

## Criminalising Fraud Affecting the Union's Financial Interests. Implications for Romanian Criminal Law

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### Abstract

*At European level, since 1976 – the year of the first draft for a Treaty amending the founding treaties in this respect –, till now – when Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted (after five years of negotiations) –, the legislative process aimed at protecting the European Union financial interests is a long and difficult one.*

*In Romania, distinct criminalization of fraud affecting the European Union's financial interests, in Articles 18<sup>1</sup>-18<sup>3</sup> of Law no 78/2000, according to the definition of criminal offences from Article 1 of the “old” Convention on the protection of the European Communities' financial interests, makes the relevant national legislation comply with the minimum requirements of the above mentioned Directive. Attempting to harmonize in this area, however, has multiple implications for national legislation and, at the same time, for judicial practice in criminal matters.*

**Key words:** *harmonization; criminal law; European criminal law; financial interests; European Union*

### Introduction

On 26 July 1995, almost twenty years after the failure of the first attempt to establish a legal basis for the protection of the European Communities' financial interests in the founding treaties<sup>1</sup>, under the third pillar of the Union the Convention on the protection of the European Communities' financial interests („PIF Convention”) was signed, followed by three protocols (from 27 September 1996 to 19 June 1997). The lack of ratification or inappropriate implementation by the Member States, criticized in two Commission reports, have led the latter to successively attempt to replace them by initiating another harmonization instrument – the *directive* – binding (even if only as to

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<sup>1</sup> Draft for a Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, submitted by the Commission to the Council on 10 August 1976 (OJ C 222, 22.9.1976, p. 2–17).

the result to be achieved) and involving means of "coercion" towards the Member States in the absence of transposition or in the case of inappropriate transposition. Only on 5 July 2017, this process resulted in adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law („PIF Directive”). In the following, after a brief presentation of the harmonization instruments for the protection of the Union's financial interests by means of criminal law at European level, which have entered into force so far (PIF Convention and PIF Directive) (I), we will analyze the implications of the obligation – instituted at European level – to criminalize fraud affecting the financial interests of the Union on Romanian criminal law (II).

## I. Instruments for protecting the Union's Financial Interests by means of Criminal Law at European Level

### 1. *Convention on the protection of the European Communities' Financial Interests of 26 July 1995*

At European level, the first elements to harmonize the protection of the Union's financial interests by means of criminal law were introduced in 1995, when the *Convention on the protection of the European Communities' financial interests* (hereinafter, „PIF Convention”<sup>2</sup>) and the Protocols thereto<sup>3</sup> were adopted. The PIF Convention, in force since 17 October 2002, has been ratified by all Member States<sup>4</sup> and provides, in summary:

- a definition of fraud affecting the European Communities' financial interests, in respect of expenditure and in respect of revenue<sup>5</sup>;

<sup>2</sup> “PIF” is the French acronym for *protection des intérêts financiers* (protection of financial interests), used by the European legislature and also in case-law and legal writings.

<sup>3</sup> The Convention of 26 July 1995 (OJ C 316, 27.11.1995, p. 49–57) (fraud); the Protocol of 27 September 1996 (OJ C 313, 23.10.1996, p. 2) (corruption), the Protocol of 29 November 1996 (OJ C 151, 20.5.1997, p. 2) (the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests) and the Second Protocol of 19 June 1997 (OJ C 221, 19.7.1997, p. 12) (money laundering). Romania and Bulgaria acceded to the Convention and the Protocols thereto according to Council Decision 2008/40/JAI of 6 December 2007 (OJ L 9, 12.1.2008, p. 23–24), and Croatia - according to Council Decision (EU) 2016/815 of 17 May 2016 (OJ L 133, 24.5.2016, p. 9–10).

<sup>4</sup> According to section 4.1 of the Second Commission Report on the Implementation of the Convention for the Protection of the European Communities' financial interests and its protocols (COM(2008)77 final, Brussels, 14.2.2008), almost all Member States ratified the Convention. The other Member States have since ratified the Convention and its protocols as well.

<sup>5</sup> According to Article 1(1) of the Convention, “(...) fraud affecting the European Communities' financial interests shall consist of:

- (a) in respect of expenditure, any intentional act or omission relating to:
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
  - non-disclosure of information in violation of a specific obligation, with the same effect,
  - the misapplication of such funds for purposes other than those for which they were originally granted;
- (b) in respect of revenue, any intentional act or omission relating to:

- the obligation for Member States to criminalize fraud affecting the European Communities' financial interests and to provide for effective, proportionate and dissuasive criminal penalties, including – at least in cases of serious fraud – penalties involving deprivation of liberty which can give rise to extradition<sup>6</sup>;

- criminal liability of heads of businesses in cases of fraud affecting the European Community's financial interests, by a person under their authority acting on behalf of the business<sup>7</sup>;

- rules on the application of the criminal law in cases with foreign elements, extradition and transfer of proceedings, international cooperation and the application of the *ne bis in idem* principle;

- the jurisdiction of the Court of Justice of the EU to solve any dispute between Member States concerning the interpretation or application of the Convention and any dispute between one or more Member States and the Commission, concerning the application of Article 1 or 10 of the Convention.

*The first Protocol to the Convention on the protection of the European Communities' financial interests*, in force since 17 October 2002, includes definitions of the terms 'official', 'Community official' and 'national official', as well as 'passive corruption' and 'active corruption', and provisions on the need to criminalize and harmonize punishments for acts of corruption affecting or likely to prejudice the financial interests of the European Communities by requiring Member States to provide for "effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition"<sup>8</sup>.

*The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests*, in force since 17 October 2002, provides for the possibility for national courts to request the Court of Justice to give a preliminary ruling on a question concerning the interpretation of the Convention and the first Protocol thereto.

*The Second Protocol to the Convention on the protection of the European Communities' financial interests*, in force since 19 May 2009, provides for the liability of legal persons, confiscation, money laundering and cooperation between the Member States and the Commission in order to protect the financial interests of the European Communities and personal data.

