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**Transposition of the Directive on the fight against EU fraud by means of criminal law with comments on Croatia**

**1. Introduction**

This paper is dedicated to the protection of the financial interests of the European Union by transposition of the 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 interest by means of criminal law (PFI Directive) in national legal orders with the particular focus on Croatia. The PFI Directive was adopted after five years of negotiation between the Union's institutions, Commission, Council and Parliament and it differs in some crucial aspects to the previous Commission's proposals for a Directive on the fight against EU fraud[[2]](#footnote-2) including the version from July 11, 2012 which served as negotiation starting point. The PFI Directive is based on the Article 83(2)[[3]](#footnote-3) of the Treaty on the Functioning of the European Union (TFEU) as the European Council and the European Parliament rejected the Commission’s proposal of Article 325(4)[[4]](#footnote-4) TFEU as a basis for the Directive.[[5]](#footnote-5) The use of Article 83(2) TFEU prevented the European Union to adopt regulation on the criminal law protection of the EU’s financial interests as could have been suggested by the Article 86(2) TFEU on the establishment of the European Public Prosecutor[[6]](#footnote-6) and placed the offences against the Union’s financial interests within the area of freedom, security and justice where the EU and member states have shared competence and where the principles of subsidiarity and proportionality apply. Thus, if crime against the EU budget is particularly serious crime with a cross-border dimension it is an area where the European Union by means of directives may in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions (Article 83(1) TFEU). Member states could had used the emergency brake procedure if the draft directive would have affected fundamental aspects of their criminal justice systems (Article 83(3) TFEU) and they had freedom how to achieve the goal set in the PFI Directive adapting it to its criminal law offences and principles. Regulations, contrary to directives have to be transposed automatically and identically in all member states without any changes by national law what is considered contrary to the national criminal justice systems coherence.

The PFI Directive replaces the previous instruments for the protection of the EU’s financial interest (PFI) by criminal law (Article 17): the Convention on the protection of the European Communities’ financial interests of 26 July 1995 (PFI Convention)[[7]](#footnote-7) as well as its two Protocols − the anti-corruption[[8]](#footnote-8) Protocol of 27 September 1996 (“first Protocol”) and the Protocol dealing with the liability of legal persons and money laundering of 19 June 1997 (“second Protocol”).[[9]](#footnote-9) They were international treaties, that were adopted as third pillar instruments under the 1992 Maastricht Treaty of the European Union. The deadline to transpose the PFI Directive into national law of the member states was 6 July 2019 (Article 16), hence two years after adoption of the Directive and since than the Convention on the protection of the Union’s financial interests and its protocols should not be in force any more. The risk of legal gaps in the national criminal law protection of the EU’s financial interests arises if a member state fails to implement the PFI Directive or if the implementation of the PFI Directive is inadequate or incomplete.

If we assume that more than twenty years after the adoption of the PFI instruments the member states have transposed them adequately in the national criminal law, the correct transposition of the PFI Directive presupposes the identification of the differences between the PFI Directive and the previous PFI instruments. Is the scope and content of the protection of the Union’s financial interests in the Convention and its Protocols same as in the Directive? Is the only reason for adopting the PFI Directive the abolishment of the third pillar instruments by the Lisbon Treaty and replacing them by directives or so called “Lisbonisation” of the EU legal acts? If the answer to both question is positive, we can conclude that the national criminal law protection of the Union’s financial interest is adequate and transposition of the Directive in the national law does not require any changes. From the Croatian implementation act and its explanation, it is plausible to conclude that this was conclusion of the Croatian legislator. However, if the adoption of the Directive is not only the question of legal basis and the type of EU legal instrument before and after Lisbon Treaty but it provides for some substantial changes in the protection of the Union’s interest; if it broadens the scope of the criminal law provisions on the fight against fraud to the EU’s financial interests comparing to the PFI Convention and its two Protocols,[[10]](#footnote-10) the member states are required to verify whether their national law corresponds to the changes in the protection of the Union’s financial interests. The result of verification can be positive or negative but it presupposes the identification of the differences between the previous PFI instruments and the Directive and the explanation why the national implementation act satisfies the requirements of the directives. Therefore, this paper shall be divided in the four chapters. After introduction, in the second chapter the novelties with regard to fraud against the Union’s financial interests in the Directive shall be presented, the third chapter shall deal with the transposition of the PFI Directive in Croatia and the forth chapter shall be conclusion on the Croatian transposition of the Directive in national law.

