

**Evaluation**  
of the  
**proposal for a Directive on the fight against fraud to  
the Union's financial interests by means of criminal  
law (COM (2012) 363 final)**  
on the basis of the  
**Manifesto for a European Criminal Policy**

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## **1. On the requirement of a fundamental legal interest worthy of protection**

### **a) What interest does the legal instrument in question aspire to protect?**

The proposal aspires to protect first and foremost the Union's financial interests, i.e. its property.

In its preamble (para 1) it is stated that this protection should have a holistic character, concerning not only the management of budget appropriations, but extending to all measures that negatively affect or threaten to affect the Union's assets as well as "those of the Members States, to the extent that they are designated to support or stabilise the economy or public finances of Member States with relevance to Union Policies". However, the content of art. 2 and 3 of the proposal itself does not support the statement made in the preamble as long as the protection of the assets of Member States are concerned. Article 2 defines the Union's financial interests as "all revenues and expenditures covered by, acquired through, or due to: (a) *the Union budget*; (b) *the budgets of institutions, bodies offices and agencies established under the Treaties or budgets managed and monitored by them*", while article 3 describes as fraud affecting the financial interests of the EU only acts or omissions that affect *the Union's budget or budgets managed by the Union or on its behalf*." Even in the frame of article 3 (b) (i), that describes the fraudulent behaviours in respect of the revenues, the reference to "*the resources of the Union budget or budgets managed by the Union or on its behalf*", does not allow the conclusion that the Member States assets are protected herewith directly, even if they are assets designated to support or stabilise the economy of Member States with relevance to the Union policies. Once a resource has become a Union's budget resource, then its assets do not belong to the Member States any longer and this is the reason why one should understand the preamble's wording only as a reference to an *indirect* protection of Member States' assets that are connected to Union policies.

On the other hand through the new fraud related criminal offence described in article 4 para 1, which concerns preparative acts for circumventing or skewing the application of the eligibility, exclusion, selection or award criteria for public procurements or grant procedures that involve the Union's financial interests, is made clear that the protection of these interests has not a strict economic dimension, i.e. loss or danger for loss of an economic value. It seems to have a rather broader identity, in the sense of a protection of the Union property's function itself. Thus it might be, for example, that in a concrete case circumventing selection criteria of a grant would have to be criminalized even though it wouldn't lead to any financial damage for the EU, as long as it violates, of course, the specific goals for which the Union's property is meant to be used.

Apart from the EU financial interests the proposal aspires to protect additional legal interests, that are though not mentioned at all as such in it. These are: (a) the EU public service and that of its Member States, which are meant to be protected through the provisions about passive and active corruption (though only so far their violation is connected to a possible negative effect on the Union's financial interests), and (b) the legal interest meant to be protected by the criminalization of money laundering, which is here also of interest only so far as it concerns the fraud and fraud related criminal acts affecting the EU's financial interests. According to the prevailing view in the criminal law doctrine the legal interest protected by the criminalization of this latter conduct (: money laundering) is the one violated by the act, from which the illegal property has been derived. This means that in the case of the Commission's proposal the criminalization of money laundering refers to the same legal interest as that of punishing fraud and fraud related acts against the EU's financial interests.

Thus the legal interests aspired to be protected by the Commission's proposal for a directive on the fight against fraud to the Union's financial interests are two: the Union's property and the public service of the Union and its Member States.

**b) Is the protected interest fundamental in terms of its nature?**

The protected legal interests are obviously fundamental in terms of their nature for the EU.

The Union has been founded as an economic organization of its Member States and even today – despite the widening of its institutional structure- it lays great importance to the economic integration of its Member States. Thus the protection of its financial interests plays a decisive role as it contributes to the safeguarding of its existence and to the realization of its goals.

The Union's public service bears the same fundamental character. It is only through an objective and non-pecuniary function of its officials that the EU can realize its goals through its organs and contribute to the prosperity of its citizens. The same is true for the public service of its Member States.

**c) Is the protected interest anchored in the primary law of the EU?**

The financial interests of the Union (i.e. its property) are anchored in the primary EU law. One can recognise the importance of this legal interest today through the provisions of the Lisbon Treaty itself (: Art. 3 para 4 TEU, Art 33, 83 para 2, 86 and 325 TFEU). It is characteristic that in this Treaty one can find a separate chapter, even though consisting of only one article, that deals with the fight against fraud to the Union's financial interests. Additionally to that it shouldn't be overlooked that the Union has a special institution for the fight against fraud (OLAF), that has been established since many years now through a Commission's decision.

Concerning the protection of the EU public service one won't find an explicit provision in the Lisbon Treaty. Still the provisions of the primary EU law, which concern the EU organs and institutions, make their importance for the EU function (e.g. Art. 13-19 TEU, Art. 223ff. TFEU) clear.

The public service of the EU Member States is obviously not in the primary EU law anchored, but this does not mean that it cannot be protected by the EU, as first of all it is a legal interest that it belongs to its Member States and secondly because the method of protecting even "foreign" legal interests is not unknown to national legislators as well.

**d) Is the protected interest possible to reconcile with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?**

The above mentioned protected legal interests do reconcile with the constitutional traditions of the Member States, because they are classical legal interests, which belong to natural or legal persons (see the property) or the society/the citizens (see the public service) and as such they can be protected without causing a problem for the Member States' legal orders.

The Union's property, i.e. the property of a supranational organization, which has become recently a legal personality, cannot be treated by the Member States' legal traditions differently than the property of a legal person. As far as it is indisputably an important legal interest for the existence of the Union itself, the Member States have indeed a special obligation to protect it. This is explicitly expressed in the provisions of the EU primary law, which have been mentioned above and especially in article 325 TFEU.