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

- non-disclosure of information in violation of a specific obligation, with the same effect,

- misapplication of a legally obtained benefit, with the same effect".

<sup>6</sup> According to Article 2 of the Convention, *serious fraud* shall be considered to be fraud involving a minimum amount to be set in each Member State, of at least 50.000 Euro; however, in cases of *minor fraud* involving a total amount of less than 4.000 Euro and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type.

<sup>7</sup> According to Article 3 of the Convention, „Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud affecting the European Community's financial interests, as referred to in Article 1, by a person under their authority acting on behalf of the business.”.

<sup>8</sup> Article 5(1) of the first Protocol to the Convention.

The legal framework established by the Convention on the protection of the European Communities' financial interests and the Protocols thereto has been complemented by *general measures in the field of criminal law* applicable at Union level, including in matters relating to the protection of its financial interests, regarding the confiscation of any instruments, proceeds or other property related to crime, as well as combating other illegal activities affecting licit economy, such as money laundering and corruption.

## **2. Directive (EU) 2017/1371 of the European Parliament and of the Council on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law**

On 5 July 2017 the Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law<sup>9</sup> (hereinafter, „PIF Directive”) was adopted, with deadline for transposition 6 July 2019. The Directive is based on Article 83(2) of the Treaty on the Functioning of the European Union (TFEU)<sup>10</sup> and replaces, starting with the deadline for transposition, the Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto – of 27 September 1996, of 29 November 1996 and of 19 June 1997 –, for the Member States bound by it, for which references to the Convention shall be construed as references to the Directive<sup>11</sup>.

**2.1. Subject matter and scope.** The Directive establishes *minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests*, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the acquis of the Union in this field.<sup>12</sup>

<sup>9</sup> OJ L 198, 28.7.2017, p. 29–41.

<sup>10</sup> The Commission considered, however, that the legal basis of the Directive should have been Article 325(4)

TFEU (indicated in the initial proposal), and reserved its right to initiate legal proceedings about the legal basis before the Court of Justice. [COM(2017) 246 final, Brussels, 16.5.2017 (Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at first reading with a view to the adoption of 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)].

<sup>11</sup> Article 16 of PIF Directive. Under the latter aspect, it should be noted that Ireland has notified its wish to take part in the adoption and application of the Directive. Denmark and the United Kingdom have not taken part in the adoption of the Directive and are not bound by it or subject to its application (See recitals (36) to (38) of the PIF Directive). Denmark will be therefore still bound by its obligations under the Convention on the protection of the European Communities' financial interests of 26 July 1995 and the Protocols thereto. As regards the United Kingdom, in July 2014 (before the expiry of the transitional period, on 1 December 2014), according to Article 10(4) of Protocol (No 36) on transitional provisions, it has notified to the Council that it does not accept the powers of the Commission and of the Court of Justice of the European Union as set out in the Treaties, with respect to the acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon, including the PIF Convention and the Protocols thereto (See Council Communication of 1 December 2014, *UK's block opt-out and partial re-opt-in to the ex-third pillar acquis*, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/145981.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145981.pdf)).

<sup>12</sup> Article 1 of PIF Directive

As the 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<sup>13</sup>, for example by extending the definition of the criminal offences in question or imposing penalties beyond the required limits.

**The inclusion of VAT fraud** within the scope of the PIF Directive, originally proposed by the Commission<sup>14</sup> – following the judgment of the Court of Justice of the European Union (CJEU) of 15 November 2011 – *European Commission v Federal Republic of Germany*<sup>15</sup> and according to the opinion of the European Court of Auditors in this respect<sup>16</sup> –, has been the subject of wide-ranging debates. In the majority, Member States (including Romania) have opposed the inclusion of value added tax (VAT) fraud within the scope of the Directive. In this regard, besides arguments relating to EU and Member States competences in the area of tax law, the main argument was based on “the lack of proportionality: (...) as only a very small portion of the VAT revenues collected by national Tax administrations is transferred into the budget of the EU, and as national protection mechanisms are already in place”<sup>17</sup>.

After a general approach was reached in Council June 2013, on the proposal for a Directive, following the fifth trilogue on 2 June 2015 the negotiations were interrupted, mainly for the reason that the Parliament could not accept the exclusion of VAT – related fraud from the scope of the Directive<sup>18</sup>.

The discussion on the inclusion of fraud with VAT in the draft PIF-Directive was revived as a result of the CJEU Judgment of 8 September 2015, in case *Ivo Taricco and others*, where the Court held, inter alia, that the concept of ‘fraud’ is defined in Article 1 of the PIF Convention as „any intentional act or omission relating to [...] the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European [Union] or budgets managed by, or on behalf of, the European [Union]”, and it „therefore covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules”<sup>19</sup>.

Finally, on 30 November 2016, the Council and the European Parliament have reached a compromise solution<sup>20</sup>, in the sense that PIF Directive shall apply „only in

<sup>13</sup> Recital (16) of PIF Directive

<sup>14</sup> COM(2012) 363 final, 11.7.2012, p. 9.

<sup>15</sup> CJEU (Grand Chamber), Judgment of 15 November 2011, *European Commission v Federal Republic of Germany*, C-539/09, EU:C:2011:733.

<sup>16</sup> Opinion No 8/2012 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 (pursuant to Article 325 of the Treaty on the Functioning of the European Union) Avizul nr.8/2012 al Curții de Conturi Europene (prezentat în temeiul articolului 325 TFEU) (OJ C 383, 12.12.2012, p. 1–2), point 8.

<sup>17</sup> See Note with the subject “Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interest by means of criminal law (first reading) = Policy debate/Progress report”, no 12686/16, Brussels, 30 September 2016, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_12686\\_2016\\_INIT&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_12686_2016_INIT&from=EN).

<sup>18</sup> See Note with the subject „PIF: 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 (First reading) = Progress report”, no 15130/16, Brussels, 2 December 2016, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_15130\\_2016\\_INIT&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15130_2016_INIT&from=EN).

<sup>19</sup> CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 41.

