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UNION LEGAL FRAMEWORK ON COMBATING FRAUDS AGAINST THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

Elise-Nicoleta VÂLCU¹

Abstract

Illegal activities that affect the financial interests of the European Union are, in most cases, transnational, being committed by criminal groups that know the legislative vulnerabilities of some Member States. An efficient fight against these types of illicit actions cannot be achieved only by a regulation and implementation at national level, in other words by the presence of national criminal legislation but by a harmonization of criminal laws in the field, respectively by a common definition at the union level, and implicitly by the creation of the appropriate legal framework regarding the offenses directed against the financial interests of the European Union. Thus, the need arose for the common definition of the offenses directed against the financial interests of the European Union, as well as the creation of a similar sanctioning system at the level of the Member States.

The provisions of the Directive 2017/1371 on combating fraud directed against the financial interests of the Union by means of criminal law are in accordance with the Union law in the field deduced from the analysis, so the Union norm establishes minimum rules regarding the definition of crimes and sanctions regarding the fight against fraud and other illegal activities which affect the financial interests of the European Union.

Keywords:

Fraud; financial interests; union funds; active corruption; passive corruption.

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1. Introductory considerations regarding the evolution of the Union and national regulations referring to the protection of the financial interests of the European Union

The policy of the European Union in the field of the protection of the financial interests of the European Union is subject to the measures of legislative harmonization, so that, in this field, we retain a broad legislative framework from which we identify the PIF² Convention followed by three protocols, namely the Union directives, sources of secondary Union law, each addressing from a cross-border perspective the scourge of corruption, but also provisions of primary union law.

The main source of primary law in this matter is the Treaty on the Functioning of the European Union, regarding the protection of the financial interests of the EU, art. 325 regulating the issue of the involvement of the Member States in the fight against fraud. Specifically, the European Union and the Member States fight fraud and any other illegal activity that harm the financial interests of the Union through measures taken in accordance with that Article, measures that deter fraud and provide effective protection in the Member States.

As regards secondary Union law, we recall Directive 91/308 / EEC, which defined money laundering according to drug offenses and imposed obligations exclusively on the financial sector. Subsequently, Directive 2001/97 / EC extended the scope of Directive 91/308 / EEC both in terms of offenses and in the range of professions and activities concerned.

In June 2003, the International Financial Action Task Force (FATF) revised its recommendations to include in the category of offenses and terrorist financing and formulated more detailed requirements regarding customer identification and verification, situations where an increased risk of money laundering or terrorist financing can justify increased measures and also situations where low risk may justify less rigorous controls. These changes were reflected in Directive 2005/60 / EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for money laundering and terrorist financing and in Commission Directive 2006/70 / EC establishing measures to implementation of Directive 2005/60 / EC of the European Parliament and

² The European Convention on the protection of the financial interests of the European Communities was adopted on the basis of art. K.3 of the TEU, become art.31 by the Treaty of Nice, replaced by art.82, art.83 and art.85 of the TFEU.

of the Council as regards the definition of "politically exposed persons" and the technical criteria for applying the simplified precautionary procedures for clients, as well as for the exemption on account of financial activity in occasionally or on a very limited scale.

Directive 2015/849 / EU on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing is the fifth directive that addresses the problem represented by money laundering.

The provisions of *Directive 2017/1371³ on combating fraud directed against the financial interests of the Union by means of criminal law* are in accordance with the Union law in this matter, so the Union law establishes minimum rules regarding the definition of crimes and sanctions regarding the fight against fraud and other illegal activities that bring harm to the financial interests of the Union.

The PIF Convention gives a common definition of fraud affecting the Union's expenditure and revenue.

And at the level of the Council of Europe, there is a constant concern about the fight against this scourge called widespread corruption in the Member States. Thus we retain in this regard the *Criminal Convention of the Council of Europe⁴* adopted at Strasbourg on January 27, 1999, ratified by Romania by Law no. 27/2002. According to the Convention, corruption is identified at both public and private level⁵. Regarding the qualification of the active subject within these acts of corruption, we note that they can be committed by national civil servants, foreigners, parliamentarians, foreigners, international officials as well as by persons representing international organizations.