As long as the EU public service is concerned the situation is slightly different, because the Member States protect normally their own public service and not that of foreign States or of international organizations. However as far as they belong to such organizations this is possible, because of the fundamental character of the legal interest under discussion. On the other hand one should not forget that in the last few years the different States –in the frame of the fight against corruption– they have overtaken on the basis of international treaties the protection of the public service of other States, at least to a certain degree (see e.g. the Treaty of the Council of Europe for the fight against corruption).

In the EU Charter of fundamental rights are obviously only such fundamental rights recognised, which belong to natural persons and are protected mainly against the State. Amongst the above mentioned legal interests, only the EU property could claim protection on the basis of the Charter, as bearers of financial interests can be natural persons as well, while the public service –as a social legal interest– cannot claim protection thereupon.

**e) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?**

The proscribed conduct to the Union's financial interests (art. 3, art. 4 para 1 and 4) is especially harmful to the society, because the frauds and the related to them illegal activities pose a serious problem, which can be proved on the basis of empirical data (COM (2012) 363 final, P. 1) and does not allow the Union to reach its goals.

The harmfulness of the conducts proscribed as far as the other legal interests are concerned, is in this proposal only so far of interest as it might lead to the violation of the financial interests of the EU.

The special social harmfulness of the corruptive conduct (art. 4 para 3) is obvious, because it violates the objective and non-pecuniary function of the public service. However this social harmfulness is present irrespective of whether such conduct is undertaken as a means of fraud against the EU's financial interests or not.

The autonomous social harmfulness of the conduct proscribed as money laundering is on the other hand not evident. It rather represents a second chance for the penal repression mechanism to reveal and prosecute the criminal act from which the illegal property has been derived.

**f) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?**

From the Commission's thoughts expressed in its proposal one cannot discern the additional legal interests that are to be protected apart from the EU's financial interests (Preamble para 1: "The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures negatively affecting or threatening to negatively affect its assets, and those of the Member States to the extent they are designated to support or stabilise the economy or public finances of Member States with relevance to Union policies",

preamble para 6: "The Union's financial interests can be negatively affected where individual tenderers provide information to contracting or grant awarding authorities based on information unduly obtained directly or indirectly from the tendering body, with the aim of circumventing or skewing rules applicable to a public procurement or grant procedure",

preamble para 7: "The Union money laundering legislation is fully applicable to laundering the proceeds of the criminal offences referred to in this Directive. A reference made to that legislation should insure that the sanction regime introduced by this Directive applies to all criminal offences against the Union's financial interest.",

preamble para 8: "Corruption constitutes a particularly serious threat against the Union's financial interests, which can in many cases also be linked to fraudulent conduct. A particular criminalisation in this area is therefore needed.",

preamble para 9: "The Union's financial interests can be negatively affected by certain types of conduct of a public official which aim at misappropriating funds or assets contrary to the purpose foreseen, and with the intention to damage the Union's financial interests. There is therefore a need to introduce a precise definition of offences covering such conduct".)

**A provisional conclusion:** The Commission has overtaken in its current proposal a well known method, which can be traced back to the PIF Convention, to the Corpus Juris project and to its old proposal for a directive on the criminal protection of the Community's financial interests of 2001. According to this method the protection of the EU's financial interests should be reached through an additional criminalization of conducts that as such violate mainly other legal interests, although they appear to be in a concrete case connected to the damage or the possibility of damaging the Union's financial interests. This choice has to be criticized, because one is creating actually in this way a restricted special part of criminal law exclusively for the protection of the EU's financial interests. In other words there is no sense in criminalizing the corruption of public officials only in connection with the relevant fraudulent acts that violate the EU's financial interests, because corruption as a conduct bears wrongfulness per se and when it is related to fraud against the Union's property, one should just deal with the matter of concurrence of different offences that occurs.

Apart from that, this method is nowadays not necessary anymore, because the Union has already a Treaty (26.5.1997) for the fight against corruption of its officials as well as of those of its Member States.

The same is true as far as money laundering is concerned. Money laundering is in the meantime a consecutive criminal act, attached to many other offences and many EU legal instruments that

regulate this field exist already, so that a new EU intervention in order to proscribe the money laundering exclusively for the fraudulent conduct against the EU's financial interests has no meaning.

Thus it would be wise for the EU in both cases (: corruption and money laundering) just to make adjustments to its existing legal instruments for these two fields, in order to bring up the protection to the desired level, in case this is not already satisfying in view of acts that are related to damages of the Union's financial interests.

Last but not least striking off corruption and money laundering from the list of fraud related offences is imperative for an additional and very important reason. The Commission's proposal has chosen as a legal basis for this directive article 325 para 4 TFEU. However this provision acknowledges the EU competence for criminal law measures only with regard to the prevention of and the fight against fraud and not in respect to other offences that violate mainly other legal interests and not the Union's financial interests. The Commission's opinion that "The term fraud must in this context be understood in a broad sense, including also certain fraud related criminal offences" (COM (2012) 363 final, p. 6) is not convincing not only because there is no criteria to which extend such a broad sense applies, but also because article 325 TFEU, acknowledging *special* competence to the EU for the fight against fraud on its financial interests should be interpreted in a rather narrow than in a wide sense, as it is the case with all *special* rules.

## **2. On the *ultima ratio* principle**

### **a) Are there for the protection of the legitimate interest (according to 1) alternative protection mechanisms –unrelated to the imposition of criminal sanctions- available to the EU?**

The Commission recognises in its proposal that there are indeed alternative to criminal law protection mechanisms available for the Union's financial interests. This is why it stresses that "criminal law in the Member States should continue to complement the protection of the Union's financial interests under administrative and civil law for the most serious types of fraud related conduct in this field, whilst avoiding inconsistencies, both within and among these areas of law" (preamble para 2).