<sup>20</sup> See „A” Item Note, no 5478/17, Brussels, 1 February 2017, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_5478\\_2017\\_INIT&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5478_2017_INIT&from=EN).

cases of serious offences against the common VAT system”, namely where the intentional acts or omissions “are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000”<sup>21</sup>.

**2.2. Fraud affecting the Union's financial interests.** Fraud affecting the Union's financial interests is defined in Article 3(2) of the PIF Directive. In addition to fraud affecting the Union's financial interests, PIF Directive provides for a number of other criminal offences, “related” to it (according to the original proposal). These are “money laundering” (involving property derived from the criminal offences covered by the directive), “passive corruption”, “active corruption” and “misappropriation”, which are not the subject of the present analysis.

Fraud affecting the Union's financial interests is structured, following the model of the PIF Convention, on two categories: *fraud in respect of expenditure*<sup>22</sup>, with separate mention of fraud in respect of *procurement-related expenditure*<sup>23</sup>, and *fraud in respect of revenue*<sup>24</sup>, with a distinct definition of fraud in respect of *revenue arising from VAT own resources*<sup>25</sup>.

**2.3. The need to criminalise.** PIF Directive sets out for the Member States the obligation to criminalize, inter alia, the acts or omissions defined in Article 3, when committed *intentionally*<sup>26</sup>, including the *attempt* to commit them<sup>27</sup>.

*Aiding and abetting* the commission of any of the criminal offences referred to in Article 3 are also punishable as criminal offences<sup>28</sup>.

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<sup>21</sup> Article 2(2) of PIF Directive.

<sup>22</sup> „(...) any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted” (Article 3(2) (a) of PIF Directive).

<sup>23</sup> „(...) at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests” (Article 3(2) (b) of PIF Directive).

<sup>24</sup> „(...) any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) misapplication of a legally obtained benefit, with the same effect” (Article 3(2) (c) of PIF Directive).

<sup>25</sup> „(...) any act or omission committed in cross-border fraudulent schemes in relation to: (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; (ii) non-disclosure of VAT – related information in violation of a specific obligation, with the same effect; or (iii) the presentation of correct VAT – related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds” (Article 3(2) (d) of PIF Directive).

<sup>26</sup> Criminal offences which do not require intention are not covered by the Directive. The intentional nature of an act or omission may be inferred from objective, factual circumstances. [recite (11) of PIF Directive].

<sup>27</sup> Article 5(2) of PIF Directive.

<sup>28</sup> Article 5(1) of PIF Directive.

**2.4. Liability of legal persons.** PIF Directive requires liability of legal persons for any of the criminal offences referred to in Article 3, where:

- any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person [based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person] committed any of the criminal offences referred to in Articles 3 for the benefit of that legal person<sup>29</sup>;
- the lack of supervision or control by a person referred to above has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Article 3 for the benefit of that legal person<sup>30</sup>.

For the purposes of the PIF Directive, “legal person” means “an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations”<sup>31</sup>.

Liability of legal persons shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences<sup>32</sup>.

**2.5. Sanctions.** PIF Directive provides for the Member States to ensure that the criminal offences affecting the Union's financial interests are punishable by *effective, proportionate and dissuasive criminal sanctions*, both for natural and for legal persons<sup>33</sup>, while setting up, separately, a set of minimum rules that these sanctions must meet for the two categories of persons mentioned above:

**A. Referring to *sanctions with regard to natural persons*,** PIF Directive stipulates:

- a maximum penalty which provides for imprisonment<sup>34</sup>;
- a maximum penalty of at least four years of imprisonment when the criminal offence involves *considerable* damage or advantage (more than EUR 100 000)<sup>35</sup>;
- an aggravating circumstance where a criminal offence referred to in Article 3 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA<sup>36</sup>, mentioning that “Member States are not obliged to provide for this 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”<sup>37</sup>.

At the same time, Member States may provide for sanctions other than criminal sanctions, where the criminal offence involves damage or an advantage of less than EUR 10 000<sup>38</sup>, and the competent authorities may exercise disciplinary powers against public officials<sup>39</sup>.

<sup>29</sup> Article 6(1) of PIF Directive.

<sup>30</sup> Article 6(2) of PIF Directive.

<sup>31</sup> Article 2(1) (b) of PIF Directive.

<sup>32</sup> Article 6(3) of PIF Directive.

<sup>33</sup> Article 7(1) and Article 9(1) of PIF Directive.

<sup>34</sup> Article 7(2) of PIF Directive.

<sup>35</sup> Article 7(3) of PIF Directive.

<sup>36</sup> Article 8 of PIF Directive. According to Article 1.1 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42–45), “criminal organisation” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit”.

<sup>37</sup> Recital (19) of PIF Directive.

<sup>38</sup> Article 7(4) of PIF Directive.

<sup>39</sup> Article 7(5) of PIF Directive.

**B.** Referring to *sanctions with regard to legal persons*, these shall include criminal or non-criminal fines and may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from public tender procedures; (c) temporary or permanent disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) judicial winding-up; (f) temporary or permanent closure of establishments which have been used for committing the criminal offence<sup>40</sup>.

Given the wide differences between the Member States' legislation on the liability of legal persons, the Directive does not require a *criminal* fine and the other sanctions are provided as an example.

### **2.6. Limitation periods for criminal liability and the enforcement of penalty.**

Another novelty of the PIF Directive is the attempt to approximate the provisions on limitation periods for criminal liability and the enforcement of penalty, for fraud affecting the Union's financial interests.

It thus establishes the need to provide provide for a limitation period that enables the investigation, prosecution, trial and judicial decision for a sufficient period of time after the commission of the criminal offences, in order for those criminal offences to be tackled effectively<sup>41</sup>, respectively, for those which are punishable by a maximum sanction of at least four years of imprisonment, for a period of at least five years from the time when the offence was committed<sup>42</sup> or shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts<sup>43</sup>.

