



Transposition of the Directive on the Protection of the Financial Interests of the European Union into national legislation: experiences with tools and powers

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Abstract

The Directive on the Protection of the Financial Interests of the European Union (“PIF Directive”) has significantly increased the powers and the tools for conducting investigations concerning financial criminality in many Member States of the European Union. This is both in terms of substantive criminal law (including the elements of the criminal offence and the penalties) and in terms of procedures extending the reach of investigative acts and their use (*e.g.*, the seizure and freezing of assets). The Directive is also of enormous importance for the exercise of the competences by the European Public Prosecutor’s Office (EPPO). Not only because of the aforementioned tools and powers but also in the light of cross border investigations, which would benefit greatly from harmonization between Member States.

Keywords PIF Directive · Importance · Member States · EPPO · Harmonization of criminal law

1 Introduction

The following text on the transposition of the Directive on the Protection of the Financial Interests of the European Union (“PIF Directive”) into national legislation is written from my experience as a Belgian national prosecutor and as policy officer of the Minister of Justice for criminal legislation. However, my recent experience of the past six months as a European prosecutor at the European Public Prosecutor’s Office (EPPO) is also reflected in this text. The functioning of the European Public Prosecutor’s Office will of course also have consequences for the handling of individual

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criminal cases in the Member States and probably also for criminal law policy there and for the harmonization of European criminal law, *e.g.*, through the rulings of the Court of Justice of the EU. The perspective of this text comes from a dual experience, both national and European.

First, the scope and the legal framework of the Directive are briefly explained. Then the relevant tools and powers that the new PIF Directive has given both to Member States (with a focus on Belgium) and to the EU are described, in particular to the European Public Prosecutor's Office, the competences of which are related to the protection of the financial interest of the EU. Finally, the state of play and future challenges regarding the Directive are listed.

2 Scope

The scope of this article concerns first and foremost the transposition of the PIF Directive into national law, but also its consequences for the EPPO and for its investigations and prosecutions. It can be emphasized that there is certainly a impact of the transposition of the Directive for the member states and for the EU/EPPO.

3 The legal framework at European level

Nowadays, the European Union is much more than a purely economic partnership involving a common market and the free movement of people, as it was some decades before. Its powers extend to many areas. In the area of criminal law, uniform (minimum) standards have been established and agreements have already been drawn up for cooperation between the EU Member States in investigating, prosecuting and judging offences, as well as in executing sentences. Concrete examples include the European arrest warrant, the European investigation order, joint investigation teams and the mutual recognition of judgments in criminal matters.

The fact that now a European independent supranational prosecution authority like the European Public Prosecutor's Office has been created, with the power to conduct and lead independently investigations and prosecutions relating to criminal offences only demonstrates the European Union's growing interest in justice and security. It is therefore justified to speak of a growing and more direct influence of Union law on national criminal law.

Within the legal framework, the following legislations are of crucial importance:

- the Treaty on the Functioning of the European Union (TFEU)¹ – Title V: Area of freedom, security and justice – Chap. 4: Judicial cooperation in criminal matters: *e.g.*, Art. 83 and Art. 86 (concerning the establishment of a European prosecutor's office);

¹ Official Journal EU C 326, 26.10.2012, p. 1 (consolidated version).

- Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (EPPO) Regulation;²
- 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 (PIF Directive).³

The European Public Prosecutor’s Office draws its most important powers from the PIF Directive (PIF stands for “*protection des intérêts financiers*”). Indeed, Article 22, § 1, of the EPPO Regulation states that “the EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in the PIF Directive, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law.”

In the PIF Directive, there are references to some other important European acts:

- Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime;⁴
- Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing;⁵ and, last but not least;
- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014/42).⁶ This Directive offered a lot of important tools and powers.

Also noteworthy of course is Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF Regulation).⁷ This Regulation has been significantly amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor’s Office and the effectiveness of the European Anti-Fraud Office investigations.⁸ As the heading of the Regulation 2020/2223 explicitly states, the intention is to strengthen substantially the means and tools available to the Union to protect its financial interests by cooperation with the European Public Prosecutor’s Office. Of course, the strengthening of the European Anti-Fraud Office (OLAF) will also benefit all other investigations and prosecutions in the Member States, both criminal and administrative.

²Official Journal EU L 283, 31.10.2017, p. 1.

³Official Journal EU L 198, 28.7.2017, p. 29.

⁴Official Journal EU L 300, 11.11.2008, p. 42.

⁵Official Journal EU L 141, 4.5.2016, p. 89.

⁶Official Journal EU L 127, 29.4.2014, p. 39.

⁷Official Journal EU L 248, 18.9.2013, p. 1.

⁸Official Journal EU L 437, 28.12.2020, p. 49.

