent supranational prosecution authority* which will be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union's financial interests, and will exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences as well. The scope of competence of the European Public Prosecutor's Office is therefore limited to the *criminal offences against the financial interests of the EU*, however, the European Council is entitled to extend the powers of the Prosecutor's Office to other *serious crimes having a cross-border dimension*.

After the Treaty of Lisbon, based on the aforementioned criminal law competences, an *intensive criminal legislation* began in the field of the criminal law protection of the financial interests of the European Union, as a result of which two important legal acts were adopted: the *Directive on the fight against fraud to the Union's financial interests by means of criminal law*⁴⁰ and the *Regulation on the establishment of the European Public Prosecutor's Office*⁴¹. The PIF Directive contains the substantive criminal law provisions in connection with the fight against fraud, while the EPPO Regulation – which is not discussed in details within the framework of this paper – provides for the procedural side of the protection of the financial interests of the European Union.

III. DIRECTIVE ON THE FIGHT AGAINST FRAUD TO THE UNION'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW

The PIF Directive aims to establish *minimum rules* concerning the *definition of criminal offences and sanctions* with regard to *combatting fraud and other illegal activities affecting the Union's financial interests*, with a view to *strengthening protection* against criminal offences which affect those financial interests, in line with the *acquis* of the Union in this field.⁴² In order to achieve this objective, the Directive *defines the criminal offences* of fraud affecting the

³⁸ ÖBERG, Jacob: *Union Regulatory Criminal Law Competence after Lisbon Treaty*. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 19/4, 2011. pp. 290-293.

³⁹ See for example: AMBOS: *Op. cit.* pp. 447-448; HECKER, Bernd: *Europäisches Strafrecht*. Springer Verlag, Berlin-Heidelberg, 2012. p. 493; SAFFERLING: *Op. cit.*, p. 409; SATZGER, Helmut: *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2016. pp. 119-120; SICURELLA: *Op. cit.* pp. 236-237.

⁴⁰ 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, 28.7.2017, pp. 29-41] (hereinafter referred to as: PIF Directive).

⁴¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017, pp. 1-71] (hereinafter referred to as: EPPO Regulation)

⁴² Article 1 of the PIF Directive.

Union's financial interests⁴³ and other criminal offences affecting financial interests (active and passive corruption, money laundering and misappropriation).⁴⁴ The Directive obliges the Member States to *criminalize the described conducts* and punish them with *effective, proportionate and dissuasive criminal sanctions*. In the most serious cases, the Directive also prescribes the *minimum amount of the maximum penalty* the Member States are required to prescribe. It means that the aforementioned criminal offences have to be punishable by a maximum penalty of at least *four years of imprisonment* when they involve considerable damage or advantage, which involves more than EUR 100.000. However, the Member States may provide for *sanctions other than criminal sanctions*, where the criminal offence involves damage or an advantage of less than EUR 10.000.⁴⁵ Furthermore, the Directive regulates the *liability of legal persons*⁴⁶, the question of *jurisdiction*⁴⁷ and the *limitation period* for the aforementioned criminal offences.⁴⁸

As it can be seen, the PIF Directive aims to *harmonize the criminal law systems of the Member States* in connection with the criminal offences and sanctions relating to the crimes affecting the Union's financial interests. This objective is also stressed by the Preamble of the PIF Directive, according to which Member States should provide for certain types and levels of sanctions when the criminal offences defined in the Directive are committed in order to *ensure equivalent protection of the Union's financial interests throughout the Union* by means of measures which should act as a deterrent.⁴⁹ However, if the provisions of the PIF Directive are analysed in detail, it can be seen that the aim of the unified and equivalent protection of the financial interests of the European Union cannot completely be achieved.⁵⁰ This fact follows both from the legal basis and from the content of the Directive.