According to PIF Directive, *limitation periods for the enforcement of penalty*, for at least five years from the date of the final conviction (which may include extensions of the limitation period arising from interruption or suspension), are required for the the enforcement of: (a) a penalty of more than one year of imprisonment; or alternatively, (b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least four years of imprisonment<sup>44</sup>.

## **II. The Obligation to Criminalize Fraud Affecting the Union's Financial Interests. Implications on Romanian Criminal Law**

PIF Convention (as well as the Protocols thereto) has been ratified by all EU Member States, but most of them opted to criminalise fraud affecting the Union's financial interests under the Criminal Code by assimilating the Union's financial interests to the national ones, without defining "fraud" according to the Convention.

In this context, *the fragmentation of existing national criminal law provisions* on the protection of the European Union's financial interests, the *updating of the definitions of offenses* affecting the Union's financial interests, which include those in respect of revenue arising from VAT own resources and misappropriation, plus *the need to approximate sanctions* (including liability of legal persons and sanctions with regard to

<sup>40</sup> Article 9 of PIF Directive.

<sup>41</sup> Article 12(1) of PIF Directive.

<sup>42</sup> Article 12(2) of PIF Directive.

<sup>43</sup> Article 12(3) of PIF Directive.

<sup>44</sup> Article 12(4) of PIF Directive.



natural persons) and *limitation periods*, as proposed more recently by the PIF Directive, imply important changes to Member States' criminal law, especially those that focus on financial sanctions for economic crime.

### 1. Criminalising Fraud Affecting the Union's Financial Interests

In Romania, in 2003, fraud affecting the Union's financial interests constitutes a criminal offence according to Articles 18<sup>1</sup>-18<sup>3</sup> of Law no. 78/2000<sup>45</sup>, with a similar definition to the one provided by Article 1 of the PIF Convention, although the acts or omissions were circumscribing some of the already existing criminal offenses (fraud or misappropriation, forgery and abuse of office, referring to the Criminal Code alone)<sup>46</sup>. Its provisions have been modified following the entry into force of the New Criminal Code, by Law no. 187/2012, for the implementation of Law no 286/2009 on the Criminal Code<sup>47</sup>, in general in the sense of reducing penalties.

The abovementioned texts comply with the definition of fraud from Article 1 of PIF Convention and, in our opinion, also comply with the minimum requirements of Article 3 of PIF Directive. The need to ensure a system of protection for the Union's financial

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<sup>45</sup> Section 4<sup>1</sup> (Articles 18<sup>1</sup>-18<sup>5</sup>) of Law no 78/2000 on preventing, discovering and sanctioning of corruption acts – *Criminal offences against the European Union's financial interests* - was introduced by Book II Title I Article I point 18 of the Law no. 161/2003; its title was amended by Article 79 point 11 of Law no. 187/2012 (replacing the phrase "European Communities" with that of "European Union").

According to Articles 18<sup>1</sup>(1) and (2) and 18<sup>3</sup>(1) and (2) of Law no. 78/2000 the following acts or omissions shall be punished by imprisonment from 2 to 7 years and the interdiction of certain rights:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the wrongful obtaining of funds from the Union budget or budgets managed by the Union, or on its behalf;

- the intentionally non-disclosure of information, in violation of a specific obligation, in order to obtain funds from the Union budget or budgets managed by the Union, or on its behalf, which has as its effect the wrongful obtaining of those funds;

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;

- the intentionally non-disclosure of information, in violation of a specific obligation, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf.

According to Article 18<sup>2</sup>(1) and (2) of Law no. 78/2000, the following acts or omissions shall be punished by imprisonment from 1 to 5 years and the interdiction of certain rights:

- the misapplication of funds from the Union budget or budgets managed by the Union, or on its behalf for purposes other than those for which they were originally granted;

- misapplication of a legally obtained benefit, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf.

According to Articles 18<sup>1</sup>(3), 18<sup>2</sup>(3) and 18<sup>3</sup>(3) of Law no. 78/2000, if the abovementioned offences have caused particularly serious consequences ("a material damage exceeding 2,000,000 RON", according to Article 183 CC), the special penalty limits increase by half.

According to Article 18<sup>4</sup> of Law no. 78/2000, the attempt to commit any of the criminal offences referred to in Articles 18<sup>1</sup>, 18<sup>2</sup> and 18<sup>3</sup> is punishable as a criminal offence (and the special penalty limits are reduced by half, as it is stipulated in Article 33 (2) CC).

<sup>46</sup> Regarding the necessity of a special incrimination, it was argued in the legal literature that "fraud affecting the Community budget under the incidence of the Romanian criminal law could only be partially sanctioned on the basis of existing provisions". (George Antoniu, *Protecția penală a intereselor financiare ale Comunităților Europene*, in *Revista de drept penal*, no 2/2002, p. 9-18).

<sup>47</sup> Romanian Official Journal no. 757 o 12 November 2012.

interests equivalent to that recognized for national financial interests would, however, require that, fraud in respect of Union's revenue, shall constitute one of the criminal offences provided by Articles 270, 272 and 273 of the Romanian Customs Code and Articles 8 or 9(1) point c) of Law no 241/2005 (to prevent and combat tax evasion), prior to the one provided by Article 18<sup>3</sup> of Law no 78/2000 (which would have a subsidiary character). The transposition of Article 3(2) point (b) of PIF Directive, providing for fraud „in respect of procurement-related expenditure”, does not imply a new distinct criminal offence in Romanian criminal law, as these facts already constitute criminal offences, under Articles 18<sup>1</sup> and 18<sup>2</sup> of Law no. 78/2000, according to a unitary judicial practice in this respect, and the obligation to interpret national law in accordance with European Union law prohibits any change in that regard.

## 2. Liability of Natural Persons and Legal Persons for Fraud Affecting the Union's Financial Interests

Regarding the *liability of natural persons*, strictly referring to fraud affecting the European Union's financial interests (defined in Article 3 of the PIF Directive), since the offenses provided by art. 18<sup>1</sup>-18<sup>3</sup> of Law no. 78/2000 do not require a qualified subject, the transposition of the Directive does not entail modification of the Romanian legislation.

