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

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Committee of the Regions[(1)]

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures which negatively affect or which threaten to negatively affect its assets and those of the Member States, to the extent that those measures are of relevance to Union policies.

(2) The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests of 26 July 1995[(3)], including the Protocols thereto of 27 September 1996[(4)], of 29 November 1996[(5)] and of 19 June 1997[(6)] (the 'Convention') establishes minimum rules relating to the definition of criminal offences and sanctions in the area of fraud affecting the Union's financial interests. The Member States drew up the Convention, in which it was noted that fraud affecting Union revenue and expenditure in many cases was not confined to a single country and was often committed by organised criminal networks. On that basis, it was already recognised in the Convention that the protection of the Union's financial interests called for the criminal prosecution of fraudulent conduct injuring those interests. In parallel, Council Regulation (EC, Euratom) No 2988/95[(7)] was adopted. That Regulation lays down general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Union law while, at the same time, referring to sectoral rules in that area, fraudulent actions as defined in the Convention and the application of the Member States' criminal law and proceedings.

(3) Union policy in the area of the protection of the Union's financial interests has already been the subject of harmonisation measures such as Regulation (EC, Euratom)

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No 2988/95. In order to ensure the implementation of Union policy in this area, it is essential to continue to approximate the criminal law of the Member States by complementing the protection of the Union's financial interests under administrative and civil law for the most serious types of fraud-related conduct in that field, whilst avoiding inconsistencies, both within and among those areas of law.

(4) The protection of the Union's financial interests calls for a common definition of fraud falling within the scope of this Directive, which should cover fraudulent conduct with respect to revenues, expenditure and assets at the expense of the general budget of the European Union (the 'Union budget'), including financial operations such as borrowing and lending activities. The notion of serious offences against the common system of value added tax ('VAT') as established by Council Directive 2006/112/EC[(8)] (the 'common VAT system') refers to the most serious forms of VAT fraud, in particular carrousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation, which create serious threats to the common VAT system and thus to the Union budget. Offences against the common VAT system should be considered to be serious where they are connected with the territory of two or more Member States, result from a fraudulent scheme whereby those offences are committed in a structured way with the aim of taking undue advantage of the common VAT system and the total damage caused by the offences is at least EUR 10 000 000. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties. This Directive aims to contribute to the efforts to fight those criminal phenomena.

(5) When the Commission implements the Union budget under shared or indirect management, it may delegate budget implementation tasks to the Member States or entrust them to bodies, offices or agencies established pursuant to the Treaties or to other entities or persons. In the event of such shared or indirect management, the Union's financial interests should benefit from the same level of protection as they do when under the direct management of the Commission.

(6) For the purposes of this Directive, procurement-related expenditure is any expenditure in connection with the public contracts determined by Article 101(1) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council[(9)].

(7) Union money laundering law is fully applicable to money laundering involving property derived from the criminal offences covered by this Directive. A reference made to that law should ensure that the sanctioning regime introduced by this Directive applies to all serious cases of criminal offences against the Union's financial interests.

(8) Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned.

(9) The Union's financial interests can be negatively affected by certain types of conduct of a public official who is entrusted with the management of funds or assets, whether he or she is in charge or acts in a supervisory capacity, which types of conduct aim at misappropriating funds or assets, contrary to the intended purpose and whereby the Union's financial interests are damaged. There is therefore a need to introduce a precise definition of criminal offences covering such conduct.

(10) As regards the criminal offences of passive corruption and misappropriation, there is a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union, in the Member States or in third countries. Private persons are increasingly involved in the management of Union funds. In order to protect Union funds adequately from corruption and misappropriation, the definition of 'public official' therefore needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.

(11) With regard to the criminal offences provided for in this Directive, the notion of intention must apply to all the elements constituting those criminal offences. The intentional nature of an act or omission may be inferred from objective, factual circumstances. Criminal offences which do not require intention are not covered by this Directive.

(12) This Directive does not oblige Member States to provide for sanctions of imprisonment for the commission of criminal offences that are not of a serious nature, in cases where intent is presumed under national law.

(13) Some criminal offences against the Union's financial interests are in practice often closely related to the criminal offences covered by Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) and Union legislative acts that are based on that provision. Coherence between such legislative acts and this Directive should therefore be ensured in the wording of this Directive.

(14) Insofar as the Union's financial interests can be damaged or threatened by conduct attributable to legal persons, legal persons should be liable for the criminal offences, as defined in this Directive, which are committed on their behalf.

(15) 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, Member States should provide for certain 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.

(16) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests.