4 Tools and powers offered by the PIF Directive in the Member States – transposition and experiences in Belgium (and probably similar experiences in other member states)

4.1 First, fraud affecting the European Union’s customs revenues

The Belgian Law of 9 December 2019⁹ clarified and expanded the offences and inserted higher penalties/sanctions into the Customs Code of 18 July 1997. The following changes were made, and had a considerable influence on the field:

- A clear distinction was made between non-intentional and intentional infringements. The latter are now all punishable by a maximum penalty of imprisonment. These include, for example, incorrect transit declarations, the use or presentation of false, inaccurate or incomplete certificates or invoices, undeclared imports and exports, or non-compliance with the conditions that justify the granting of a more favorable tax regime;
- If intentional crimes (fraud) have caused considerable/substantial damage to the EU’s financial interests, they are punishable by a term of imprisonment of between 4 months and 5 years (this maximum sentence is therefore higher than the maximum sentence of 4 years as required by the PIF Directive). In any case, the new law stipulates clearly that the financial interests of the EU are to be considered “considerably damaged” when the damage exceeds €100,000;
- The law also stipulated, following Art. 7(3) of the PIF Directive, that the courts may decide on this high sentence in other serious circumstances. Examples from case law/jurisprudence are (as a mere matter of fact):
 - the organized character of the facts;
 - a sequence of offences;
 - being combined with illegal importation of excise goods (resulting in a high amount of evaded excise duties);
 - the existence of a misleading structures of companies (domestic and international);
 - the use of false documents;
 - the involvement of a front man or a shell company with just a post office box address.
- Cases of criminal attempt were also expanded. Thus, from now on, an attempted offence became punishable for anyone who, without prior permission, uses or tries to use the goods mentioned in the customs documents for another purpose.

In Belgium, the customs administration has special powers in the context of investigations and prosecutions. In order to be in line with the EPPO Regulation, the powers in EPPO cases will have to be exercised together with European Delegated Prosecutors and under the monitoring of the central level of the EPPO (involving a supervising European Prosecutor and the Permanent Chamber).

⁹Loi du 9 décembre 2019 modifiant la loi générale sur les douanes et accises du 18 juillet 1977 et le code de la taxe sur la valeur ajoutée transposant la directive (UE) 2017/1371, *Moniteur belge* 18 décembre 2019.

4.2 Secondly, the fraud affecting the European Union's revenues arising from the value added taxes

The (same) Belgian Law of 9 December 2019 also better aligns the VAT Code with the requirements of the PIF Directive. It added the concept of serious fiscal fraud/serious types of VAT fraud to the VAT Code. It concerns, for example, VAT carousel fraud, intra-Community fraud and missing trader fraud.¹⁰ The 2019 law clarified in the VAT Code that VAT fraud is to be considered serious in any case where infringements are linked to the territory of at least two Member States and cause a loss of at least €10,000,000. However, this does not exclude the possibility of a fraud that does not fulfil these two conditions still being considered serious by a judge. (The same examples can be used here as were used concerning customs fraud.)

The law provided for criminal sanctions (from 8 days to 5 years of imprisonment and/or €250,000 to €500,000 EUR) for those who undertake “serious fiscal fraud”. From now on, the VAT Code also provides for a criminal sanction for anyone who attempts to commit serious tax fraud. This offence is punishable by a prison sentence of between 8 days and 3 years and by a fine of between €26,000 and €50,000.

The law also introduced an aggravating circumstance in the VAT Code – namely, when the “serious fiscal fraud” was committed by a criminal organization. In this case, the guilty party is punished with a prison sentence of between 1 and 5 years and with a fine of between €5,000 and €500,000.

4.3 Thirdly, corruption

In some Member States, including Belgium, the maximum penalties for active private and public corruption and passive corruption have been significantly increased. All have been increased to at least 4 years and some to 5 years.

The definition of “union official” and “national official” was already broad and in line with Art. 4(4) of the PIF Directive:

- Union official means a person who is:
 - an official or other servant under contract with the Union (regardless of the type of contract or statute);
 - seconded to the Union by a Member State or public or private body who carries out functions equivalent to those performed by Union officials or other servants;
- National official is to be understood by reference to the definition in national law. Nevertheless, in the case of proceedings in another state the latter shall not be bound to apply the definition of the other state.
- In addition, any other person assigned and exercising a public service function concerning the Union's financial interests in member States or third countries is regarded as a public official for the purposes of the Directive.

This broad definition of “official”, combined with the extensive personal and territorial jurisdiction offered by Belgian criminal procedural law, provides for a wide possibility of investigation and prosecution.

¹⁰Missing trader fraud occurs when the supplier charges and receives VAT from his customer on an intra-Community sale and then “disappears” without paying the VAT to the Treasury.