However the general recognition of a complementary character for criminal law's function in the respective field, does not mean per se that this character is actually safeguarded by the proposed provisions. The Commission itself reveals in its proposal that the legal instrument proposed "*extends the types of some fraud related offences, introduces minimum sanctions and harmonizes statutory limitations (of the Member States)*" (COM (2012) 363 final, p. 6). All these elements are obviously choices of *expanding* criminal law, whilst the necessity for such provisions is, as we will see below, not further elaborated.

### **b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?**

The Commission's starting point is that criminalization of certain conducts is necessary as *complementary* to administrative or civil law measures. This is of course true for the protection of

such vital legal interests as the Union's financial interests. Still it would be necessary for the European legislator to demonstrate why exactly are the existent administrative or civil law measures in the fields that should be covered by criminal law of inadequate effectiveness in practice. As long as this has not been achieved a relevant deficiency can be detected. It might be argued of course that such a can be explained through the existing EU aquis in this area, which already includes criminal law rules for fraud, corruption and money laundering (see COM (2012) 363 final, p. 2). However the European legislator should have demonstrated at least for all new forms of criminalization introduced by its current proposal necessity of these rules in comparison to the existing administrative or civil law measures.

Instead of that the Commission tries to explain in its proposal the reasons of undertaking a new harmonization of the Member States' criminal law provisions in the field, in comparison to the existing status. It is a different question though, whether we need new criminal law provisions instead of administrative or civil law measures and a different one whether we are to change the existing criminal law rules seeking more effectiveness. Both questions are related to the matter whether criminal law is used in a specific case as a last resort (*ultima ratio* principle). If administrative measures are sufficient, no criminal law is needed and if existent criminal law measures are sufficient, then no new criminal law provisions can be justified. This is why the Commission should have answered both these questions separately.

**c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of member States, where appropriate) is necessary?**

The Commission does not repeat the mistake made in all proposals of new directives, which were introduced after the Lisbon Treaty, where it actually referred in general terms to 4 different policy options (which were in every proposal identical: (Policy option (1): Status Quo / No new EU action, Policy option (2): Development of a programme to strengthen the efforts to counter attacks against information systems by means of non-legislative measures, Policy option (3): Targeted update of the rules of the Framework Decision (new Directive replacing the current Framework Decision, Policy option (4): Introduction of comprehensive EU legislation against cybercrime), and then named its preference for one of them with no further justification.

However trying to explain why resort to criminal law with a new legal instrument on the fight against fraud to the Union's financial interests is necessary, the Commission does not really justify the choice made for the harshest control mechanism available, i.e. criminal law. Its explanation is based on the *diverging* rules that Member States have adopted and the consequently often diverging levels of protection within their national legal systems (COM (2012) 363 final p. 2). According to the Commission this state of affairs shows that *there is no equivalent protection* of the Union's financial interests, and *that measures against fraud have not reached the necessary level of deterrence* (COM (2012) 363 final p. 2). As an example is used the fact that with respect to fraud the Member States have included definitions of this crime *in many different forms of legislation, ranging from general criminal law, which may include specific or generic offences, to criminal tax codes*, as well as the *divergence that can be noted with respect to the levels of sanctions*, which are applicable to these forms of crime in the different Member States (COM (2012) 363 final, p. 2). However even diverging levels of protection do not necessarily mean that there is need for an intervention for bringing these



levels to the same stage, because under the perspective of the ultima ratio principle the decisive question is not whether such diversions have a negative impact on the effectiveness of *the Union's policies* to protect its financial interests (COM (2012) 363 final, p.3), but whether more criminal law (due to new conduct that should be criminalized or higher level of punishments through the introduction of minimum levels for them) can be justified as a last resort for the specific acts and the relevant punishments for them. This question cannot be answered with a general statement that refers to diverging levels of protection in the different Member States. On the other hand it should be mentioned that the Lisbon Treaty itself obliges Member States for the same level of protection regarding the Union's financial interests compared to the one available for their own (article 325 para 2 TFEU) and not for a level of protection that would be the same all over the Union.

In other words the question that is related to the ultima ratio principle does not refer to the necessity of certain criminal law provisions in order to ensure the effectiveness of the Union's policies to protect its financial interests (cf. COM (2012) 363 final p. 3), but it refers to the impossibility to find milder means in order to tackle with the problem. Thus it may very well be that removing diverging levels of criminal law protection could make the Union's policies on the field more effective, but this does not mean that such an expansion of criminal law is also justified in view of its use as a last resort.

#### **d) Do the proscribed types of conduct indeed call for criminal sanctions as a last resort?**

This question has to be answered in respect of each proposed offence.

By fraud affecting the Union's financial interests (art. 3) the problem lies mainly in the broad sense, in which the punishable conduct is described as long as it refers to an omission. The European legislator calls the Member States to punish as a criminal act "*any (act or) omission relating to the use or presentation of false, incorrect or incomplete statements, etc, which has as its effect the misappropriation or wrongful retention of funds from the Union budget, or any such (act or) omission relating to the misapplication of liabilities or expenditure for purposes other than those for which they were granted*". This means that the punishable omission in these two forms of the conduct described in art. 3 *doesn't need to be an omission violating a specific obligation*. Thus practically any person, who might even have no special obligation to present a correct document, i.e. someone who is not even the responsible person for such conduct in the frame of a company, could make oneself punishable for fraud affecting the Union's financial interests, if he/she knows about the planned presentation of an incorrect document, can report and stop it and doesn't do so with the result that the EU suffers a damage of its financial interests, due to a misappropriation of funding given to the specific company. Such a criminal liability for an omission resulting to a financial damage irrespective of any violation of *a specific obligation to act and prevent the undesired result* goes too far, because in the European legal tradition not every person can be held as a guarantor for the legal interests of another person or an entity and consequently be liable for their violation by someone else. This can be very well illustrated in the differentiation made between the criminal liability for not helping a wounded child which lies in the street. There is a basic differentiation made if the person omitting to help is just a passenger or the child's mother. If we were to punish any omission like an act, with no additional prerequisites, especially in cases where the result cannot be caused without another person's act, then criminal law would seize control of our everyday life. This is why the



description of the punishable conduct referring to fraud affecting the Union's financial interests has to be improved as long as art. 3 paras (a) and (b) (i) and (ii) are concerned.