As for criminal participation, inciting, aiding and abetting the commission of fraud affecting the European Union's financial interests provided by art. 18<sup>1</sup>-18<sup>3</sup> of Law no. 78/2000 are punishable as criminal offences (in the same conditions as the author of the offence); therefore, the Romanian law corresponds to the obligation stipulated by Article 5 (1) of the PIF Directive, on punishing incitement, aiding and abetting.

Regarding the *liability of legal persons*, in Romanian criminal law, the general criminal liability of legal persons has been regulated since 2006 (Article 19<sup>1</sup> of Romanian Criminal Code of 1969<sup>48</sup> and Article 135 of Romanian Criminal Code of 2009, in force) and meets the requirements of Article 2(1) point (b) of the PIF Directive<sup>49</sup>. According to Romanian criminal law, there shall be liable legal persons<sup>50</sup> of private law, for profit or non-profit, after they have been legally constituted and until the closure of

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<sup>48</sup> Article 19<sup>1</sup> of the Romanian Criminal Code of 1969 was introduced by Article I point 1 of the Law no. 278/2006, amending and supplementing the Criminal Code (Romanian Official Journal no 601 of 12 July 2006), and according to Article VIII of the same Act, the provisions regarding legal persons entered into force 90 days after the date of publication (on 10 October 2006). Law no. 301/2004 – Criminal Code (Romanian Official Journal no 575 of 29 June 2004), the first law which established the criminal liability of legal persons as a principle, in Article 45, has never entered into force. For details on the regulation of criminal liability of legal persons in Romania, see Andra-Roxana Ilie, *Angajarea răspunderii penale a persoanei juridice*, C.H. Beck Publishing House, Bucharest, 2011, p. 15 ss.

<sup>49</sup> See *supra*, part I, point 2.4.

<sup>50</sup> *Legal personality* is a necessary condition for the criminal liability of legal persons in Romanian law, as shown by the literal interpretation of Article 135 CC; the literature in this sense (Andra-Roxana Ilie, *op. cit.*, p.56-66; Laura Maria Stănilă, *Răspunderea penală a persoanei juridice*, Hamangiu Publishing House, Bucharest, 2012, p.114-118) has recently been confirmed by the High Court of Cassation and Justice, The Panel for Clarification of Legal Aspects, who stated that „the individual undertaking, type of economic activity organised by an entrepreneur, under the provisions of Urgency Ordinance of the Government no 44/2008, does not have the status of a legal person and therefore cannot be held liable under the conditions set out in the Article 135 CC” (Decision no 1/2016, published in Romanian Official Journal no 138 of 23 February 2016).

their liquidation formalities<sup>51</sup>, as well as legal persons governed by public law, except for the State, public authorities<sup>52</sup> and public institutions, in the case of the latter, whether the offense was committed in the exercise of an activity which is not subject to the private domain<sup>53</sup>. These conditions are complying with the requirements laid down in Article 2(1) point (b) of the PIF Directive.

### 3. Sanctions for Fraud Affecting the Union's Financial Interests

***In the case of natural persons***, in Romania, for fraud affecting the Union's financial interests, the law provides for a penalty over the minimum of four years of imprisonment, regardless of the amount of the damage, so that the PIF Directive does not require national legislation to be amended in this respect either.

The Romanian law already fulfills the requirements of Article 8 of PIF Directive<sup>54</sup>: committing the offence "within a criminal organisation" has even more serious consequences than the one foreseen there – considering it as an aggravating circumstance (which is, however, also provided in Romanian criminal law<sup>55</sup>) –, providing for a second, separate criminal offence, provided by Article 367 CC ("the organized crime group")<sup>56</sup>.

According to Article 136 of the Romanian Criminal Code (CC), ***penalties applicable to the legal persons*** are criminal fine<sup>57</sup>, as the main penalty, and complementary penalties: a) dissolution; b) suspension of the activity or of one of the activities (for a period ranging from three months to three years); c) closure of some establishments (for a period ranging from three months to three years); d) exclusion from public procurement tenders (for a period ranging from one year to three years); e) placement under judicial supervision (for a period ranging from one year to three years); f) publication of the judgement. The penalty provided by Article 136(3) (d) CC - exclusion from public procurement tenders -, as opposed to the corresponding sanctions laid down by Article 9 points (a) and (b) of PIF Directive ("exclusion from entitlement to public benefits or aid" and „exclusion from public tender procedures”), refers only to the possibility of participating in „public procurement tenders”, and not to „public benefits or aid”; at the same time, this penalty, as well as the placement under judicial supervision are limited in time, although the Directive does not provide for such a

<sup>51</sup> Andra-Roxana Ilie, *op. cit.*, p. 66-82.

<sup>52</sup> According to Article 240 of Law no. 187/2012, for the implementation of Law no. 286/2009 on the Criminal Code (Romanian Official Journal no. 757 of 12 November 2012), „*In applying the provisions of Article 135 of the Criminal Code, public authorities are the authorities expressly provided for in Title III, as well as in Articles 140 and 142 of the Romanian Constitution [the Parliament, the President of Romania, The Government, Public Administration authorities, Judicial Authority, the Court of Audit and the Constitutional Court - a.n.]*”.

<sup>53</sup> Andra-Roxana Ilie, *op. cit.*, p.82-98. For the analysis of the criminal liability of public institutions, see also Viorel Pașca, in Matei Basarab (coordinator), *Codul penal comentat. Vol. I. Partea generală*, Hamangiu Publishing House, Bucharest, 2007, p. 105-106.

<sup>54</sup> “where a criminal offence referred to in Article 3, (...) sau 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA, this shall be considered to be an aggravating circumstance”.

<sup>55</sup> According to Article 77(a) of the Romanian Criminal Code (CC), „committing the deed of three or more people together” is an aggravating circumstance.

<sup>56</sup> This possibility is mentioned, however, expressly, in recital (19) of PIF Directive.