³ Member States have the obligation to adopt and publish by 6 July 2019 laws, regulations and administrative provisions in order to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures. Member States shall apply these measures from 6 July 2019.

⁴ The criminal convention of the Council of Europe defines corruption in the two modes of committing: a) activating corruption represents the promise, offering or giving, with intent, of any person, directly or indirectly, of any undue use to an official, for himself or for another, in order to fulfil or abstain from performing an act in the exercise of its function; b) passive corruption represents the request or the receipt, with intent, by a public official, directly or indirectly, of an undue use, for himself or for another, or the acceptance of an offer or promise of such use, in order to fulfil or refraining from performing an act in the exercise of its function; see in this regard, Adrian Petre, Valentin Trif, *Constatarea infractiunilor de coruptie*, Editura C.H. Beck, 2016, p.2

⁵ The criminal code distinctly incriminates the acts of corruption in the private environment by regulating the art.308 C penal.

In the Romanian specialty literature, corruption was individualized in the following forms: abuse of power in the exercise of the duties of service; fraud (deception and prejudice of another person or entity); the use of illicit funds in financing political parties and electoral campaigns; favouritism; establishing an arbitrary mechanism for exercising power in the field of privatization or public procurement; conflict of interest. The forms of corruption were first included in a normative act in 2001 *under H.G. no. 1065/2001 regarding the approval of the National Program for the prevention of corruption and of the National Action Plan against corruption*⁶. At national level, at present, the framework law which includes provisions regarding the protection of the financial interests of the European Union is *Law no. 78 of May 8, 2000 updated in 2016, for the prevention, discovery and sanctioning of corruption acts*.

2. Categories of offenses affecting the financial interests of the European Union regulated by Directive (EU) 2017/1371 on combating fraud directed against the financial interests of the Union by means of criminal law

For the purposes of this rule "financial interests of the Union" means all the revenue, expenditure and assets that are included, collected or due, as the case may be, either to the budget of the Union or to the budgets of the institutions, bodies, offices and agencies of the European Union.

a) Offenses concerning frauds that harm the financial interests of the European Union⁷.

Article 3 paragraph 1 of the Union law stipulates that "fraud that infringes the financial interests of the Union constitutes an offense when committed intentionally".

For the purposes of this Directive, frauds affecting the financial interests of the Union are considered to be those acts:

⁶ By H.G. no.583 / 2016 one approved the National anticorruption strategy for the period 2016-2020, the new strategy putting the acceptance on the preventive measures in order to prevent the corruption facts..

⁷ See in this regard Article 1 of the Convention elaborated on the basis of Article K3 of the Treaty on European Union regarding the protection of the financial interests of the European Communities of 26 July 1995.

a) *in connection with expenses that are not related to the acquisition, any action or inaction* regarding::

- a.1. the use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or withholding of funds or assets from or on behalf of the Union budget or the budgets managed by the Union;
- a.2. disclosure of information, in violation of a specific obligation, having the same effect;
- a.3. improper use of such funds or assets for purposes other than those for which they were initially granted

b) *in connection with the expenses related to the acquisitions, at least if it is committed in order to obtain an illegal profit for the author or for another person, by causing a loss in the financial interests of the Union, any action or inaction* regarding:

- b.1. the use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or withholding of funds or assets from or on behalf of the Union budget or the budgets managed by the Union;
- b.2. non-disclosure of information, in violation of a specific obligation, having the same effect;
- b.3. improper use of such funds or assets for other purposes than the one for which they were initially granted, which harms the financial interests of the Union;

c) *in relation to income other than those obtained from their own VAT resources any action or inaction* regarding:

- c.1. the use or presentation of false, incorrect or incomplete declarations or documents, having the effect of illegally diminishing the resources of the Union budget or of the budgets managed by the Union or on its behalf;
- c.2. non-disclosure of information, in violation of a specific obligation, having the same effect; or
- c.3. improper use of a legally obtained benefit, having the same effect;

d) as regards the income obtained from its own VAT resources, any action or inaction committed under fraudulent schemes of a cross-border nature regarding:

- d.1. the use or presentation of false, incorrect or incomplete VAT declarations or documents, having the effect of diminishing the resources of the Union budget;
- d.2. non-disclosure of VAT information, thus violating a specific obligation, having the same effect; or

d.3. presenting correct VAT declarations to mask fraudulently non-payment or the establishment of undue rights to VAT refunds.

b) Money laundering

Another act incriminated by this rule is money laundering as described in Article 1 (3) of Directive (EU) 2015/849.