5 Tools and powers offered by the Directive (EU) 2014/42 on freezing and confiscation in the Member States

This Directive is far-reaching in this respect and provides the prosecuting and judging authorities with a whole host of tools and powers. Article 10 of the PIF Directive stipulates clearly that “Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in articles 3, 4 and 5. Members States bound by Directive 2014/42 shall do so in accordance with that Directive.”

In Belgium, there were already many tools and powers enabling the seizure and confiscation of assets, also the value-based confiscation (confiscation of assets of equivalent value), but the 2014 Directive, again explicitly supported and demanded by the PIF Directive, has expanded these possibilities even further. Since the law of 18 March 2018,¹¹ seizure and value-based confiscation is also possible as regards the instrument of crime. The Directive on freezing and confiscation provides:

“Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.”

Previously, only the immediate and direct confiscation of the crime proceeds was possible.

Because of the PIF Directive, Belgium also introduced into the Criminal Code the special confiscation of assets which are benefits arising from crimes for which the perpetrator and accomplices have not expressly in concrete terms been convicted (Belgian Law of 18 March 2018). A defendant may therefore be convicted for the capital gains that he has received during a certain period defined by law and which are likely to have arisen from other offences for which he or she has not been charged. This means that for some offences, the confiscation may also be ordered for the accumulation of assets over a period of five years prior to the suspect’s charge or inculcation if there are serious and concrete indications of such accumulation. It will be up to the convicted person to prove legal origin.

6 Tools and powers offered by the PIF Directive

6.1 Harmonization by the PIF Directive

Harmonization is an absolute necessity for the effectiveness of investigations and prosecutions by the European Public Prosecutor’s Office. It may be stated that the PIF offences have more or less (but certainly not always) the same constitutive elements in the Member States and that the penalties/sanctions comply more or less in the

¹¹Loi du 18 mars 2018 modifiant diverses dispositions du droit pénal, de la procédure pénale et du droit judiciaire, Moniteur Belge 2 mai 2018.

most Member States with the Directive. The same applies to criminal attempt (*e.g.*, in Belgium), and to the crime or aggravating circumstance of criminal organization. Also, the rules about prescription periods and the liability of legal persons are more or less the same.

It is of course thanks to the PIF Directive that this harmonization – in the field of both substantive criminal law and criminal procedure – has been able to take place in most Member States of the EU. Without harmonization, it would be more difficult for the European Public Prosecutor's Office to handle its criminal cases. The reasons include, among others, the following:

- Many case files will consist of cross-border investigations. It is therefore right and necessary that the Member States, and in particular the European Prosecutors and the European Delegated Prosecutors, speak about the same crimes and their qualifications and the assessment of the seriousness of the facts. The same goes for determining the seriousness of offences by providing requirements for penalties.
- The determination of the seriousness of facts by the PIF Directive (involving legal presumptions) has already been mentioned: for VAT fraud, an amount of €10,000,000 and facts linked to two or more Member States are always serious. For other criminal offences (such as fraud involving procurement and non-procurement-related expenditure and *e.g.*, customs offences), the PIF Directive states that damage or advantage involving amounts of more than €100,000 shall be presumed to be “considerable”. In this way, there can no longer be any doubt in the Member States that such criminal cases must be regarded as serious.
- It should not be forgotten that for EPPO cases, European Delegated Prosecutors do not have to use the classic system of mutual legal assistance or the European Investigation Order. Within the European Public Prosecutor's Office, Member States can use the so-called “assignment of measures” as provided for in Article 31 of the EPPO Regulation (a closer and more direct form of cooperation).
- Moreover, by providing for the obligation to make certain offences punishable by a maximum penalty of at least four years of imprisonment (see Art. 7), the PIF Directive has ensured – through the binding EPPO Regulation – that Member States have to ensure that the Delegated Prosecutors are entitled to order or request the following intrusive measures (see Art. 30 of the Regulation): a house search; the obtaining of objects, documents, computer data; the freezing or interception of electronic communications; the tracking and tracing of an object and so on.
- Article 11 of the Directive is also a provision which should not be underestimated. It provides for very wide competence for the national jurisdiction, certainly in terms of personal and territorial competence. And here too the connection can be seen between the PIF Directive and the EPPO Regulation. (See Art. 23 and Recital 64 of the Regulation.) This recital stipulates that “the EPPO should exercise its competence as broadly as possible so that its investigations and prosecutions may extend to offences committed outside the territory of the Member States.”

For all these reasons, the powers and instruments created by the PIF Directive (sometimes in connection with or supported by the EPPO Regulation) have increased the power to investigate crimes against the financial interests of the European Union, both by national law enforcement authorities and by the EPPO.