The PFI Directive covers the content of the PFI Convention and its two protocols and includes beside EU fraud, offences of passive and active bribery and money laundering, liability of legal persons, general concepts of substantive criminal law such as incitement, aiding and abetting, and attempt, sanctions with regard to natural and legal persons, aggravating circumstances, freezing and confiscation, jurisdiction, limitation periods and cooperation. Taking into account the comprehensive approach in regulating EU fraud in the PFI Directive, this paper will be limited to analysis of offences of the EU fraud including a new offence of misappropriation in the PFI Directive.

**2. Novelties with regard to the offences of fraud against the Union’s financial interests in the Directive**

**2.1. More precise definition of the Union’s financial interests (Article 2(1)(a))**

The object of fraud in the PFI Directive is defined more precisely and extensively than in the PFI Convention. This relates to the definition of the financial interests as well as to the budgets within the scope of the Directive. The PFI Directive did not eliminate the traditional division of the Union budget fraud from the PFI Convention as revenue (resources) related fraud (Article 3 (2)(c)(d)) and expenditure (funds) related fraud (Article(2)(a)(b)), but has extended the notion of the “Union’s financial interests” to assets as third element. The PFI Directive covers the fraudulent conduct with respect to revenues, expenditure and assets at the expense of the Union budget including financial operations such as borrowing and lending activities (recital 4).

Also, the notion of the Union budget is defined more accurately. The definition from the Article 1(1) of the PFI Convention “the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities“, is replaced by the “(i) the Union budget and (ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.” The precision about the object of the fraud is crucial for the correct implementation in the national criminal law and the effective prosecution and adjudication of fraudulent behavior by national judicial authorities.

**2.2. VAT fraud**

The EU budget is funded from the EU’s own resources.[[11]](#footnote-11) There are three main types of EU budget own sources: a) customs duties and sugar levies on imports from outside the EU, b) the proportion of the value added tax (VAT) collected by each member state, c) a proportion of member states gross national income (GNI).[[12]](#footnote-12) In 2017 the GNI participated with 65%, customs duties with 16%, VAT with 12% and other revenue with 7% in the EU budget.[[13]](#footnote-13) *Prima facie*, there is no doubt that the VAT is part of EU-own resources, the revenue of the EU budget and present financial interest of the EU.

In the area of VAT, it is estimated that cross-border fraud, such as ‘missing trader’ or ‘carousel’ fraud, generates budgetary losses of around EUR 50 billion a year.[[14]](#footnote-14) Also, the OLAF and Eurojust reports revealed numerous large-scale VAT fraud cases that they are dealing with. The majority of VAT fraud damage is borne by the Member States, but is also proportionally to the part of the VAT paid to the EU affects the EU budget. The action and cooperation at the EU level is needed not only because the VAT fraud affects financial interest of the Union but also because the perpetrators of the VAT fraud take advantage of the open system of trading within the Single Market.[[15]](#footnote-15)

**a) Member states’ opposition to EU VAT fraud**

However, one of the major issues with regard the criminal law protection of the Union’s financial interest was whether the VAT can be considered Union revenue in sense of the PFI instruments. The PFI Convention did not mention expressly that VAT is under its scope and the member states claimed that the VAT fraud is in national competence. The treatment of the VAT was also a biggest stumbling block in the negotiation on the 2012 Commission’s proposal for the PFI Directive that in the recitals 4 and 5 expressly stated that fraud affecting VAT is under its scope. In the course of negotiation, the Parliament supported the Commission while the Council insisted to exclude revenues arising from the VAT from the notion of the Union’s financial interests.