1. The legal basis of the PIF Directive

The *European Commission* originally initiated to adopt the PIF Directive based on the legal competence of *Article 325(4) TFEU*. According to the justification of the Commission, *Article 325 TFEU* confers upon the Union strong powers to adopt '*measures*' which '*act as a deterrent*' and '*afford effective*' and '*equivalent protection*', which comprises by nature, and historically a criminal law dimension. Criminal law is needed in order to have a preventive effect in this area, where the threat of criminal law sanctions and their effect on the reputation of the potential perpetrators, can be presumed to act as a strong disincentive to commit the illegal act in the first place. *Article 325 TFEU* therefore includes the *power to enact criminal law provisions* in the context of the protection of Union's financial interests against all angles of illegal attacks.⁵¹

⁴³ Under Article 2(1)(a) of the PIF Directive, the definition of the Union's financial interests' means all revenues, expenditure and assets covered by, acquired through, or due to the Union budget; or the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

⁴⁴ Articles 3-4 of the PIF Directive.

⁴⁵ Article 7 of the PIF Directive.

⁴⁶ Article 6 and 9 of the PIF Directive.

⁴⁷ Article 11 of the PIF Directive.

⁴⁸ Article 12 of the PIF Directive.

⁴⁹ Preamble (15) of the PIF Directive.

⁵⁰ See: MADAI, Sándor: *Nem család, de ámitás? Dogmatikai megjegyzések a PIF Irányelvhez*. Miskolci Jogi Szemle, 2019/2. különszám, 2. kötet, pp. 133-136.

⁵¹ 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 [COM(2012) 363, 11.7.2012.].

During the negotiation process of the PIF Directive, however, the legal basis was modified to Article 83(2) TFEU by the Council⁵² and the European Parliament⁵³. According to the *Opinion of the Legal Service of the Council*, the legal basis in Article 325(4) TFEU could not be interpreted widely as to cover also harmonisation of criminal offences and sanctions. According to the CLS, a legislative proposal that aims at ‘*defining criminal offences and sanctions*’ in connection with fraud and other illegal activities affecting the Union’s financial interests cannot eschew Article 83(2) TFEU as a legal basis in favour of a provision such as Article 325(4) TFEU. The legal basis in Article 83(2) TFEU aims to tackle all cases where the EU legislature needs to harmonise the definition of criminal offences and sanctions in order to make other – non-criminal law – EU harmonised measures more effective. Therefore, the approximation of criminal law through the definition of criminal offences and sanctions for the purposes of effective implementation of other non-criminal Union policies is to be made under Article 83(2) TFEU.⁵⁴

Apart from the theoretical debates⁵⁵ in connection with the adequate legal basis for the protection of the financial interests of the European Union, the modification of the legal basis of the PIF Directive had several practical consequences as well. It can be stated that the legal basis of Article 83 TFEU could provide for a *much lesser unified protection of the financial interests of the European Union* than a legal act adopted based on Article 325, since there are several important differences between the two legal provisions.

1. *Directive or regulation?* Firstly, the legal acts adopted under Article 83 TFEU can only be *directives*. Directive is a legal instrument which is binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.⁵⁶ It means that a directive has to be implemented into the national legal systems of the Member States. It can clearly be seen, that the directive only provides a framework which the Member States can transplant differently based on their national concepts and traditions. Therefore, due to the implementation requirement, a directive cannot completely eliminate the differences of the legal regulation of the Member States. However, the Union legislative competence under Article 325 TFEU is not restricted to directives, but the Treaty provides the possibility to adopt all necessary measures in order to fight against criminal offences affecting the financial interests of the EU. As a result of this, the Union is entitled to adopt not only directives, but *regulations* as well, which have general application, are binding in its entirety and are directly applicable in all Member States.⁵⁷ Therefore Article 325 TFEU enables the EU legislator to adopt *directly applicable, supranational criminal law*

⁵² See: General approach of the Council (Justice and Home Affairs) on the 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 [10729/13, 10.6.2013]; Position of the Council at first reading of 25 April 2017 with a view to the adoption of a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law [6182/1/17, REV 1, 25.4.2017].

⁵³ See: European Parliament legislative resolution of 16 April 2014 on the 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 [C7-0192/2012, 06.4.2012].

⁵⁴ Opinion of the Legal Service on the 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 [15309/12, 22.10.2012].