<sup>57</sup> Article 137(2) - (5) CC.

limit<sup>58</sup>. As sanctions under Article 9 points (a) to (f) are optional, and the enumeration - exemplary (the expression being that „*may include other sanctions, such as – a.n.*”), the fulfillment of the general condition of the “effective, proportionate and dissuasive sanctions” is rather a matter of interpretation and enforcement of the law, to be considered by the national court in the sanctioning process, and it is not for the national legislature to enact any special rule transposing those provisions.

#### 4. Limitation Periods for Criminal Liability and the Enforcement of Penalty for Fraud Affecting the Union's Financial Interests

In Romania, taking into account the limits of penalties for criminal offences affecting the Union's financial interests provided by Law no 78/2000, **limitation periods for criminal liability** are of 5 years (for criminal offences provided by Articles 18<sup>2</sup> and 18<sup>5</sup>) and of 8 years (for criminal offences provided by Articles 18<sup>1</sup> and 18<sup>3</sup>)<sup>59</sup>, including for the attempted or qualified form of the offenses<sup>60</sup>, both for natural and for legal persons<sup>61</sup>. The limitation periods shall be interrupted by any procedural act in that case<sup>62</sup>, but an interruption of the limitation period may give rise to an extension of that period by no more than the maximum prescribed period<sup>63</sup>; thus the maximum limitation periods are of 10 years and 16 years respectively. The Romanian legal provisions meet the minimum requirements from Article 12(1), (2) and (3) of PIF Directive, and are also in compliance with the principle of equivalence laid down by Article 325(2) TFEU<sup>64</sup>, whereas they are the same as those applicable to offenses of “illegal obtaining of funds”, provided by Article 306 CC, și “misappropriation of funds”, provided by Article 307 CC, which protect the national budget.

The importance of the (special) limitation period for criminal liability for the fulfillment of the Member States' obligation to combat fraud affecting the Union's financial interests has been highlighted in a relatively recent CJEU ruling, in *Taricco and Others*<sup>65</sup>, where the Court stated that „a national rule in relation to limitation periods for criminal offences (...) which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial

<sup>58</sup> Article 9(a) does not provide for the temporary or permanent nature of the prohibition, as in the case of the sanctions provided for in points (b), (c) și (d) of the same Article.

<sup>59</sup> According to Article 154 CC: „(1) Limitation periods for criminal liability are the following: (...) c) 8 years, when the law provides for the offense a term of imprisonment of more than 5 years, up to 10 years; d) 5 years, when the law provides for the offense a term of imprisonment of more than one year, up to 5 years; (...). (2) Limitation periods (...) start to run from the date when the offence was committed. In the case of continuing offenses, the term shall run from the date on which the act or omission, or the last act or omission ceased (...)”.

<sup>60</sup> According to Article 187 CC, „By punishment provided by law is meant the punishment provided by the law that criminalizes the act committed in the form consumed, without taking into consideration the causes of reduction or increasing of punishment”.

<sup>61</sup> According to Article 148 CC, „criminal liability of legal persons is submitted to limitation periods provided by law for natural persons”.

<sup>62</sup> Article 155(1) CC.

<sup>63</sup> Article 155(4) CC.

<sup>64</sup> „Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.”

<sup>65</sup> CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555.

duration<sup>66</sup>, is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union". Moreover, by the same judgment, the Court also stated that "in the event that the national court concludes that the national provisions at issue do not satisfy the requirement of EU law (...), that court would have to ensure that EU law is given full effect, if need be by disapplying those provisions", „without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure"<sup>67</sup>, but "it must also ensure that the fundamental rights of the persons concerned are respected"<sup>68</sup>.

CJUE Judgment in *Taricco and others* Case sparked vivid controversy in legal literature<sup>69</sup> and judicial practice<sup>70</sup> and generated, in less than a year and a half, a new request for a preliminary ruling made from the Italian Constitutional Court („Corte Costituzionale"), by Order no. 24/2017<sup>71</sup>, lodged on 26 January 2017<sup>72</sup>. The case also brought into question the legal nature of the limitation period for criminal liability in the

<sup>66</sup> In the main proceedings, according to Italian law, the limitation period for criminal liability is of 6 years and cannot, in any circumstances, be extended for more than one quarter (so the total period was 7 years and 6 months maximum), no matter how many interruptions would occur.

<sup>67</sup> CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 49 and the case-law cited.

<sup>68</sup> *Idem*, pct.53.

<sup>69</sup> Emmanouil Billis, *The European Court of Justice: A "Quasi-Constitutional Court" in Criminal Matters? The Taricco Judgment and Its Shortcomings*, in *New Journal of European Criminal Law*, Vol. 7, Issue 1, 2016, p. 20-38; Michele Caianiello, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?*, 24 February 2017, available at [http://www.penalecontemporaneo.it/foto/DPC\\_Riv\\_Trim\\_2\\_17.pdf#page=225&view=fit](http://www.penalecontemporaneo.it/foto/DPC_Riv_Trim_2_17.pdf#page=225&view=fit), and the legal literature cited.

<sup>70</sup> Some courts directly performed the *Taricco* case and disappplied the national rules with strong effects in malam partem for the defendants of that case (Italian Court of Cassation, 3<sup>rd</sup> division, 2210/16, 17 September 2015, Def. *Pennacchini - apud* Stefano Bissaro, *The „Taricco" case and the courts' power to create new criminal law: strained dialogue between the Italian Constitutional Court and the European Court of Justice*, available at [https://ddd.uab.cat/pub/poncom/2017/176433/Stefano\\_Bissaro\\_The\\_Taricco\\_case\\_and\\_the\\_courts\\_power\\_to\\_create\\_new\\_criminal\\_law\\_strained\\_dialogue\\_between\\_the\\_Italian\\_Constitutional\\_Court\\_ICC\\_and\\_the\\_European\\_Court\\_of\\_Justice\\_ECJ.pdf](https://ddd.uab.cat/pub/poncom/2017/176433/Stefano_Bissaro_The_Taricco_case_and_the_courts_power_to_create_new_criminal_law_strained_dialogue_between_the_Italian_Constitutional_Court_ICC_and_the_European_Court_of_Justice_ECJ.pdf)) or decided to apply the national provisions holding that the double conditions provided by the ECJ for the disapplication were not met (Italian Court of Cassation, 4<sup>th</sup> division, 7914/16, 25 January 2016, Def. *Tormenti and others - ibidem*).