There are several arguments endorsing the Council’s position. The first one is related to the shifting of competences from member states to the European Union and disregarding the division of competences in the treaties. The taxation and the power to tax is the member state competence and the European Union has only very limited tax competences related to single EU market. Therefore, member states had fear that the PFI instruments had the capacity to expand the EU’s competence in the sphere of tax.[[16]](#footnote-16) They claimed that the proposed Directive could encroach on the Member States’ responsibilities to control and operate the VAT system.[[17]](#footnote-17) Second argument was that the member states receive 97% of VAT while only 3% of the VAT is paid to the EU budget and therefore the member states should address the VAT fraud and not the EU.[[18]](#footnote-18) The third argument was related to the method of payment of VAT to the EU. The VAT is payed to the member states which than allocate a certain percentage to the EU and therefore it was claimed that the VAT proceeds do not constitute EU revenue in and of themselves.[[19]](#footnote-19) “Any perceived damage to the EU assets is *indirect*, i.e. it affects the ability of Member States to apportion a fraction of evaded earnings from their own assets.”[[20]](#footnote-20) It is even claimed that the same logic should apply to the proportion of member state’s GDP allocated to the EU budget.[[21]](#footnote-21) This is invalid argument as the VAT is tax and the gross national income is not a tax but the value produced by a country’s economy in a given year. It is irrelevant whether the percentage of the VAT is paid directly to the EU or a member state pays a percentage of the VAT to the EU.

**b) ECJ judgments**

This issue was resolved by three judgments of the European Court of Justice that all stated that VAT fraud is affecting EU financial interests. In the judgment of 15 November 2011, C-539/09, Commission v Germany, the Court stated that any lacuna in collection of the VAT revenue in compliance with the applicable Union law potentially causes a reduction of the availability of the VAT resources to the Union budget.[[22]](#footnote-22) In judgment *Åkerberg Fransson*, C‑617/10 of 26 February 2013, the Court proclaimed that “In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties“.[[23]](#footnote-23) So the Court clearly stated that VAT revenue is financial interest of the EU and that the VAT fraud diminishes the EU’s budget.

The negotiations on the PFI Directive gave results only after the Tarricco judgment of 8 September 2015[[24]](#footnote-24) where the ECJ repeated that “the European Union’s own resources include revenue from application of a uniform rate to the harmonized VAT assessment bases determined according to EU rules”,[[25]](#footnote-25) that “the Member States must fight against tax evasion regarding the VAT”[[26]](#footnote-26) and that “in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner”.”[[27]](#footnote-27)

**c) Definition of the VAT fraud**

After almost 5 years of negotiation, the PFI Directive expressly included VAT fraud within it scope. The offence of VAT fraud is prescribed in two articles in the PFI Directive: Article 2(2) that limits this offence only to serious cases and Article 3(2)(d) that prescribe the elements of the offence. Due to the political compromise, the PFI Directive is not applied to all cases of VAT fraud as was proposed by the Commission[[28]](#footnote-28) and as was prescribed, according to the ECJ, by the PFI Convention, but only to cases of serious offences against the common VAT system.[[29]](#footnote-29) The serious offences against the common VAT system exist where the intentional acts or omissions defined in Article 3(2)(d) are connected with the territory of two or more member states and involve the total damage[[30]](#footnote-30) of at least 10 000 000 Euro (recital 4, Article 2(b)(2)). The Directive cites the examples of serious fraud such as carrousel fraud, VAT fraud through missing traders,[[31]](#footnote-31) and VAT fraud committed within a criminal organization, which create serious threats to the common VAT system and thus to the Union budget (recital 4).

Additionally, the elements of VAT fraud are not the same as the elements of the classical EU fraud regarding revenue. The introduction of the VAT fraud in the PFI Directive was not only the introduction of the new object of EU fraud comparing to the PFI Convention but has introduced the new form of EU fraud against the revenue. While the PFI Convention has common forms of fraud against all kind of the EU revenue,[[32]](#footnote-32) the PFI Directive has split the fraud against revenue into: a) fraud in respect of revenue other than revenue arising from VAT own resources (Article 3(2)(c)) that correspond in full to the forms of fraud against revenue in the PFI Convention (Article 1(1)(b)),[[33]](#footnote-33) and b) fraud in respect of revenue arising from VAT own resources (Article 3(2)(d)). VAT fraud also has three forms of fraudulent behavior but they have to be committed in cross-border fraudulent schemes. This additional common element corresponds to the requirement from Article 2(2) that fraud is connected with the territory of two or more Member States of the Union. The difference in first two forms is that the required effect for the VAT fraud is “the diminution of the resources of the Union budget”, while for fraud against other EU revenue is “illegal diminution of the resources of the Union budget” so the illegality of the diminution of the resources has to be proven. Additionally, the third form of VAT fraud is a new offence committed by: “the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.”