⁵⁵ See for example: DI FRANCESCO MAESA, Costanza: *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, 3/2018. pp. 1457-1461; DORRA: *Op. cit.* pp. 278-289; JUSZCZAK-SASON: *Op. cit.* pp. 80-82; KRÜGER, Matthias: *Unmittelbare EU-Strafkompetenzen aus Sicht des deutschen Strafrechts. Höchststrichterliche Rechtsprechung zum Strafrecht*, 7/2012. pp. 311-317; STURIES, Jonas: *Ermächtigt der Vertrag von Lissabon wirklich zum Erlass supranationaler Wirtschaftsstrafgesetze? Höchststrichterliche Rechtsprechung zum Strafrecht*, 6/2012. pp. 273-288; UDVARHELYI: *Op. cit.* (2019) pp. 149-158.

⁵⁶ Article 288 TFEU.

⁵⁷ Article 288 TFEU.

norms which can serve not only as the harmonization but also as the unification of the national criminal laws of the Member States.

2. *Minimum harmonization or unification?* Secondly, Article 83 TFEU only prescribes the adoption of *minimum rules* with regard to the definition of criminal offences and sanctions. It means that this legal provision only provides for *minimum harmonization*, whereby the Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests.⁵⁸ The provision of Article 325 TFEU does not contain such restriction, due to which – as it was stated before – the EU legislation can not only harmonize but to *unify the legal system of the Member States*.
3. *Possibilities for opt-out or unified regulation in all Member States?* Thirdly, the specialities of the regulation of Article 83 TFEU enables several Member States not to participate in the adopted directive. On the one hand, *Article 83(3) TFEU* provides for a special '*emergency brake*' procedure, which enables the suspension of the ordinary legislative procedure if a Member State considers that the directive *affects fundamental aspects of its criminal justice system*. In this case the Member State concerned is entitled not to participate in the directive which it considered as problematic from the point of view of its fundamental criminal law principles. On the other hand, there are Member States which either *do not participate* in the adoption of the criminal law measures pursuant to Article 83 TFEU (Denmark) or have an *opting-in position* (the United Kingdom and Ireland).⁵⁹ Consequently, due to the emergency brake rule and the opt-out possibilities, if a legislative proposal is adopted on the basis of Article 83 TFEU, it is likely that it would not apply to every Member States. In relation of Article 325 TFEU these restrictions do not apply, as a consequence of which a legal act adopted under this legal basis can be legally binding to all Member States.

Therefore, it can be concluded that Article 325 TFEU could ensure a *more unified protection of the financial interests of the European Union*, while Article 83 TFEU contains special provision which aims to *protect the sovereignty and the different legal systems and traditions of the Member States*.

2. The provisions of the PIF Directive

Apart from its legal basis, the regulation of the PIF Directive also contains several elements, because of which the Directive cannot really contribute in the unified protection of the financial interests of the European Union. The reason of these provisions is mostly the *minimum harmonization method* of the PIF Directive.

As it was already mentioned, the PIF Directive defines the element of the criminal offences of fraud and other delicts affecting financial interests as well as the sanctions which can be imposed on the perpetrator of the aforementioned crimes. However, due to the fact that the Member States are entitled to maintain stricter rules, they are free to *criminalize other conducts, prescribe other elements of the crimes* which are not regulated in the Directive or *define higher level of sanctions*. This speciality of the Directive can result that differences still remain in the regulation of the criminal offences concerned in the Member States. Hereinafter, the paper cites some examples from these provisions of the PIF Directive.

2.1. Regulation of the criminal offences

The PIF Directive requires the Member States to take the necessary measures to ensure that the described conducts *constitute a criminal offence*, however, only if these are committed

⁵⁸ See: Preamble (16) of the PIF Directive.

⁵⁹ See: Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol No. 22 on the position of Denmark.

intentionally.⁶⁰ However, the Member States are free to decide to criminalize the offences when they are committed *recklessly* or by *serious negligence*. As a result of this, it can happen that only intentional fraud, corruption, money laundering or misappropriation is punishable in one part of the Member States, while these criminal offences or at least some of them are also criminalized in the other part of the States, if they are committed negligently or recklessly.