<sup>71</sup> The Order is available at <http://www.giurcost.org/decisioni/2017/0024o-17.html>, and in English at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/O\\_24\\_2017.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf).

<sup>72</sup> *M.A.S. and M.B.*, C-42/17. In the main proceedings, the Milan Court of Appeal (6421/15, 18 September 2015, Def. *De Bortoli and others*) and the Italian Court of Cassation, 3<sup>rd</sup> division (28364/16, 30 March 2016, Def. *Cestari and others*) have referred to the Italian Constitutional Court a question concerning Article 2 of Law no 130 of 2 August 2008, insofar as it authorises the ratification and gives legal effect to Article 325(1) and (2) TFEU, as interpreted by the judgement *Taricco* (see Stefano Bissaro, *op. cit.*).

By Order of 28 February 2017 (EU:C:2017:168), the President of the Court decided that the reference for a preliminary ruling is to be determined pursuant to an expedited procedure, according to Article 105(1) of the Rules of Procedure of the Court of Justice. Opinion of Advocate General Bot was delivered on 18 July 2017 (EU:C:2017:564); yet, the Court's judgement has not been delivered at the time of writing this article (28.09.2017).

Member States: institution of substantial criminal law (subject to the principle of retroactivity of the more lenient criminal law)<sup>73</sup> or of procedural criminal law (subject to the principle of immediate application of the law – *tempus regit actum*)<sup>74</sup>? Regarding the application of limitation period rules and the possibility of their retroactivity *in malam partem*, we must take into account the general principles laid down in the case-law of the European Court of Human Rights (ECHR)<sup>75</sup>, in *Coëme and others v. Belgium*<sup>76</sup>, *Previti v. Italy*<sup>77</sup> and *Cristian Borcea v. Romania*<sup>78</sup>, that the immediate application of a law extending the limitation periods does not breach Article 7 of the European Convention on Human Rights (ECHR). For the purpose of Article 7 of the Convention and, implicitly, Article 49 of Charter of Fundamental Rights of the European Union (CFREU), limitation periods for criminal liability fall within the scope of criminal procedural law<sup>79</sup> and are governed by the *tempus regit actum* rule; so it remains to be determined to what extent the provisions of Article 52(3) CFREU allows for the prior application of national law, namely the non-retroactivity of a law modifying the rules on limitation if it is not in favor of the accused, as a result of its classification as substantive criminal law at the national level.

In this regard, the CJEU has already ruled, in the *Melloni* Case, that the interpretation according to which Article 53 CFREU gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its Constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law can not be accepted<sup>80</sup>.

Therefore, irrespective of the internal legal provisions (even constitutional ones) that qualify the limitation periods for criminal liability as an institution of substantive criminal law, they can be removed from retroactive application, even to the detriment of the accused, under the conditions laid down by the CJEU in *Taricco and others*<sup>81</sup>.

The previous reasoning could also apply to Romanian legislation (in the unlikely situation where limitation periods would prove to be too short and would create a risk

<sup>73</sup> In the Hellenic Republic, the Kingdom of Spain, the Republic of Latvia, Romania or the Kingdom of Sweden, the limitation rules, as in Italy, form part of substantive criminal law. (*ibidem*, note no 13).

<sup>74</sup> In the Kingdom of Belgium, the Federal Republic of Germany and the French Republic the limitation rules are considered to be procedural rules. (*ibidem*, note no 13).

<sup>75</sup> According to Article 52(3) CFREU, „In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”.

As it results from the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02, OJ C 303, 14.12.2007, p. 17–35), for Article 49(1) (with the exception of the last sentence) and (2) CFREU both the meaning and the scope are the same as Article 7 of the ECHR.

<sup>76</sup> ECHR, Judgement of 22 June 2000, final 18.10.2000, CE:ECHR:2000:0622JUD003249296.

<sup>77</sup> ECHR, Decision of 12 February 2013, CE:ECHR:2013:0212DEC000184508.

<sup>78</sup> ECHR, Decision of 22 September 2015, CE:ECHR:2015:0922DEC005595914.

<sup>79</sup> Although in *Taricco and others* (paragraph 57), the Court refers to those set out by the ECHR as regards the criminal procedural nature of limitation periods, it should be noted that the PIF Directive, including the approximation of limitation periods, was adopted on the basis of Article 83(2) TFEU, which refers to "the definition of criminal offences and sanctions"; the original legal basis proposed by the Commission (Article 325 TFEU) was changed during the legislative process (see *supra*, note no 10).

<sup>80</sup> CJEU (Grand Chamber), Judgment of 26 February 2013, *Stefano Melloni v Ministero Fiscal*, C-399/11, EU:C:2013:107, paragraphs 56-57.

<sup>81</sup> In this regard, the Advocate General's Opinion from 18 July 2017, in case *M.A.S. and M.B.*, C-42/17, *cit. supra* (note no 72).

of impunity for fraud affecting the Union's financial interests), as limitation periods for criminal liability is an institution of substantive criminal law - according to literature as well as the judicial practice<sup>82</sup> -, and it is submitted, therefore, to the principle of the more lenient law, provided by Article 15(2) of the Romanian Constitution<sup>83</sup>.