So, EU VAT fraud has the forms that do not correspond to the existing forms of fraud against the EU revenue that existed in the PFI Convention and the member states had obligation to transpose them in the national criminal law.

**2.3. Procurement-related expenditure**

Public procurement, the largest channel of public spending constitutes an area that is particularly vulnerable to fraud and irregularities.[[34]](#footnote-34) From 2011-2016 20 % of all reported irregularities have been related to breaches of public procurement rules, accounting for 30 % of all reported irregular financial amounts.[[35]](#footnote-35) Therefore, large part of the caseload of the OLAF investigators relates to allegations of fraud in public procurement[[36]](#footnote-36) and OLAF cases frequently concern cross-border procurement fraud or corruption in public procurement procedures involving EU financing.[[37]](#footnote-37) The 2016 OLAF report explains the functioning, significance, prevalence and certain cases of fraud in public procurement that OLAF dealt with.[[38]](#footnote-38) The fraud related to public procurement was focus of the European Commission anti-fraud strategy for years[[39]](#footnote-39) and the PFI Directive is its significant addition.

The PFI Directive is introducing novelties also on the side of the fraud against the EU expenditure related to the fraud in procurement. It establishes a new distinction between non-procurement- and procurement-related expenditure fraud. The non–procurement-related fraud (Article 3(2)(a)) is identical to the fraud against expenditure in the PFI Convention (Article 1(1)(a)).[[40]](#footnote-40) However, the procurement-related expenditure contains new elements of crime (Article 3(2)(b)).

Procurement related expenditure is any expenditure in connection with the public contracts as determined by Article 101(1) of Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union (Recital 6). It prescribes that public contracts are contract for pecuniary interests concluded in writing between economic operators and contracting authorities against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services. Such contracts comprise: a) building contracts, b) supply contracts, c) works contracts, d) service contracts.[[41]](#footnote-41)

Procurement related fraud has also three forms two of which relate to the classical form of EU expenditure fraud as (i) the use or presentation of false, incorrect, or incomplete statements or documents (1st indents of Article 3(2)(b)) and (ii) non-disclosure of information in violation of a specific obligation (2st indents of Article 3(2)(b)). The effect of both forms has to be the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf. The third form of procurement related fraud is classical fraud against expenditure through the misapplication of funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests”. The last part of the provision that requires establishment of the damage to the EU budget represents an additional objective element that was in PFI Convention removed from the fraud against other type of expenditure.

Furthermore, there are additional elements of crime that do not exist in the description of the expenditure related fraud in the PFI Conventions. All three forms of procurement related fraud in the PFI Directive exist “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”. Offense committed “in order to make an unlawful gain for the perpetrator or another” is a subjective element of the offence, part of intention or *mens rea*, and “causing a loss to the Union's financial interests” is and objective element of causing damage. These additional elements are narrowing the field of incrimination of fraud and are prohibited when transposing the non-procurement-related expenditure. Words “at least” would suggest that these elements are not obligatory and the member states may leave them out when transposing procurement related fraud.

**2.4. Misappropriation by a public official**

The entirely new offence introduced by the PFI Directive is misappropriation. An offence of misappropriation is the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union’s financial interests. The fraudulent behavior of this offense is similar to the offenses of EU fraud through misapplication of funds, assets or benefit[[42]](#footnote-42) as in both cases the perpetrator is using them contrary to the purpose for which they were intended. However, in case of misappropriation a perpetrator is not a person who uses EU funds or is obliged to pay duties to the EU budget, but a person that is entrusted to disburse funds to the final user. In most cases these are public officials of the member states or the EU. The other difference is that the damages to the Union’s financial interests have to be determined. This objective element of actual damage to the EU budget is introduced in order to differentiate a criminal offence of misappropriation from mere breach of the terms of use regarding the allocated resources.[[43]](#footnote-43)

The PFI Directive, in relation to the offenses of misappropriation and passive corruption requires to expand a definition of public officials covering not only a Union official and a national official, but also any other person assigned and exercising a public service function involving the management of or decisions concerning the Union’s financial interests (Article 4(4)(b)). In the recital 10 it is explained that private persons are increasingly involved in the management of Union funds and therefore there is a need to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involve in the management of such funds. Therefore, member states have to extend the definition of public officials also to private persons involved in the management of the EU funds.