Concerning the fraud related offences one can make a negative and a positive remark as far as the ultima ratio principle is concerned.

A violation of the principle is discernible in fraud related to public procurements or grant procedures (art. 4 par. 1) as long as the proscribed conduct is not bound as such (i.e. in terms of its objective elements) to a possible danger for a circumvention or skewing of the eligibility, exclusion, selection or award criteria of a public procurement or a grant, arising from the suitability of the conduct itself. The choice made by the Commission expands criminal liability with no justification to cases where the proscribed conduct could not lead objectively to circumvention or skewing of the procedure, as the concrete suitability of the conduct for such a result is not an element of the actus reus. Thus the criminal liability refers here to a situation that lies far ahead any possible damage of the Union's financial interests and is based actually solely on the perpetrator's intention. This combination of a proscribed conduct that does not create yet -under any possible conception- a kind of danger for the protected legal interest is of course a sign for an over expanding criminal law, which does not respect the ultima ratio principle and places the centre of punishability on criminal intention .

On the contrary one should in view of the ultima ratio principle positively evaluate the Commission's choice to punish corruption only with regard to *future* actions of a public official and not in respect of already conducted ones, because in these latter cases the connection between the bribe and its influence on the public service's function (the connection "do ut des") can be very easily questioned. Negative appears though in the frame of corruption and with regard to the ultima ratio principle as well the expansion of the public official's notion in art. 4 par 5 (b) to persons not holding a legislative, administrative or judicial office, which exercise a public service function just by *participating* in the management of or the decisions concerning the Union's financial interests. Participation is a very broad sense and could even arise from one's own initiative, without that the concrete action has ever been entrusted to the acting person. Criminalizing however, as corruption of officials, bribery acts towards persons who overtake out of their own initiative participation in the management of the Union's financial interests is not in line with using criminal law as a last resort, because such cases should be controlled with administrative or (other) preventive measures, which would not allow participation in management or decisions concerning the Union's financial interests without a formal entrustment of such a public service.

Last but not least a positive remark in view of the ultima ratio principle must also be made in respect of the provision of art. 7 para 2 concerning minor offences irrespective of their concrete character as fraud or fraud related offences, which involve damage or advantages of less than 10,000 euros and are not accompanied by particularly serious circumstances, for which member States may provide instead for other than criminal penalties. Minor wrongfulness depends in the field of economic crime on the level of the economic damage in which the conduct results and thus one should always keep in mind that for those cases criminal law might very well not be needed as a last resort, as alternative milder means in the field of administrative or civil law can easily be found.

### **3. On the principle of guilt**

#### **a) Does the punishment provided for the instrument relate in a proper way to the actual responsibility of the individual?**

All the proscribed conducts in the Commission's proposal refer to intentional acts or omissions. Thus the principle of guilt is, as far as this general requirement is concerned, safeguarded. A further relevant progress to the existing status should also be acknowledged. In the proposal one doesn't find any more the well known –since the PIF Convention (art. 1 para 4)- phrase that the intentional character of the punishable act or omission should be inferred from the objective circumstances. Through such an automatic conclusion the guilt principle can be easily circumvented and this is why one has to acknowledge the positive Commission's step to cross off the relevant phrase. However these positive findings do not mean that the guilt principle is safeguarded for the specific offences that the proposal entails, i.e. with regard to the question whether their type and gravity is in correspondence to the individual guilt.

#### **b) Do these sanctions correspond to individual guilt in terms of their type and gravity?**

For the first time in the proposed directive we experience the application of minimum levels of sanctions not only for the maximum but also for the minimum threshold of the penalties that are to be threatened by the national legislators. Such a choice can very easily disturb the coherence of the individual national legal systems, as it will be elaborated below, but it can also create serious problems with regard to the proportionality principle. If the minimum threshold of a penalty is set too high, the proportionality principle is unavoidably violated. This is not inevitably so in the case of the maximum threshold of penalties, as the judge has still the possibility not to reach it. On the contrary the judgement of a concrete case cannot circumvent the minimum penalty threshold of a certain criminal law provision, except if the respective legal order is familiar with an institution of reforming this threshold in cases, for example, of mitigating circumstances, which of course are not always available.

The Commission's choice is also disputable under the perspective of the nature of a directive as a European legal instrument. By using a method of defining both the minimum and the maximum threshold of the minimum penalties which are to be proscribed by the national legislators the Union does not leave actually any free space for the Member States to define the means of reaching the directive's goals when transferring the European legislative act in their national legal systems. In other words, the Commission's proposal tends actually to take on the characteristics of a regulation than a directive, because as far as the penalties for certain offences are concerned there is almost nothing left for the national legislators to define.

On the other hand it is also disputable whether the method chosen by the Commission is compatible with the assimilation principle ruling the protection of the Union's financial interests according to the Lisbon Treaty (art. 325 para 2 TFEU). The Member States are obliged to protect the Union's financial interests as they protect their own. Proscribing European minimum levels for the minimum threshold of the penalties for fraud and fraud related offences that affect the Union's financial interests may very well lead to a higher protection of the Union's interests towards the ones of the Member States. However it is questionable whether this has been the intention of the Union's primary law legislator.