Regarding the **limitation periods for the enforcement of penalty**, according to Romanian criminal law system, it is an institution of substantive criminal law as well<sup>84</sup> which, according to Article 161(1) CC, prevent the enforcement of the primary punishment<sup>85</sup>; the limitation periods relevant to the criminal offenses under review

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<sup>82</sup> See Vasile Teodorescu, in George Antoniu, Tudorel Toader (coordinators), *Explicațiile noului Cod penal*, vol. II, Universul Juridic Publishing House, Bucharest, 2015, p.456; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Universul Juridic Publishing House, București, 2014, p. 400; Florin Streteanu, *Considerații privind modificarea Codului penal prin Legea nr. 27/2012*, in *Caiete de drept penal*, no 1/2012, p. 11-22; Vintilă Dongoroz e.a., *Explicații teoretice ale codului penal român, Partea generală*, vol. II, Ediția a II-a, Academia Română and ALL BECK Publishing Houses, Bucharest, 2003, p.341; Vintilă Dongoroz, *Drept penal* (re-editing the 1939 edition), Bucharest, 2000, p.570. It has also been mentioned that "limitation period for criminal liability appears as a legal institution with effects both on the level of substantive criminal law, being a condition of punishment, as well as on the level of the criminal procedural law, being a condition of procedibility, the fulfillment of the limitation period preventing the exercise of the criminal proceedings" (Viorel Pașca, in Matei Basarab (coordinator), *op. cit.*, p.630). Following the amendments to the Romanian Criminal Code of 1969 by Law no 27/2012, increasing the special limitation period and causing the referral to the Romanian Constitutional Court, an opinion was also expressed regarding the reconsideration of the legal nature of the limitation period for criminal liability and its inclusion in the area of criminal procedural law (See Florin Plopeanu, *Prescripția răspunderii în dreptul penal sau cum o eroare a creat un mit*, 14.11.2013, available at <https://www.juridice.ro/291577/prescriptia-raspunderii-in-dreptul-penal-sau-cum-o-eroare-a-creat-un-mit.html>).

Romanian Constitutional Court has stated, by Decision no 1092/2012 (Romanian Official Journal no 67 of 31 January 2013), „the provisions of Article 124 of the Criminal Code (Article 124 of the Criminal Code of 1969, entitled "Special limitation period"- a.n.) (...) are constitutional insofar as they do not prevent the application of more lenient criminal law to the deeds committed under the previous law"; in this respect, it pointed out that "limitation periods belong to substantive criminal law and not to procedural criminal law" and, referring to the case of *Cöeme and others v Belgium* [*cit. supra* (footnote no 76)], that „in the legislation subject to the attention of the European Court, the limitation period has, unlike Romanian law, procedural meaning and is therefore susceptible to immediate application of the new law". Romanian Constitutional Court, in Decision no 147/2015 (Romanian Official Journal no 328 of 14 May 2015) reiterated those made by the abovementioned decision, with reference to Article 155(4) CC (identical with the provisions of Article 124 of the Criminal Code of 1969).

<sup>83</sup> „The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions.". Also, according to Article 20(2) of the Romanian Constitution, „Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions.”.

<sup>84</sup> Romanian Constitutional Court, in Decision no 511/2013 (Romanian Official Journal no 75 of 30 January 2014), made a detailed analysis of the relevant history, doctrine and jurisprudence. Although it establishes that the limitation periods for the enforcement of penalty belongs to the substantive law, the Court shall, by a majority of votes, state that the provisions of Article 125(3) of the Criminal Code, introduced by art. I, item 4 of the Law no 27/2012, which provided, *ex novo*, no limitation periods for the enforcement of penalty in case of murder, first-degree murder, aggravated homicide and intentional criminal offenses followed by the victim's death, including penalties for which, on the date of entry into force of these provisions, the limitation period had not been fulfilled.

<sup>85</sup> According to Article 162(2) CC, “complementary penalties applied to natural persons and safety measures shall not be subject to a period of limitation”. In the case of legal persons, Article 149(2) CC provides that the enforcement of complementary penalties “shall be enabled within a period of three years from the date on which the fine was executed or considered as executed”.

(affecting the Union's financial interests) are of 5 years plus the duration of the penalty to be executed, but not more than 15 years, or, if the penalty consists in a fine, of 3 years (for natural persons)<sup>86</sup> and of 5 years (for legal persons)<sup>87</sup>; they start from the date when the conviction sentence remains final<sup>88</sup> and may be interrupted or suspended<sup>89</sup>. Unlike the limitation period for criminal liability, for the enforcement of penalty, there is no longer a "special limitation period", so in order for the limitation period to produce its effects it must not be interrupted or suspended<sup>90</sup>.

Referring to the limitation period for enforcement of penalty - of 5 years for legal persons and of more than 5 years for natural persons (if the latter are sentenced to imprisonment), provided by the Romanian Criminal Code, it can be seen that it meets the requirements set out in Article 12(4) of PIF Directive<sup>91</sup>, so that the implementation of the Directive does not require any change to national law in this respect either.

### Conclusions

At European level, since 1976 – the year of the first draft for a Treaty amending the founding treaties in this respect –, till now – when Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted (after five years of negotiations) –, the legislative process aimed at protecting the European Union financial interests is a long and difficult one.

In Romania, distinct criminalization of fraud affecting the European Union's financial interests, in Articles 18<sup>1</sup>-18<sup>3</sup> of Law no 78/2000, according to the definition of criminal offences from Article 1 of the "old" Convention on the protection of the European Communities' financial interests, makes the relevant national legislation comply with the minimum requirements of the above mentioned Directive.

Attempting to harmonize in this area, however, has multiple implications for national legislation and, at the same time, for judicial practice in criminal matters. Both in the legislative activity and in practice the difficulty is generated not only by the complexity inherent in the approach, but also by the ambiguity of some of the provisions of the European normative acts, as well as by the importance of their correlation with the provisions of the Constitution or with the already existing provisions in the field.

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<sup>86</sup> Article 162(1) b) and c) CC.

<sup>87</sup> Article 149(1) CC.

<sup>88</sup> Article 162(2) CC.

<sup>89</sup> The cases, conditions and effects of interruption or suspension of the limitation period for the enforcement of penalty are provided at Articles 163-164 CC.

<sup>90</sup> Constantin Mitrache, Cristian Mitrache, *op. cit.*, p. 511; Viorel Pașca, in Matei Basarab (coordinator), *op. cit.*, p.646.

<sup>91</sup> See *supra*, part I, point 2.6.



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