**3. Transposition of the PFI Directive in Croatia**

At the end of 2018, on December 19, the Republic of Croatia has adopted the amendments of the Criminal Code implementing the PFI Directive. The law came into force on January 4, 2019 and thereby Croatia has fulfilled its obligation from Article 16 of the PFI Directive which prescribed that deadline to transpose the PFI Directive into national law of the member states was July 6, 2019 (Article 16). However, the only change that was introduced was the reference to the PFI Directive in Article 386 of the Criminal Code. Article 386 of the Criminal Code contains the list of legal acts of the European Union that were transposed in the Croatian Criminal Code and in point 13 the reference to the PFI Directive was introduced as required by the Article 17(1) of the PFI Directive.[[44]](#footnote-44) The Croatian Government claimed that the analysis of the PFI Directive revealed that national criminal legislation is already in line with the requirements that the Directive places on Member States,[[45]](#footnote-45) and the Croatian Parliament accepted the same position and adopted the transposition of the PFI Directives with no substantial changes.

The explanation of the Proposal of the Amendments of the Criminal Code given by the Government of the Republic of Croatia from June 27, 2018 cited the offences of the Criminal Code that protect the Union’s financial interest. It is asserted that the offenses under Article 3 of the PIF Directive correspond in the Croatian law to the following offenses: tax or customs duty evasion (Article 256 of the Criminal Code), subsidy fraud (Article 258 of the Criminal Code) and fraud in business dealings (Article 247 of the Criminal Code).[[46]](#footnote-46) As regards the other criminal offences affecting the Union’s financial interests under Article 4 of the PIF Directive, an analysis revealed that they correspond to the criminal offenses: money laundering (Article 265 Criminal Code), taking a bribe (Article 293 of the Criminal Code), giving a bribe (Article 294 of the Criminal Code), embezzlement (Article 232 of the Criminal Code) and embezzlement at work (Article 233 of the Criminal Code).[[47]](#footnote-47) Furthermore, the analysis of the criminal sanctions of the above-mentioned offenses has shown their compliance with Article 7 of the PIF Directive, which provides for a maximum penalty of at least four years of imprisonment. The legislative proposal recognizes and mentions as the only novelty Article 12 of the PFI Directive that prescribes the statute of limitations on criminal prosecution and the statute of limitations for imprisonment for the offenses referred to in Articles 3 and 4. The analysis of the time limits in question showed their compliance with Article 81 of the Criminal Code (statute of limitations for prosecution) and Article 83 of the Criminal Code (statute of limitations for execution of sentence).

Without aspirations to offer solutions to transposition of the PFI Directive in Croatia and to expose the full analysis of shortcomings of the protection of the Union’s financial interests in Croatia, the mere correlation of novelties in the PFI Directive with the provisions of the Croatian Criminal Code expose that the transposition is defective and without any proper content. Just few arguments related to offences of EU fraud will be given:

a. The legislator has just repeated the criminal offences implementing the PFI Convention and its two Protocols. Furthermore, without any reference to the PFI Directive the explanation of the Amendments is referring to the offences that do not mention or refer to the protection of the Union’s financial interest and did not serve previously in theory or case law for that purpose. E.g. it is not clear why the legislator considered that the offence of fraud in business dealings (Article 247 of the Criminal Code) transpose the offenses under Article 3 of the PFI Directive or why the offenses embezzlement (Article 232 of the Criminal Code) and embezzlement at work (Article 233 of the Criminal Code) serves as transposition of offenses under Article 4 of the PFI Directive. Elements of crimes prescribed by Article 3 and Article 4 of the PFI Directive cannot be recognized in mentioned offences of the Croatian Criminal Code.

b. In the Act of transposition there are no references, explanation or provisions with regard to new forms of EU fraud such as VAT fraud, procurement fraud or new offense of misappropriation.

c. It is very dubious that offence of tax or custom duty evasion (Article 256 of the Criminal Code) can cover the VAT fraud as it refers only to the serious fraud involving two or more member states, cross-border fraudulent schemes and total damage of at least 10 000 000 euro. According to the Croatian transposition of the PFI Directive the European Public Prosecutor shall have jurisdiction to prosecute for any tax or custom duty evasion.