Apart from that one should recall that the Union has not set till now any obligatory level for the minimum thresholds of penalties as far as the protection of personal legal interests is concerned. This is a sign of a non justifiable discrepancy in terms of the proportionality principle. The European criminal legislator should take into account, that according to a basic stance of the European legal tradition personal legal interests (e.g. life, freedom, sexual integrity of children etc.) are held to be more important than non personal/material ones (e.g. property).

If one leaves now aside the above mentioned general problems, which arise due to the Commission's new method for proscribing penalties, and focuses on the specific provisions of the proposed directive with regard to penalties and the guilt or proportionality principle, one can come both to positive and negative findings.

Positively has to be evaluated first of all the Commission's choice to leave the exact level of penalties for cases which involve an advantage or damage of less than 30.000 Euros to the discretion of the Member States, under the general provision of course that the penalties for fraud and fraud related crimes have to be effective, proportionate and dissuasive, including fines and imprisonment.

With regard to penalties the Commission differentiates among the fraud related offences in a way that is obviously problematic. A differentiation is justified and has to be made, if it is based on the distinct wrongfulness and guilt that accompanies the respective offences. Thus it is not understandable why the European legislator has chosen to threaten the fraud related offence of art. 8 para 1, first phrase, which refers to a certain conduct in the frame of public procurements or grant procedures with the aim of circumventing or skewing the application of eligibility, exclusion, selection or award criteria, with *the same threshold* of penalties as that of fraud affecting the Union's financial interests. The latter is an offence resulting to damage of the Union's property, while the former is one that can just endanger those interests. Punishing with the same level of penalties offences of different wrongfulness (: harm and possibility of such harm), violates the proportionality principle and consequently the principle of guilt.

On the other hand equally (if not even more) problematic is the second phrase of art. 8 para 1, which defines the level of penalties for money laundering and corruption. These two offences should according to the Commission be punished with even higher penalties than those for fraud, as the Commission has set for them the same minimum and maximum threshold as the one attached to fraud (6 months and 5 years respectively), starting though from a lower level of the advantage or damage involved, i.e. when the latter is at least 30.000 (and not 100.000) Euros. With regard to corruption such a choice could be understandable, because here there is an additional legal interest involved (: the Union's public service and that of its Member States). However this is not the case for money laundering. The legal interest violated through money laundering is *the same* with the one of the former basic act, the product of which has been laundered. Thus money laundering that follows fraud to the Union's financial interests cannot be punished with an even higher level of penalties than the one determined for fraud, as in this case the legal interest protected is not only the same but it has been additionally already damaged through fraud as described in art. 3.

The guilt and proportionality principles are unfortunately violated as well through the provision of art. 8 para 2, according to which Member States are required to take the necessary measures to ensure that the criminal offences referred to in Title II shall be punishable by a maximum penalty of at least 10 years of imprisonment where the offence was committed within a criminal organisation in the sense of the Framework Decision 2008/841. Elevating the minimum level for the maximum

threshold of the penalty on a double higher scale cannot be justified though, because the perpetrator of such an offence has to be a member of a criminal organisation (“the offence was committed within a criminal organization”). This conduct is already an autonomous offence, punished separately from fraud or fraud related crimes. Thus one has to deal here with a matter of concurrent offences, for which the solution would be to choose simply two separate penalties. On the contrary elevating the level for one of them based on the fact of perpetrating the other constitutes a double punishment for the same reason and consequently a violation of the proportionality principle. This is why the European legislator should abstain from such a provision, which has become though very common and can be found in all its recent legal instruments, no matter their scope of protection.

As long as the guilt and proportionality principles are concerned positively has to be evaluated however the provision of art. 7 para 4, according to which Member States are to ensure that sanctions of another nature, that cannot be equated to criminal penalties, and which are already imposed on the same person for the same conduct, can be taken into account when sentencing that person for a criminal offence referred to in the Commission’s proposal. Despite the distinct nature and goals served by the different kinds of sanctions the proportionality principle is obviously better served when the judge can take into consideration the fact of a multiple sanctioning for the same conduct, especially in a field where administrative sanctions refer normally to the same conducts that are punished through criminal provisions as well.

**c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?**

The European legislator deals with the question whether his proposed minimum levels of sanctions are appropriate having regard to the guilt of the individual in the proposal’s explanatory thoughts. Apart from being general and not addressing the substantial problems that have been elaborated above (see preamble para 12: “In order to protect the Union’s financial interests equivalently through measures which should act as *a deterrent* throughout the Union, member States should further foresee certain minimum types and levels of sanctions when the criminal offences defined in this directive are committed. *The levels of sanctions should not go beyond what is proportionate for the offences* and a threshold expressed in money, under which criminalisation is not necessary, should therefore be introduced”) the Commission’s thoughts in the preamble reveal the real reasons for the choices made.

First of all the main concern seems to be achieving deterrence throughout the Union by means of an equivalent protection in all Member States (see preamble para 12 above and para 14: “The sanctions for natural persons in more serious cases should foresee imprisonment ranges. These serious cases should be defined by referring to a certain minimum overall damage, expressed in money, which must have been caused by the criminal behaviour to the Union’s and, possibly, other budget. *The introduction of minimum maximum imprisonment ranges is necessary in order to guarantee that the Union’s financial interests are given an equivalent protection throughout Europe*”). However introducing minimum maximum imprisonment ranges to a certain overall damage, expressed in money, does not make, as it has already been argued above, the penalties proportionate by itself. The principle of proportionality has to be taken seriously on European level, as it is a fundamental European legal principle. Thus it should be examined in a holistic way, i.e. horizontally (: in respect of