In connection with the criminal offence of fraud, the PIF Directive distinguishes between procurement-related and non-procurement related expenditure. However, relating to the *procurement-related expenditures*, the Directive criminalized the described conducts ‘*at least*’ when they are committed in order to *make an unlawful gain for the perpetrator or another by causing a loss to the Union’s financial interests*.⁶¹ In this case, it is not sufficient that the perpetrator aimed at obtaining an advantage, damage needs to be caused in addition with it.⁶² However, Member States can decide to prescribe stricter regulation and penalize these conducts in the absence of the aforementioned conditions as well. Therefore, the protection of the procurement-related expenditures may vary in the territory of the European Union.

Another example for the failure of the complete unification of the criminal offences is the highly debated⁶³ issue of the *VAT-fraud*. Based on the compromise reached by the EU institutions, in connection of these offences the PIF Directive applies only in cases of *serious offences against the common VAT system*, which means that the criminal offence has to be connected with the *territory of two or more Member States* of the Union and involve a *total damage of at least EUR 10.000.000*.⁶⁴ The VAT-fraud cases which do not meet the aforementioned criteria remain within the regulatory competence of the Member States, which can lead to the survival of the diverse national regulations. The limited scope of application in connection with VAT-fraud therefore significantly weakens the added value of the PIF Directive.⁶⁵

In connection with VAT-fraud, it is also important to highlight that the Court of Justice of the European Union also expressed that the fight against VAT-fraud falls within the scope of competence of the European Union. According to the CJEU, there is a direct link between, on the one hand, the collection of VAT revenue in compliance with the Community law applicable and, on the other, the availability to the Community budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second. It results that any reduction in VAT resources must be offset by means of a reduction in expenditure or an increase in GNI-based own resources, which is likely to affect the general equilibrium of the system of own resources intended to cover Community expenditure.⁶⁶ In the Taricco case, the CJEU also stated that criminal penalties are essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner and that the definition of fraud in the PIF Directive covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules.⁶⁷

⁶⁰ Articles 3-4 of the PIF Directive.

⁶¹ Article 3(2)(b) of the PIF Directive.

⁶² JUSZCZAK–SASON: *Op. cit.* p. 82.

⁶³ See in details for example: DI FRANCESCO MAESA: *Op. cit.* pp. 1461-1463; JACSÓ, Judit – UDVARHELYI, Bence: *Új irányelv az uniós csalások elleni büntetőjogi védelemről*. Magyar Jog, 2018/6. pp. 331-332; JUSZCZAK–SASON: *Op. cit.* pp. 82-83; KAIAFA-GBANDI, Maria: *The protection of the EU’s financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union’s financial interests*. Zeitschrift für Internationale Strafrechtsdogmatik, 12/2018. pp. 576-578.

⁶⁴ Article 2(2) of the PIF Directive.

⁶⁵ See: DI FRANCESCO MAESA: *Op. cit.* p. 1462.

⁶⁶ Judgment of the Court (Grand Chamber) of 15 November 2011 in Case C-539/09 *European Commission v Federal Republic of Germany*, ECR I-11235, paras 72 and 76. See also: Judgment of the Court (Grand Chamber) of 26 February 2013 in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, published in the electronic Reports of Cases, para 26;

⁶⁷ Judgment of the Court (Grand Chamber) of 8 September 2015 in Case C-105/14 *Criminal proceedings against Ivo Taricco and Others*, published in the electronic Reports of Cases, paras 38-41. See also: Judgment of the Court (Grand Chamber)

2.2. Incitement, aiding, abetting and attempt

According to the PIF Directive, the Member States are obliged to take the necessary measures to ensure that *inciting, aiding and abetting the commission* of as well as the *attempt to commit* any of the aforementioned criminal offences are *punishable as criminal offences*.⁶⁸

However, the Directive fails to give a definition of the incitement, aiding and abetting and attempt. In the absence of common autonomous EU definitions, the own and possibly different national criminal law regulations of the Member States have to be applied to these concepts. As result of the fundamentally different dogmatic approaches of the Member States relating to the stages of perpetration and the accessory perpetrators, the same act could be considered punishable in one State while it could remain unpunished in another State.⁶⁹

2.3. Regulation of the criminal sanctions

The *minimum harmonization regulation method* can clearly be observed in the provisions of the PIF Directive relating to the sanctions which also disable the unification and provide the possibility for derogation to the Member States.