d. The third form of the VAT fraud described as “the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.” cannot be covered by the fraudulent behavior of tax evasion from Article 256 of the Criminal Code.[[48]](#footnote-48)

e. The Act on transposition do not mentions procurement or procurement-related expenditure. The EU subsidies cannot be equated with the public contract in procurement procedure. Also the perpetrator of the subsidy fraud is a receiver of the subsidies and aid granted from European Union funds and not the responsible person in contracting authorities or in economic operator concluding public contract in procurement procedure.[[49]](#footnote-49)

f. Additionally, the third form of the procurement fraud (iii) requires the establishment of the damage to the EU budget, while the first two forms give the possibility to the state to introduce the elements of damage. The introduction of this element will narrow the area of incrimination of the fraudulent behavior. The criminal law as *ultima ratio* generally should not be used too extensively and over the limits required by the EU law or at least such overcriminalisation requires particular justifications.

g. There is no reference to the new offence of misappropriation. When referring to the offences under Article 4 of the PFI Directive, the legislator is not mentioning at all this offence. This offence was not transposed at all in the Croatian Criminal Code.

h. Accordingly, a definition of public officials in Article 87(3) of the Criminal Code[[50]](#footnote-50) was not extended to cover private person involved in the management of the EU funds as required by the PFI Directive.

Finally, the superficial and ignorant attitude to the transposition of the PFI Directive in Croatia is evident from the fact that the list of the transposed legal acts of the European Union in Article 386 of the Criminal Code still contains the PFI Convention and its two Protocols[[51]](#footnote-51) although, as it was already mentioned, they are replaced by the PFI Directive and therefore the member states are not any more bound by it (Article 16 of the PFI Directive). The transposition of the PFI Convention in Croatia required three subsequent legislative amendments and we can hope that this will not be the case with transposition of the PFI Directive. In any case, Croatia was required to immediately communicate to the Commission the text of the main provisions of national law which it adopted in the field covered by the PFI Directive. So, a ball is in the Commission’s court. In any case, the PIF Directive requires the Commission to submit a report to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures to comply with this Directive by July 6, 2021 (Article 18(1)).

**4. Conclusion**

The transposition of the PFI Directive in the national criminal law is very complex and demanding task that should not be underestimated. The legislators have to keep in mind that there are two substantial differences in transposition of the PFI Directive to transposition of the PFI Convention. Firstly, the failure of transposition or inadequate transposition of the Directive is subject to the infringement procedure that can result in high monetary penalty. That was not the case with the PFI Convention adopted before the Lisbon Treaty. The present analysis is showing that Croatia is already under the threat of such procedure that can endanger already insufficient resources of the Croatian budget. Secondly, the national legislators should be aware that the national transposition act of the PFI Directive will decide on the subject matter jurisdiction of the European Public Prosecutor Office. The EPPO will not apply the PFI Directive in criminal proceedings before the national courts but offences prescribed by national law. In order to respect the principle of legality in criminal law, legal certainty and the division of jurisdiction between the national prosecutor and the EPPO, the national law should precisely define offences under the jurisdiction of the EPPO. For the EPPO it will not be possible to reach to some other criminal offence in order to prosecute fraudulent behavior outside of the PFI offences. Furthermore, it is not probable that the national legislators will opt for the provisions that allow the EPPO to prosecute for more extensive fraudulent behavior than required by the PFI Directive. This would lead to the overburdening of the EPPO, uneven treatment of the EU citizens and forum-shopping. Therefore, the national legislator should strictly abide to the requirements of the PFI Directive and follow the elements of crimes prescribed in it, clearly establishing the field of prosecution for the EPPO.