different offences on European level), vertically (: in respect of similar offences in the Member States) and above all *stricto sensu*, in other words with regard to every introduced minimum maximum level of penalty in relation to the offence attached to. If such a control would have been undertaken, the violations of the proportionality and guilt principles arising from the choices made and described above would have become obvious. On the other hand the Commission relates the choices made, and especially the one of the minimum level of penalties introduced (6 months), with the possibility of issuing for such cases a European Arrest Warrant (see preamble para 14: “ The minimum sanction of six months ensures that a European Arrest Warrant can be issued and executed for the offences listed in article 2 of the Framework Decision on the European Arrest Warrant, thus ensuring that judicial and law enforcement cooperation will be as efficient as possible”). However setting the range of penalties on the basis of a possibility for applying a procedural tool does not only circumvent the proportionality and guilt principles, but it actually overturns the relationship between substantial and procedural criminal law. The latter is there to realize the application of the former and can never become a criterion for the substantive criminal law rules. Thus setting the ranges of penalties cannot take into account whether this would facilitate the issuance of the EAW. On the contrary, the way of thinking should be exactly the opposite, i.e. the EAW should be issued only in cases of offences which prove to be -on the basis of other substantial criteria- so serious, that they allow the issuance of such a severe procedural tool.

Last but not least it has to be mentioned that it is astonishing how general and insufficient the Commission’s reference to the proportionality principle is, in spite of its importance in the frame of European law. Apart from the above mentioned paragraphs of the preamble one finds just one phrase in the explanatory thoughts of the proposal, which is actually not giving any specific argument for supporting the proportionality principle. According to the Commission: “It has carefully been ensured that these measures do not go beyond what is necessary to achieve this objective *and are thus proportionate*” (!) (COM (2012) 363 final, p. 8). However, as we have seen above, there are plenty of reasons to argue for the contrary.

#### **4. On the principle of legality**

**a) If the proposed legislative act aims at the introduction of a supranational criminal offense:**

**aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the proposed directive itself?**

Not relevant

**bb) Are the sanctions provided for foreseeable?**

Not relevant

**b) If the legislative act aims at harmonising national criminal law provisions:**

**aa) To the extent that the obligation to adjust national criminal law does not give any leeway for the implementation (and thus exhaustively defines the criminal offence): Are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as supra a)?**

As far as fraud affecting the Union's financial interests (art. 3) is concerned, one could argue that the way the punishable conduct is described is not in line with the *lex certa* requirement, i.e. it does not allow the described conduct emanate from the proposed directive itself and thus it does not make clear on one hand for the national legislators what to punish and on the other hand for the citizens which conduct can make them according to the Union criminally liable. Specifically the Commission's proposal defines fraud in respect of expenditure or revenue, any act or omission *relating to*: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect either the misappropriation or wrongful retention of funds from the Union budget [...] or the illegal diminution of the resources of it". In this way though it is not clear to which acts or omissions the European legislator is referring to, because *relating to* the use or presentation of false statements or documents may be many different acts or omissions, as for example supporting them, facilitating them, or even preparing them. This is why the European legislator has to overcome this deficiency, which can result to an over broadening of the criminalization of fraud affecting the Union's financial interests as well. This could be done just by changing the wording of art. 3 in both its subparagraphs (a) and (b) from its current form to: "any act or omission in violation of a specific obligation, constituting : (i) the use or presentation [...], (ii) non disclosure of information [...], (iii) the misapplication of liabilities or expenditure [...]".

On the other hand with regard to fraud related criminal offences affecting the Union's financial interests similar problems arise by the description of corruption. The Commission's proposal does not include *expressis verbis* in the description of corruption the bribery behaviour which is meant to lead to an act or refraining from acting of an official *against his duties*. This deficiency which is not justified, as bribery acts are punished even for the case of *an official acting in accordance with his duty*, has to be overcome as well and one could not argue that the wording of art. 4 para 3, which refers to the acting of a public official "in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests", covers it. Acting in a way which damages the Union's financial interests does not necessarily involve a conduct that is against the duties of an official. By not regulating this case the directive's description for the offence of corruption does not make the relevant conduct foreseeable from its own wording and in so far it is not in line with the *lex certa* requirement

**bb) Do the national legislators have the possibility to implement each single prescription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?**

For the cases mentioned above the national legislators do not have the possibility to implement the provisions of the proposal without doubts about their alignment with the European law. The vagueness of the proposal's wording by fraud and its deficiency for covering characteristic cases of

corruption do not allow national legislators to understand what exactly the European legislator meant to define as a criminal offence in the respective fields. Under these conditions and for the purpose of avoiding to contravene the Union's choices national legislators normally chose the "safe" method of just copying the Union's notion of an offence, reproducing the same problem on national level, and do not usually follow their own way for defining it, because of the relevant risk not to be in conformity with the Union's choices. Thus the European legislator is expected to solve the above described problems related to the principle of legality.

**c) Does the proposed directive introduce retroactive rules, or does it compel member States to introduce such rules?**

No

**d) Is any potential retroactivity justified with reference to the principle of *lex mitior*?**

Not relevant

**e) Have national Parliaments, organizations, and citizens been informed of the proposed directive in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?**

The explanatory report of the Commission's proposal refers rather extensively to the consultations undertaken with interested parties before the proposal was introduced as well as to the relevant impact assessment of policy alternatives. However the readiness to hear and turn to advantage alternative thoughts remains to be experienced in the present period as the Commission's proposal has recently been made public and it is only now that can be assessed in respect of its merits and deficiencies. As far as the national parliaments are concerned no relevant information is yet available.