(17) This Directive does not affect the proper and effective application of disciplinary measures or penalties other than of a criminal nature. Sanctions that cannot be equated to criminal sanctions, which are imposed on the same person for the same conduct, can

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be taken into account when sentencing that person for a criminal offence defined in this Directive. For other sanctions, the principle of prohibition of being tried or punished twice in criminal proceedings for the same criminal offence (*ne bis in idem*) should be fully respected. This Directive does not criminalise behaviour which is not also subject to disciplinary penalties or other measures concerning a breach of official duties, in cases where such disciplinary penalties or other measures can be applied to the persons concerned.

(18) Sanctions with regard to natural persons should, in certain cases, provide for a maximum penalty of at least four years of imprisonment. Such cases should include at least those involving considerable damage done or advantage gained whereby the damage or advantage should be presumed to be considerable when it involves more than EUR 100 000. Where a Member State's law does not provide for an explicit threshold for considerable damage or advantage as a basis for a maximum penalty, the Member State should ensure that the amount of damage or advantage is taken into account by its courts in the determination of sanctions for fraud and other criminal offences affecting the Union's financial interests. This Directive does not prevent Member States from providing for other elements which would indicate the serious nature of a criminal offence, for instance when the damage or advantage is potential, but of very considerable nature. However, for offences against the common VAT system, the threshold as of which the damage or advantage should be presumed to be considerable is, in conformity with this Directive, EUR 10 000 000. The introduction of minimum levels of maximum imprisonment sanctions is necessary in order to ensure equivalent protection of the Union's financial interests throughout the Union. The sanctions are intended to serve as a strong deterrent for potential offenders, with effect throughout the Union.

(19) Member States should ensure that the fact that a criminal offence is committed within a criminal organisation as defined in Council Framework Decision 2008/841/JHA[(10)] is considered to be an aggravating circumstance in accordance with the applicable rules established by their legal systems. They should ensure that the aggravating circumstance is made available to judges for their consideration when sentencing offenders, although there is no obligation on judges to take the aggravating circumstance into account in their sentence. Member States are not obliged to provide for the aggravating circumstance where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions.

(20) Given, in particular, the mobility of perpetrators and of the proceeds stemming from illegal activities at the expense of the Union's financial interests, as well as the complex cross-border investigations which this entails, each Member State should establish its jurisdiction in order to enable it to counter such activities. Each Member State should thereby ensure that its jurisdiction covers criminal offences which are committed using information and communication technology accessed from its territory.

(21) Given the possibility of multiple jurisdictions for cross-border criminal offences falling under the scope of this Directive, the Member States should ensure that the principle

of *ne bis in idem* is respected in full in the application of national law transposing this Directive.

(22) Member States should lay down rules concerning limitation periods necessary in order to enable them to counter illegal activities at the expense of the Union's financial interests. In cases of criminal offences punishable by a maximum sanction of at least four years of imprisonment, the limitation period should be at least five years from the time when the criminal offence was committed. This should be without prejudice to those Member States which do not set limitation periods for investigation, prosecution and enforcement.

(23) Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters and to other rules under Union law, in particular under Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council[(11)], there is a need for appropriate provision to be made for cooperation to ensure effective action against the criminal offences defined in this Directive affecting the Union's financial interests, including exchange of information between the Member States and the Commission as well as technical and operational assistance provided by the Commission to the competent national authorities as they may need to facilitate coordination of their investigations. Such assistance should not entail the participation of the Commission in the investigation or prosecution procedures of individual criminal cases conducted by the national authorities. The Court of Auditors and the auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies should disclose to the European Anti-Fraud Office (OLAF) and to other competent authorities any fact which could be qualified as a criminal offence under this Directive, and Member States should ensure that national audit bodies within the meaning of Article 59 of Regulation (EU, Euratom) No 966/2012 do the same, in accordance with Article 8 of Regulation (EU, Euratom) No 883/2013.

(24) The Commission should report to the European Parliament and to the Council on the measures taken by Member States to comply with this Directive. The report may be accompanied, if necessary, by proposals taking into consideration possible evolutions, in particular regarding the financing of the Union budget.

(25) The Convention should be replaced by this Directive for the Member States bound by it.

(26) For the application of point (d) of Article 3(4) of Directive (EU) 2015/849 of the European Parliament and of the Council[(12)], the reference to serious fraud affecting the Union's financial interests as defined in Article 1(1) and Article2(1) of the Convention should be construed as fraud affecting the Union's financial interests as defined in Article 3 and in Article 7(3) of this Directive or, as regards offences against the common VAT system, as defined in Article 2(2) of this Directive.

(27) Proper implementation of this Directive by the Member States includes the processing of personal data by the competent national authorities, and the exchange of such data between Member States on the one hand, and between competent Union bodies on the other. The processing of personal data at national level between national competent authorities should be regulated by the *acquis* of the Union. The exchange of personal data between Member States should be carried out in accordance with Directive (EU)