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2. The European Commission has already presented the Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (COM(2001)272 final) on May 23, 2001 under Article 280 of the EC Treaty of Amsterdam. [↑](#footnote-ref-2)
3. Article 83(2) TFEU: If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76. [↑](#footnote-ref-3)
4. Article 325(4) TFEU: The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies. [↑](#footnote-ref-4)
5. On discussion on the legal basis of the Directive see in: Negotiations of the Commission Proposal for the Directive in Juszczak, Adam & Sason, Elisa (2017) The Directive on the Fight against Fraud to the Union’s Financial Interests by means of Criminal Law (PFI Directive): Laying down the foundation for a better protection of the Union’s financial interests?, Eucrim - The European Criminal Law Associations' Forum. 10.30709/eucrim-2017-009; Di Francesco Maesa, Constanza (2018) The Directive on the Fight against Fraud to the Union’s Financial Interests by means of Criminal Law: A Missed Goal?, Insight, European forum, 22 October 2018, 1-15, 3-7. [↑](#footnote-ref-5)
6. Article 86(2) TFEU “2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the *regulation* provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.” [↑](#footnote-ref-6)
7. OJ C 316 from 27.11.1995, 49-57. [↑](#footnote-ref-7)
8. Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities’ financial interests (OJ C 313 from 23.10.1996, 2-10). [↑](#footnote-ref-8)
9. Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities’ financial interests (OJ C 221 from 19.7.1997, 12-22). [↑](#footnote-ref-9)
10. Kaiafa-Gbandi, Maria (2018) The protection of the EU’s financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union’s financial interests, Zeitschrift für Internationale Strafrechtsdogmatik, no 12, p. 581. [↑](#footnote-ref-10)
11. Article 311 of the Treaty on the Functioning of the European Union. On EU budget law see: https://ec.europa.eu/info/about-european-commission/eu-budget/how-it-works/budget-law\_en [↑](#footnote-ref-11)
12. Council Regulation (EU, Euratom) No 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements, *OJ L 168, 7.6.2014, p. 39–52.* [↑](#footnote-ref-12)
13. The OLAF Report 2017, p. 11. [↑](#footnote-ref-13)
14. Commission Anti-Fraud Strategy: enhanced action to protect the EU budget, European Commission, Brussels, 29.4.2019 COM(2019) 196 final, p.10. [↑](#footnote-ref-14)
15. See The Fight Against Fraud on the EU's Finances, 12th Report of Session 2012-13, House of Lords, European Union Committee, p. 22. [↑](#footnote-ref-15)
16. The Fight Against Fraud on the EU's Finances, 12th Report of Session 2012-13, House of Lords, European Union Committee, p. 20. [↑](#footnote-ref-16)
17. The Fight Against Fraud on the EU's Finances, 12th Report of Session 2012-13, House of Lords, European Union Committee, p. 20. [↑](#footnote-ref-17)
18. Ibid., p. 22. [↑](#footnote-ref-18)
19. Kaiafa-Gbandi, 2018, 577. [↑](#footnote-ref-19)
20. Ibid. See reference 14. [↑](#footnote-ref-20)
21. “The problem inherent in this view can be grasped if conceived that – according to it – any fraudulent violation against a Member State’s GDP should be considered an abuse against the financial interests of the Union.” Ibid. See reference 16. [↑](#footnote-ref-21)
22. Para. 72 “There is thus a direct link between, on the one hand, the collection of VAT revenue in compliance with the Community law applicable and, on the other, the availability to the Community budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second.“ See 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, Brussels, 11.7.2012., COM(2012) 363 final, p. 8. [↑](#footnote-ref-22)
23. Case C‑617/10, judgment *Åkerberg Fransson* of 26 February 2013, § 34. [↑](#footnote-ref-23)
24. Juszczak / Sason, 2017, 83; Di Francesco Maesa, Constanza, 2018, 7. [↑](#footnote-ref-24)
25. Case C-105/14, Criminal proceedings against Ivo Taricco and Others, § 38. [↑](#footnote-ref-25)
26. Ibid. § 36. [↑](#footnote-ref-26)
27. Ibid. § 39. [↑](#footnote-ref-27)
28. COM (2012) 363 final, Brussels 11.7.2012, p. 12., recital (4) [↑](#footnote-ref-28)
29. The common VAT system is established by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1). [↑](#footnote-ref-29)
30. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties (recital 4). Kaiafa-Gbandi is warning that no damage other than that relating to Member States exists and therefore the calculation of total damages that include the losses of both the EU and member states results in an erroneous double computation. See Kaiafa-Gbandi, 2018, 577. [↑](#footnote-ref-30)
31. Examples of MTIC fraud including missing traders fraud and carrousel fraud see Eurojust News, Issue No. 11 – March 2014. [↑](#footnote-ref-31)
32. Article 1(1)(b) of the PFI Convention: 1. For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

    |  |  |  |  |  |  |  |  |
    | --- | --- | --- | --- | --- | --- | --- | --- |
    | (b) | in respect of revenue, 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 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. | |

    [↑](#footnote-ref-32)
33. The Article 3(2)(c) of the PFI Directive and Article 1(1)(b) of the PFI Convention are the same. Only difference is that the Convention is using term “intentional act or omission” and the Directive “act or omission”. The reason is that the PFI Directive has expressly in recital 11 excluded criminal offences which do not require intention from its scope.