**5. On the principle of subsidiarity**

**a) Why is it not enough with criminal law measures at Member State level?**

As far as the protection of the Union's financial interests are concerned the TFEU abides by the already well known assimilation principle (article 325 para 2), according to which Member States are obliged to protect the Union's financial interests in the same way they protect their own. This choice allows actually for a different level of protection in the different Member States. It has to be read however systematically in combination with other articles of the Treaty, as for example articles 325 para 4 and 83 para 2 TFEU. The combination of the latter makes clear that as long as harmonization of criminal law measures can be taken in fields of different EU policies, for which the support of criminal law is inevitable, this cannot be denied for the protection of the Union's financial interests. On the other hand the actual content of article 325 para 4 TFEU, as it stands today and in comparison



to the past, shows that the Treaty itself intended to make it possible for the Union to intervene for the protection of its financial interests even with criminal law measures.

This institutional framework, which allows for the Union's intervention combined with the unsatisfactory situation that is described in the explanatory report of the Commission's proposal, referring to the diverging levels of protection of the Union's financial interests within the different national legal systems of the EU's Member States, makes the Union's choice for a directive striving to harmonize the criminal legislation of the Member States in this field understandable. From a European citizen's point of view one could also argue that as far as one deals here with the same legal interest *that belongs to the EU itself*, it is a matter of equality for the peoples of Europe to be treated in an at least equivalent way, when they harm or endanger the Union's property. On the other hand it should not be overlooked that such a choice poses difficulties for safeguarding coherence with regard to the European and especially the national legislation of the different Member States, as the financial interests of the EU have to be placed harmonically within the scale of protected values of every national legal order.

This general estimation about the Commission's proposal being in line with the subsidiarity principle does not mean of course that the specific choices made respect it in all its extent. Subsidiarity arises also in the form of the ultima ratio principle when one examines under this scope the proposed criminal provisions themselves. In respect of that we have seen already that the proposal cannot avoid relevant criticism (see above under 2).

**b) Why is the objective of each measure –whether in terms of its scope or its impact – better served on a European level?**

Apart from the arguments already mentioned above a harmonized content of fraud affecting the Union's financial interests could facilitate also the police and judicial cooperation in the fields of research and prosecuting measures against fraudulent conducts that bear a transnational character.

**c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?**

The Commission's proposal gives a convincing justification for intervening with a directive in the field of criminal measures for the protection of the Union's financial interests. According to the explanatory report that accompanies the proposal " ...the Union's financial interests are by nature, and from the start, placed at Union level. As such they are even more "union-centred" than a field subject to harmonisation of rules in the Member States. They are more comparable in form and substance to rules on the Union institutions', bodies' offices' and agencies' self-protection, such as in terms of physical or IT-security.....Only the Union is in a position to develop binding approximation legislation with effect throughout the Member States, and thus to create a legal framework which would contribute to overcoming the weaknesses of the current situation, including in particular the lack of equivalence which is inconsistent with the treaty objectives set out in article 325 (4) TFEU" ( COM (2012) 363 final, p. 8).

However this justification is general and does not differentiate between the specific offences of the proposal. The proposal does not refer at all, for example, to the fraud related offences for which the above justification of the subsidiarity principle cannot be taken for granted. This is especially true for money laundering, for which the Union has never explained till now whether it respects the subsidiarity principle by making use of criminal law measures.

**d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?**

Not known yet, because the proposal is quite recent. In any case no such information can be derived from the proposal.

**6. On the coherence of domestic criminal justice systems**

**a) Do the criminal law provisions of the proposed directive undermine the coherence of the criminal justice system of one or more member States?**

The provisions of the proposed directive are expected to cause problems first of all in Member States that are not familiar with a system of minimum and maximum level of penalties threatened by criminal law provisions. This is a fundamental choice that a national legal order should be left to make by itself. In any case national legal orders shouldn't be forced to do that through a directive just for a number of offences and for the sake of European harmonization.

However even for Member States that are already familiar with this system, it may very well be that the minimum level of six months imprisonment set in article 8 for cases of fraud or fraud related offences involving an advantage or damage of at least 100.000 or 30.000 euros respectively is higher than the one the national legal orders foresee for the same level of advantages or damages concerning their own financial interests. In other words setting a minimum level of penalties the European legislator brings the national legal systems much easier out of balance as there is no way to escape this minimum threshold, while such a possibility on the contrary exists as far as the maximum level is concerned, because the latter could be avoided from the judge when selecting the concrete penalty for the perpetrator who is to be punished.

**b) In terms of systematicity and substantive content, is the proposed directive in line with other EU legislative acts related to criminal law?**

On the other hand one could neither argue that the proposed directive is in line with other EU legislative acts related to criminal law. None of them binds at present the Member States to foresee a specific minimum level of penalties for an offence that is being harmonized on European level. Thus the new choice appearing in the Commission's proposal cannot be in conformity with the principle of coherence in its horizontal aspect as there are very serious offences that violate fundamental personal legal interests, like for example trafficking in human beings or sexual exploitation of children, for which the Union does not bind its Member States to threaten such offences with

minimum levels of penalties. Using this severe method just for protecting its own financial interests makes clear that the EU does not realize its commitment led down in the preamble of its Charter of Fundamental Rights, according to which the Union places the individual in the heart of its activities.

Additionally it shouldn't be overlooked that the Commission's choice for a minimum level of penalties in respect of offences affecting its financial interests leads to inconsistency with the primary EU law itself. If one focuses on money laundering, for example, the difference for punishing money laundering acts after a fraudulent conduct affecting the financial interests of Member States is obvious. For the latter binding minimum penalties set on European level do not exist, even if the relevant advantage or damage is over 30.000 euros. The question that arises in this respect is whether such a result can still be in conformity with article 325 para 2 TFEU, according to which Member States are obliged to protect the Union's financial interests as they protect their own. In other words the Union's choice for its own financial interests contravenes not only the assimilation principle introduced by the TFEU, but it also creates problems of inequality of protection between the financial interests of the Member States and those of the EU, that were not at all intended by the Treaty.