As a general rule, the PIF Directive repeats the formula of the ruling of the European Court of Justice in the Greek Maize case, i.e. that the criminal offences have to be punishable by *effective, proportionate and dissuasive criminal sanctions*.⁷⁰ However, this provision does not define neither the type, nor the level of the sanctions to be applied, therefore the Directive leave the Member States a *great discretionary power* to prescribe the applicable criminal sanctions.⁷¹

According the PIF Directive, Member States are required to take the necessary measures to ensure that the criminal offences are punishable by a *maximum penalty of at least four years of imprisonment* when they involve *considerable damage or advantage*, i.e. when the damage or advantage involves more than *EUR 100.000* or more than *EUR 10.000.000* in case of revenue arising from VAT own resources.⁷² However, this provision only obliges the Member States *not to prescribe less than four years of imprisonment*, but they are entitled to introduce or maintain stricter penalties (e.g. five, eight or ten years of imprisonment). It can therefore be seen that the minimum harmonization does not eliminate the currently existing diverging sanctioning systems, as a result of which it can easily happen that the same offence is punished by four years of imprisonment in one Member State and by eight years of imprisonment in another Member State.⁷³

Furthermore, the PIF Directive enables the Member States to provide for *sanctions other than criminal sanctions*, where a criminal offence involves a *damage* or an *advantage of less than EUR 10.000*.⁷⁴ This is naturally only a possibility for the Member States; therefore, it can happen that an offence with a damage of less than EUR 10.000 is a criminal offence in one Member States and an administrative offence in another Member State. It can be seen that this provision does not promote the unified protection of the financial interests of the European Union.⁷⁵

of 20 March 2018 in Case C-524/15 *Criminal proceedings against Luca Menci*, published in the electronic Reports of Cases, paras 19-20; Judgment of the Court (Grand Chamber) of 5 December 2017 in Case C-42/17 *Criminal proceedings against M.A.S. and M.B.* published in the electronic Reports of Cases, para 34.

⁶⁸ Article 5 of the PIF Directive

⁶⁹ See: KARSÁI, Krisztina: *External Effects of the European Public Prosecutor's Office Regime*. Miskolci Jogi Szemle, 2019/2. különszám, 1. kötet, p. 465.

⁷⁰ Article 7(1) of the PIF Directive

⁷¹ DI FRANCESCO MAESA: *Op. cit.* p. 1464.

⁷² Article 7(3) of the PIF Directive.

⁷³ DI FRANCESCO MAESA: *Op. cit.* p. 1465.

⁷⁴ Article 7(4) of the PIF Directive.

⁷⁵ See: MADAI: *Op. cit.* (2019) pp. 133-135.

2.4. The limitation period

The PIF Directive contains regulations in connection with the *limitation period* for the criminal offences affecting the Union's financial interests. According to the Directive, the Member States are required take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of the criminal offences affecting the financial interests for a *sufficient period of time* after the commission of the offences, in order for those criminal offences to be tackled effectively. In case of *serious criminal offences*, which are punishable by a maximum sanction of at least four years of imprisonment, the *limitation period has to be at least five years* from the time when the offence was committed. However, the Member States can establish a *shorter limitation period*, which must not be shorter than *three years*, provided that the period may be interrupted or suspended in the event of specified acts.⁷⁶

As it can be seen from these provisions, the approximation of the limitation period for the criminal offences affecting the financial interests of the European Union is also partial and the regulation of the PIF Directive does not provide for a complete unification of the national laws of the Member States.⁷⁷ On the one hand, the Directive only *define the length of the limitation period in connection with the serious criminal offences* punishable with at least four years of imprisonment. For the less serious offences, the Directive only obliges the Member States to prescribe *sufficient period of time*, which means that the Member States have *absolute discretionary power* to decide on the length of the limitation period. On the other hand, even in connection with the most serious criminal offences, the PIF Directive only specify a *minimum limitation period* of five – or under certain circumstances three – years, which does not prevent the Member States to maintain stricter rules and to define longer limitation periods.