    However, the act or omission of fraud has to be intentional, so legally and practically there is no difference. [↑](#footnote-ref-33)
34. Fraud in Public Procurement: A collection of Red Flags and Best Practices, OLAF, Ref. Ares(2017)6254403 - 20/12/2017, p. 3. [↑](#footnote-ref-34)
35. Ibid. [↑](#footnote-ref-35)
36. Report from the Commission to the European Parliament and the Council, Protection of the European Union’s financial interests — Fight against fraud, 2016 Annual Report, Brussels, 20.7.2017. COM(2017) 383 final, 15. [↑](#footnote-ref-36)
37. The OLAF Report 2017, p. 10. See cases p. 14-16. [↑](#footnote-ref-37)
38. Ibid., 15-18. [↑](#footnote-ref-38)
39. See Fraud in Public Procurement: A collection of Red Flags and Best Practices, OLAF, Ref. Ares (2017)6254403 - 20/12/2017; Identifying and Reducing Corruption in Public Procurement in the EU, study prepared for the European Commission by PwC and Ecorys, 30 June, 2013; Public Procurement: costs we pay for corruption Identifying and Reducing Corruption in Public Procurement in the EU, PwC and Ecorys, University of Utrecht, 2013; Fraud Indicators, European commission, SOLID/2012/REV [↑](#footnote-ref-39)
40. Article 1(1)(a) of the PFI Convention: 1.   For the purposes of this 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; | |

    The Article 3(2)(a) of the PFI Directive and Article 1(1)(b) of the PFI Convention are the same. Only difference is that the Convention is using term “intentional act or omission” and the Directive “act or omission”. However, as already mentioned, the PFI Directive has expressly in recital 11 excluded criminal offences which do not require intention from its scope. [↑](#footnote-ref-40)
41. Article 101(1) of the Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [↑](#footnote-ref-41)
42. Offenses of misapplication are prescribed by Article 3(2)(a)(iii)/(b)(iii)/(c)(iii) of the PFI Directive. [↑](#footnote-ref-42)
43. Kaiafa-Gbandi, 2018, 579. [↑](#footnote-ref-43)
44. Article 17(1) of the PFI Directive: 1.   Member States shall adopt and publish, by 6 July 2019, the laws, regulations and administrative provisions necessary to comply with this Directive. (…) When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. [↑](#footnote-ref-44)
45. The proposal of the Act on Amendments of the Criminal Code, Government of the Republic of Croatia, June 27, 2018, p. 2. [↑](#footnote-ref-45)
46. Ibid. [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Article 256 of the Criminal Code: (1) Whoever, with the aim that he or she or another person evade paying in full or in part a tax or customs duty, provides false or incomplete information on income, items or other facts of relevance for determining the amount of tax or customs duty payable or whoever, in the case of mandatory declaration, fails, with the same aim, to declare his or her income, items or other facts of relevance to the determination of tax or customs duty payable, which results in a reduction of the tax or customs duty payable by an amount exceeding twenty thousand kuna or to its non-determination in the said amount [↑](#footnote-ref-48)
49. Subsidy Fraud:Article 258 of the Criminal Code (1) Whoever, with the aim that he or she or another person receive a state subsidy, provides a state subsidy provider with false or incomplete information concerning the facts on which the decision on the granting of a state subsidy depends, or fails to inform a state subsidy provider of changes important for making the decision on the granting of a state subsidy.

    (5) State subsidies within the meaning of this Article shall be equated with subsidies and aid granted from European Union funds. [↑](#footnote-ref-49)
50. Article 87 (3) An official person shall mean a high-ranking or a lower-ranking state official, a high-ranking or a lower-ranking official in a unit of the local or regional self-government, holder of judicial authority, lay judge, member of the State Judiciary Council or the State Attorney Council, arbitrator notary public and public bailiff. An official person shall also mean a person who in the European Union, another state, international organisation of which the Republic of Croatia is a member, international tribunal or arbitration board the jurisdiction of which the Republic of Croatia accepts, performs the duties confided to persons listed in the previous sentence. [↑](#footnote-ref-50)
51. Article 386 point 20, 21 and 22. [↑](#footnote-ref-51)