The solution to this problem is not, of course, to adopt the method of binding minimum and maximum threshold of penalties on European level as a general tool, because as it is obvious this would create even more problems with regard to the principle of coherence both on horizontal and on vertical level. Thus the only way out is just to drop the idea of binding minimum levels of penalties.

**c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the proposed directive does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?**

The Commission's proposal does not contain any specific thoughts or arguments referring to horizontal or vertical coherence, although one would have expected it to do so, especially because of the new method introduced with the binding minimum thresholds of penalties. Instead of that one reads by the relevant explanation for choosing the method of minimum imprisonment ranges: "The introduction of minimum sanctions will ensure consistency across the Union in terms of sanctions that apply in any member State for a given type of conduct, with the effect that the Union's financial interests will be protected in an effective and equivalent manner throughout the Union.....The introduction of minimum sanctions is consequently considered necessary to ensure that an effective deterrence all over Europe can be achieved". As highlighted above achieving deterrence cannot be obviously the sole or even the main concern of the European legislator in the field of criminal law. His main concern should be the way to combine deterrence with all the other fundamental principles that have to rule his decisions when introducing binding rules for its Member States in an interface system that has to take seriously into consideration both European law and national legal traditions

## OVERALL EVALUATION

- ☐ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.
- ☐ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).
- ☐ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).
- ☒ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations).
- ☐ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly reexamined (see recommendations).

The above analysis of the rules concerning the criminalization of fraud affecting the Union's financial interests, allows us to draw the conclusion that **the Commission's proposal meets only partially the requirements of the Manifesto on European Criminal Policy**. This conclusion is based in brief on the following elements:

In the proposal for a directive on the fight against fraud to the Union's financial interests one can clearly discern the Commission's effort to comply with fundamental principles of criminal law. However the proposal does not achieve to convert this intention into concrete provisions that actually safeguard the above principles to all their extent.

As it has been shown above, significant deficiencies can be detected not only by all classical principles of criminal law (: the ultima ratio, the guilt, the proportionality principle and the principle of legality), but also by the principles of subsidiarity and coherence, which bear a special importance for European law. In this sense the proposal still needs further systematic elaboration, that would ameliorate its quality with regard to European fundamental principles and the rule of law.

On the other hand both central axes of the Commission's proposal, i.e. the introduction of a legal instrument, that covers broadly defined fraud related offences as well, which do not violate directly the Union's financial interests, and the introduction of a new method for setting obligatory minimum thresholds of punishments for their minimum level, comply neither with the Lisbon Treaty provisions, setting the Union's competence for preventing of and fighting against fraud according to article 325 para 4 TFEU, nor with the fundamental principles of European and criminal law. Thus further systematic elaboration of the proposal is imperative with regard to its central axes as well.

## RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE

Following recommendations can be made according to the above analysis for the amendment of specific provisions of the Commission's proposal

1. All fraud related offences, apart from the ones dealing with public procurements or grant procedures (art. 4 para 1) and the misappropriation of Union's funds by a public official (art. 4 para 4) which refer directly to the protection of the Union's property and not to the protection of other legal interests, should be crossed off the proposed directive, because -amongst other reasons- they contravene the legal basis chosen for the proposal.
2. Certain articles of the proposed directive should be improved in terms of respecting the ultima ratio principle as follows:
  - a) Article 3: the European legislator should bind the proscribed omissions that constitute fraud to the prerequisite of *a violation of specific obligations*, because otherwise criminal liability would extend unjustified to omissions that cannot be held equivalent to acts.
  - b) Article 4 para 1: the suitability of the proscribed conduct to cause a possible danger for a circumvention or skewing of the eligibility, exclusion, selection or award criteria of a public procurement or a grant should be added as an actus reus element.
  - c) Article 4 para 5 (b): the notion of a public official who is not holding a legislative, administrative or judicial office in cases of participating in the management or decisions concerning the Union's financial interests should be restricted only in cases that such a participation has been entrusted to him.
3. In order to respect the guilt and proportionality principles the European legislator should:
  - a) break loose from the method of binding minimum thresholds of penalties (article 8 para 1), ,
  - b) lower down the penalty foreseen for the fraud related crime described in article 4 para 1, which refers to public procurements and grant procedures, as this conduct can never be equated to fraud,
  - c) adjust the penalty foreseen for money laundering to a level that won't be higher than that of fraud (article 8, 2<sup>nd</sup> phrase) as well, and
  - d) cross off the aggravating circumstance of article 8 para 2, which refers to the commission of the respective offences within a criminal organization, as such a provision violates the proportionality principle and is actually not needed at all.
4. Breaking loose from the method of binding minimum thresholds of penalties (art. 8 para 1) would also help to better serve the principle of coherence as well.
5. In order to comply with the lex certa requirement following changes are imperative:
  - a) article 3: the description of fraud has to be made concrete by crossing off the broad and vague reference to acts or omissions *relating* to the use or presentation of documents etc... Instead of that fraud should be simply defined as "any act or omission in violation of a specific obligation, constituting: (i) the use or presentation [...], (ii) non disclosure of information [...], (iii) the misapplication of liabilities or expenditure [...]".
  - b) article 4 para 3: the description of corruption has to refer also explicitly to a bribery behaviour which is meant to lead to an act or refraining from acting of an official *against his duties*.

6. Last but not least the proposal must produce substantial reasons for respecting the proportionality principle as well as the principle of coherence, that will be based on its concrete provisions.
7. The same goes for safeguarding fundamental rights, as it is not sufficient of course just to list the ones that can be affected or protected from the specific provisions without any further elaboration.