Perhaps a side note is appropriate here. Union law has not yet succeeded in harmonizing the role and powers of intervention of judges in criminal investigations. For example, there are large differences in Member States as to whether and for which investigative acts the prosecutor should ask a judge for authorization. The same applies to the closure of investigations and the question of whether or not an “intermediate judge” should act as a filter before referring a case to a court of law. Moreover, some Member States have the figure/actor of the investigative judge who, in some criminal investigations, becomes the head of the investigation. For EPPO cases, *e.g.*, France, Luxembourg and Spain will (probably) adjust their criminal procedure. Belgium will not do so. This is politically not feasible and also the highest courts always confirm the usefulness of an impartial judge in important investigations. Of course, the Belgian magistrate of the public prosecutor’s office must also act independently and impartially. This is even stated in the Constitution. Attempts to make these judges “real judges” *at* and *not of* the investigation have so far failed.¹² However, their function would then be to safeguard the rights and freedoms of suspects and victims and to exercise judicial control over the prosecution. The investigative judge in Belgium is now “both Maigret and Solomon”, according to the famous quote by Robert Badinter, the former French Minister of Justice.

6.2 The intertwining of the PIF Directive with the EPPO Regulation

There is certainly also a practical and operational interconnection and intertwining between the goals and the tools of the PIF Directive and the EPPO Regulation, and so between the national and European institutions.

The objectives for the establishment of the EPPO are:

- more focus upon, and an increase in investigations and prosecutions of, offences against the interests of the Union. The EPPO Regulation is based on mandatory prosecution rather than on the principle of opportunity. Recital 81 states:

“taking into account the legality principle, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground bars prosecution, or where no simplified prosecution procedure has been applied. The grounds for dismissal of a case are exhaustively laid down in this Regulation.”
- more penalties and recovery of funds and property. The yearly report of the European Commission estimated that fraudulent irregularities/offences amounted to about €500 million annually. In addition, there is a loss of around €50 billion for the Member States and the Union due to cross-border VAT fraud.

¹²A Commission for the reform of criminal procedural law was appointed by the former Belgian Minister of Justice Koen Geens. The Commission made a proposal for a new Code of Criminal Procedure. The redefinition of the role of the investigating judge in the Code was criticized both in practice and in Parliament. The proposal for a new Code is still pending in the Parliament: Proposition de loi contenant le Code de procédure pénale, *Doc.parl.*, Chambre, 2020–2021, no 55-1239/001.

The means and tools for securing these objectives are:

- cooperation, mandatory reporting and mutual exchange of information between the Member State, OLAF, Eurojust, Europol, the European Court of Auditors and other institutions, bodies, offices and agencies of the European Union and of course the European Public Prosecutor's Office;
- central guidance, monitoring and decision-making in the case of EPPO matters; and also more direct and less formalistic cooperation in cross border investigations between EPPO Member States;
- the strengthening and clarification of OLAF's role and the definition of its complementarity with the EPPO. The principle of the relationship between the OLAF and the EPPO will be: complementarity, mutual reporting and information exchange, non-duplication of efforts, and use of the strong analytical capacities of OLAF and its digital forensic team.

6.3 The state of play and future challenges

Most parts of the PIF Directive have been transposed into national legislation. In Belgium, the existence of the PIF Directive has inspired and prompted the legislator to make legal adjustments and amendments, and the case law follows these trends.

However, the EPPO Regulation has not yet been fully incorporated into policy and practice, especially as regards the relationship between prosecutors and judges.

With regard to the European Public Prosecutor's Office, the following data are important to note:

- There are 22 participating Member States using 18 languages;
- The staff will consist of about 130 members at central level in Luxembourg;
- The budget is estimated to be around €45 million;
- In the Member States, a total of 140 European Delegated Prosecutors will carry out the investigations and prosecutions (some have already been appointed);
- The College of 22 European Prosecutors and one European Chief prosecutor has been in place since September 2020 and has already taken important policy and operational decisions, *e.g.*, the Internal Rules of Procedure and working agreements with partners (including OLAF, Eurojust, Europol and others);
- 15 permanent chambers will be set up;
- An estimated 2,000 to 2,500 cases will be dealt with in the relatively short term;
- The real start of the processing of concrete criminal cases will take place within a few weeks to a few months.

7 Conclusion

The PIF Directive and its transposition provide a lot of powers and tools for tackling offences against the financial interests of the European Union, white-collar crime and organized crime. It is also the motor of the functioning and competence of the European Public Prosecutor's Office.

The future will show whether the wider harmonization of criminal law and criminal procedure in the Member States and the creation of the European Public Prosecutor's Office will lead to better investigation of this type of crime and to more extensive cross border cooperation.

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