Specifically, the following acts represent money laundering, when committed intentionally:

b.1. - the exchange or transfer of goods, knowing that the goods come from an criminal activity or from an act of participation in such an activity, in order to hide or disguise the illicit origin of the goods or to support any person involved in committing that activity in order to avoid the legal consequences of the action of the respective person⁸

b.2.- The hiding or concealment of the true nature, source, location, location, movement or ownership of the goods or rights on these goods, knowing that the goods come from an criminal activity or from an act of participation in such an activity;⁹

b.3.- acquisition, possession or use of goods, knowing, at the date of their receipt, that they come from different offence activities

b.4.- in any of the actions mentioned in letters (b.1.), (b.2.) and (b.3.), the association for their commission, the attempt to commit and the assistance, instigation, facilitation and counseling with a view to committing the said actions.¹⁰

Directive (EU) 2015/849, after presenting the facts incriminated as money laundering offenses, makes a clear mention that it is subject to the provisions of this Union norm including the situation in which the activities that generated the goods to be laundered were carried out on the territory of another Member State or of a third country.

c) Passive corruption and active corruption

They are crimes when committed intentionally.

⁸ Art.1 paragraph (3) (a) of the Directive (EU) 2015/849 regarding the prevention of the use of the financial system for the purpose of money laundering or terrorist financing

⁹ Art.1 paragraph (3) (b) of the Directive (EU) 2015/849 regarding the prevention of the use of the financial system for the purpose of money laundering or terrorist financing

¹⁰ Art.1 paragraph (3) (c) of the Directive (EU) 2015/849 regarding the prevention of the use of the financial system for the purpose of money laundering or terrorist financing

For the purposes of this Directive "active corruption" means the action of a person who, directly or through an intermediary, promises, offers or grants benefits of any kind to a public official, for himself or for a third party, to act or to refrain from acting in accordance with his/her tasks or in the exercise of his/her tasks, in a manner which prejudices or is likely to harm the Union's financial interests.

"Passive corruption" means the action of a civil servant who, directly or through an intermediary, seeks or receives benefits of any kind, for himself or for a third party, or accepts a promise regarding such an advantage to act or to refrain from acting in accordance with his duties or in the exercise of his duties, in a manner which prejudices or is likely to harm the financial interests of the Union.

The approach of the two concepts by the present rule is closely linked to the inclusion in the category of offenses that harm the financial interests of the Union of the money laundering offence as described in Article 1 (3) of Directive (EU) 2015/849.

d) The embezzlement of funds

According to article 4 paragraph (3) the embezzlement of funds constitutes an offense, when committed intentionally.

For the purposes of this Directive, "misappropriation of funds" means the action of a public official who is directly or indirectly entrusted with the management of funds or assets, for the purpose of committing or paying the funds or to acquire or use assets contrary to the purpose envisaged in any way that prejudices the financial interests of the Union.

It should be mentioned that the civil servant belongs to the category of union officials and the category of national officials. Specifically the terms are defined as follows:

a) "*national official*" is both the official of any EU member state and any national official of a third country. Specifically, the term "national official" includes any person who holds an executive, administrative or judicial function at national, regional or local level, respectively any person who holds a legislative function at national, regional or local level.

b) "*Union official*" means a person who:

b.1) is an official or other agent employed by the Union under a contract, within the meaning of the Staff Regulations and the Regime applicable to the other agents of the European Union provided for by Regulation (EEC, Euratom, ECSC) no. 259/68 of the Council⁽¹⁾ (hereinafter referred to as the "Staff Regulations"); or

b.2) it is seconded to the Union by a Member State or by any public or private body, which carries out tasks equivalent to those performed by officials or other agents of the Union.

c) any other person who has been entrusted with and performs a public service function which involves the management of the financial interests of the Union in the Member States or in third countries or the taking of decisions thereon.

