Fight against fraud to the Union's financial interests by means of criminal law

2012/0193(COD) - 16/04/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 577 votes to 36, with 28 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.

Parliament position adopted at first reading following the ordinary legislative procedure amended the Commission proposal as follows.

Legal basis: Parliament proposed to retain **Article 83(2)** of the Treaty on the Functioning of the European Union as the legal basis of the proposal rather than Article 325 (4).

Objective: in order to ensure effective protection against the most serious types of fraud-related conduct, and to ensure that the Union's financial interests are optimally protected, Parliament considered that the measures adopted under administrative and civil law should be complemented by legislation under criminal law in the Member States. It also stated that this Regulation should also afford effective and equivalent protection in the Member States and in Union institutions, bodies, offices and agencies and boosting the credibility of Union institutions and initiatives.

Members introduced a **broader definition of the notion of the 'Union's financial interests'** which now covered and all its financial operations, including borrowing and lending activities.

Criminal offences: Parliament explicitly mentioned corruption relating to activities in **procurement**. It made a distinction between **active and passive corruption**. The notion of '**misappropriation**' was introduced, which, when committed intentionally, must be punishable as a criminal offence. Misappropriation should consist of an act by a public official to commit or disburse funds, or appropriate or use assets, contrary to the purpose for which they were intended, and which damaged the Union's financial interests.

In this context, an amendment was inserted regarding 'Union official' which was based on the current definition of official included in the First Protocol to the Convention on the Protection of Financial Interests in force, which was well known and accepted by Member States.

Penalties for physical persons: Parliament stated that in cases of offences involving damages of less than **EUR 5 000** (EUR 10 000 in the proposal) and not involving aggravating circumstances, Member States may provide instead for the imposition of sanctions other than criminal penalties.

Imprisonment: criminal offences involving an advantage or damage of **at least EUR 50 000** should be punishable (EUR 100 000 in the Commission's proposal).

Members deleted provisions regarding a **minimum penalty** of at least 6 months imprisonment. They went on to state that where it was established that a criminal offence had been committed **within a criminal organisation, that fact should be treated as an aggravating circumstance** for sentencing purposes rather than a different criminal offence.

Minimum sanction types for legal persons: Member States should take the necessary measures to ensure that a legal person held liable may be subject to sanctions, including temporary or permanent exclusion from Union tender procedures.

***Ne bis in idem*rule**: Parliament introduced a new article stipulating that Member States should apply in their national criminal law the *'ne bis in idem*' rule, under which a person whose trial had been completed in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that, if a penalty was imposed, it had been enforced, was in the process of being enforced or may no longer be enforced under the laws of the sentencing State.

Jurisdiction: Member States should take the necessary measures to establish their jurisdiction over the criminal offences where: (a) the offence is committed in whole or in part within their territory; (b) the offender is one of their own nationals or is resident in their territory; (c) or the offender is subject to the Staff Regulations, or was subject to the Staff Regulations at the time of the offence.

Recovery: Member States should take the necessary measures to ensure the **prompt recovery** of sums unduly paid in the context of the commission of the criminal offences and their **transfer** to the Union budget. Member States should also keep regular records of the sums recovered and shall inform the relevant Union institutions or bodies about those sums, or, where they have not been recovered, of the reasons for such non-recovery.

Cooperation between Member States and OLAF: for the purpose of the Directive, Parliament stated that cooperation should not be limited to cooperation between Member States and Commission **but encompass also the cooperation between the Member States themselves.** Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, Member States, **Eurojust** and the Commission should, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in the directive whilst complying with the Charter of Fundamental Rights of the European Union and with the applicable Union legislation on the protection of personal data,

Reports, statistics and evaluation: the Commission should, **within 24 months** after the deadline for implementation of the Directive, and thereafter on a yearly basis, submit a report assessing the extent to which the Member States have taken the necessary measures to comply with the Directive.

For their part, Member States should regularly collect and maintain **comprehensive statistics** from the relevant authorities in order to review the effectiveness of the systems established by them to protect the Union's financial interests. The Commission should, **within 5 years** after the deadline for implementation of the Directive, submit a full evaluation of the latter.