3. The material scope of competence of the European Public Prosecutor's Office

Although the paper does not aim to analyse the European Public Prosecutor's Office in details, it is important to draw the attention to one of the most important features of the EPPO Regulation, since it has direct connection with the PIF Directive and it can also be regarded as an obstacle of the unified protection of the financial interests of the European Union. This crucial point of the EPPO Regulation is the provision relating to the *material competence of the European Public Prosecutor's Office*.

According to the EPPO Regulation and in line with Article 86(2) TFEU, the European Public Prosecutor's Office shall be competent in respect of the *criminal offences affecting the financial interests of the Union* that are provided for in the PIF Directive as implemented by national law. It means that the competence of the EPPO covers the criminal offences defined in the PIF Directive, i.e. *fraud affecting the Union's financial interests*⁷⁸, *money laundering*, *active and passive corruption* and *misappropriation*, irrespective of whether the same criminal conduct could be classified as another type of offence under national law.⁷⁹ It can therefore be seen that the *EPPO Regulation refers back to the PIF Directive and to its implementation by the Member States*. The competence of the European Public Prosecutor's Office is therefore bound *to the*

⁷⁶ Article 12 of the PIF Directive.

⁷⁷ The differences in the national criminal law regulations of the Member States relating to the limitation period can have negative effect according to the Court of Justice of the European Union, when the expiration of the – not sufficiently long limitation period results the de facto impunity of the perpetrators of the criminal offences affecting the financial interests of the European Union. In this case, according to the relevant ruling of the CJEU, the Member State violates its obligations to effectively protect the financial interests of the European Union based on Article 325 TFEU. See: Judgment of the Court (Grand Chamber) of 8 September 2015 in Case C-105/14 *Criminal proceedings against Ivo Taricco and Others*, published in the electronic Reports of Cases.

⁷⁸ However, in accordance with the provisions of the PIF Directive, Article 22(1) of the EPPO Regulation states that the EPPO can only be competent as regards VAT-fraud when it is connected with the territory of two or more Member States and involves a total damage of at least EUR 10 million.

⁷⁹ Article 22(1) of the EPPO Regulation.

national implementation of the PIF Directive. This means that the European Public Prosecutor's Office also cannot provide for a unified criminal protection since the offences falling in its competence – as it could be seen – are also different based on the national implementation of the PIF Directive. Although the EU legislator intended to establish a supranational law enforcement body which can combat against criminal offences affecting the financial interests of the European Union unitedly in the whole territory of the EU, the *homogenous and unified substantive and procedural criminal rules are still missing*.⁸⁰

IV. CONCLUDING REMARKS

According to our point of view, the protection of the financial interests of the European Union can only be effective if the *substantive criminal laws as well as the criminal procedure rules* of the Member States are *totally harmonized and unified*. In the absence of the uniform definition of criminal offences and uniform level of sanctions, the risk of the non-homogenous protection of the financial interests of the European Union and the hazard of the forum shopping remains high.⁸¹ Homogenous substantive and procedural rules are therefore needed for the effective fight against fraud and other criminal offences against the financial interests of the European Union.

Although the PIF Directive can be regarded as a *significant improvement* in the field of the protection of the financial interests of the European Union, it is obvious that it cannot fully comply with the abovementioned requirement. Both the type of the legal act of the PIF Directive and its minimum harmonization regulation method make it unable to provide for a unified protection of the financial interests of the EU in the Member States. Even if the PIF Directive was fully and correctly implemented by the Member States, differences in the criminal law regulation of the Member States would possibly still remained.

Naturally, the unification of the criminal system of the Member States is currently not the reality, since the Member States still do not want to give up their national sovereignty in this field. However, in order to ensure the effective protection of its financial interests, the European Union has to find a *proper balance* between the two competing legal interests: the *protection of the national sovereignty and the criminal law systems of the Member States* and the *unified protection of the protection of the financial interests of the European Union*.

KEYWORDS

Protection of the financial interests of the European Union, Treaty of Lisbon, EU-fraud, PIF Directive, EPPO Regulation, European Public Prosecutor's Office

KEÚČOVÉ SLOVÁ

Ochrana finančných záujmov Európskej únie, Lisabonská zmluva, podvody, smernica PIF, nariadenie EPPO, Európska prokuratúra,

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