Recommendations for sanctioning the offenses regulated by the Union norm, made to the Member States when the active subject is the natural person

As regards natural persons¹¹, the Union directive recommends to the Member States the establishment by transposition rules for each of the three categories of offenses, maximum penalty of at least four years of imprisonment when they involve a significant injury or advantage. The damage or advantage resulting from the commission of the offenses is considered significant when it is quantified more than 100,000 euro.

Where one of the offenses listed above involves damage or an advantage of less than EUR 10,000, Member States may provide for penalties of a different nature than criminal penalties.

Recommendations for sanctioning the offenses regulated by the Union norm, made to the Member States when the active subject is the legal person

Article 6 regulates the criminal liability of legal persons for the same crime, committed for their benefit by any person who acts either on his own account or as part of an organ of the respective legal body and who holds a leading position with different powers, as the case may be, either to take decisions or to exercise control within the respective legal person.

Also, the criminal liability of legal persons intervenes, when the lack of supervision or control by a person mentioned above has made it possible for a person under his authority to commit any of the offenses mentioned in the present analysis, producing benefit to the respective legal person.

It is important to remember that, in no case, attracting the criminal liability of the legal person does not exclude the criminal liability of the natural persons who are, as the case may be, perpetrators, accomplices or instigators of the present crimes¹².

The criminal liability of the legal person can be accompanied by other sanctions, such as:

- (a) exclusion from public benefits or aid;
- (b) temporary or permanent exclusion from public tender procedures;

¹¹ Article 7 of Directive (EU) 2017/1371

¹² according to art.5alin.1 of this directive ", the instigation and complicity in committing any of the mentioned offenses are punished as offenses"

- (c) temporary or permanent prohibition to conduct commercial activities;
- (d) placement under judicial supervision;
- (e) judicial liquidation;
- (f) temporary or permanent closure of the units that served in the commission of the crime.

Regarding the *damage or the advantage* resulting from the offenses mentioned by the legal person, the EU norm recommends a threshold of EUR 100,000 for attracting criminal liability. On the contrary, if the commission of the offenses involves a damage of less than EUR 10,000 or an advantage of less than EUR 10,000, the EU directive recommends that Member States apply sanctions of a different nature than the criminal one. We consider as an exception the case of serious offenses against the common VAT system consisting of intentional actions or inactions committed in fraudulent schemes of a cross-border nature, for which a damage of at least EUR 10 000 000 is foreseen.

The retention of the cross-border character in committing any of the offenses tackled within the present material constitutes an aggravating circumstance, thus according to art. 8 of the directive "when an offense referred to in Articles 3, 4 or 5 is committed within a criminal organization within the meaning of Framework Decision 2008/841 / JHA, it is considered an aggravating circumstance".

In order to confiscate the instruments and products obtained as a result of the offenses referred to in this Article, the Member States have the obligation to take the measures regulated by Directive 2014/42 / EU on the freezing and confiscation of the instruments and products of the crimes committed in the European Union¹³.

¹³ The current Union legislative framework on freezing, seizure and confiscation of assets consists of Joint Action 98/699 / JHA, Council Framework Decision 2001/500 / JHA, Council Framework Decision 2003/577 / JHA, Framework Decision 2005/212 / JHA, and Council Framework Decision 2006/783 / JHA. Directive 2014/42 / EU on the freezing and confiscation of the instruments and products of offenses committed in the European Union complements the EU legal framework. For the purposes of this Directive, the terms of confiscation and freezing are defined as follows: "confiscation" means a definitive disposal of goods ordered by a court in connection with a crime; "Freezing" means the temporary prohibition of the transfer, destruction, transformation, alienation, movement of goods or temporary assumption of custody or control over the goods.

Conclusions

We believe that with the regulation of this Directive, a coherent and stable legislative framework is envisaged.

Both the Union legislature and the specialized doctrine unanimously accept that these frauds affect both the revenues and the expenses of the European Union, and moreover, they are committed by organized criminal networks operating on several state territories, thus making the anti-fraud fight unfolded at both the institutional level as well as at the level of each member state of the European Union.

The protection of the Union's financial interests implies an increased institutional interest at the preventive level, which materialized in chasing fraudulent behaviour.

We believe that with the regulation of this Directive, Romania has the obligation to transpose this Union norm, imposing the amendment of Law 78/2000 the internal framework norm in the matter, considering the creation of a coherent and stable legislative framework.

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