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**COMMISSION STAFF WORKING PAPER**

**to the European Parliament, the Council, the European Economic and Social Committee  
and the Committee of the Regions**

*Accompanying the document*

**COMMUNICATION FROM THE COMMISSION**

**On the protection of the financial interests of the European Union by criminal law and  
by administrative investigations:**

**An integrated policy to safeguard taxpayers' money**

{COM(2011) 293 final}

## **1. CHALLENGES FOR THE PROTECTION OF EU FINANCIAL INTERESTS**

The protection of the EU's financial interests has been a long-standing concern of the Commission. The negotiation by Member States, upon Commission proposal, of a Convention on the protection of the (then) Communities' financial interests in 1995 (hereinafter the "Protection of Financial Interests Convention"), as well as the setting up of OLAF and EUROJUST, bear witness of these policies.

As compared to the time when these policies were designed, however, the scene has changed. Not only has the level of integration increased, with new policy fields and types of expenditure having developed, but also the geographic scope of the EU, and the variety of nationally legal systems it features, have evolved since.

The present Staff Working Document accompanies the communication on the protection of the financial interests of the European Union. Illustrating the shortcomings and the need to act identified in the communication by concrete facts and examples is necessary to take the real dimension of the problem.

The relevant fraud indicators may be further underpinned by published figures on reported fraud and irregularities (Annexes I and II).

The statistical and analytical record seems to indicate that criminal policy challenges stem from an insufficient deterrence preventing criminal misuse of the EU budget (2.1.). This is further illustrated by some concrete cases based on the experience both of OLAF (2.1.1.) and EUROJUST (2.1.2.).

The insufficiencies in the national legal actions are further confirmed by some figures and statistics, extracted from the OLAF operational case record, on national judicial authorities' action in Protection of Financial Interests cases forwarded by OLAF (2.2.).

The reasons for the shortcomings in the area of the Protection of Financial Interests are further explained. The difficulties in fighting offences against the EU financial interests experienced by the practitioners and illustrated by concrete cases, often result from the insufficient legal framework in this field and the lack of a common level playing field in criminal law (3.1.).

The national legal framework has been harmonised to a rather limited extent with the entry into force and transposition of the Protection of Financial Interests Convention, which however has certain deficiencies.

In order to better perceive the insufficiencies in the Member States legal orders, it is helpful to present a synoptical comparison, on the basis of the example of several national legal systems, (i) of the main criminal law concepts in the Protection of Financial Interests area which have been harmonised (3.1.1.) and (ii) of certain criminal law concepts which lack currently approximation on EU level but are of utmost relevance for the protection of the EU financial interests (3.1.2.).

The insufficient cooperation between authorities, the shortcomings and the need to act are reflected by answers collected from the practitioners in the field of the Protection of Financial Interests both on national and EU level (3.2.).

The reflections by practitioners shed some light on the limits to mutual legal assistance (3.2.1.), the problem of the unused evidence (3.2.2.) and a tendency to restrict the prosecution to domestic cases (3.2.3.)

The possibilities to strengthen the tools to address the various aspects of the problem have been the subject for some EU Commission reports and studies by legal experts. An overview on some of the studies conducted so far on the issue is included (4.).

The figures for irregularities and suspected fraud at the expense of the EU public funds have remained substantial over the last 5 years, notwithstanding all efforts to curb the phenomenon, even though they are given financial follow-up and Member States are obliged to return the reported irregular amounts to the EU budget.

Suspected fraud in the sector of the common agricultural policy, as reported by Member States, has gradually diminished over the last 4 to 5 years. But the figures in relation to suspected fraud cases in the area of the cohesion policy related to notified irregularities by Member States show, irrespective of some fluctuations over the recent years, an average potential financial impact at a level of about 100 million € per year. At the latest at closure of programmes, if not earlier in the programming period, confirmed irregular amounts are deducted from payment claims made to the EU budget.

The situation is different with respect to pre-accession funds. Here, a sharp increase of reported fraud and irregularities cases may be noted. Annex I and Annex II provide figures hereafter. They are used here as the concrete indicators for the numbers and amounts of fraud and irregularities at the disposal of the Commission. These objective indicators need, however, to be used carefully.

First, it needs to be considered that these figures reflect a reporting practice by administrative authorities in the Member States towards the EU Commission based on sectoral regulatory provisions which foresee periodic reporting. Cases which are not reported do not appear. There is also no general reporting by judicial authorities. Fraud cases which have not been detected will anyway not enter into the statistics. Any fraud cases as are reported in the statistics reflect also the efficiency of the competent national authorities in detecting fraud.

Second, a distinction between reported irregularities and fraud cases needs to be drawn. Irregularities do not systematically amount to criminal conduct. They reflect however a suspected violation of EU law which may be harmful to the taxpayer. Concerning the reported fraud cases it may equally be useful to underline that these refer to a first suspicion. The reporting duty applies at the beginning of a detected case. The facts established may develop during the investigation by the competent Member States authorities and the reported cases may not be considered cases of convicted fraud.

## **2. CRIMINAL POLICY CHALLENGES**

### **2.1. Insufficient deterrence preventing criminal misuse of the EU budget - Case examples and case studies in the field of Protection of Financial Interests**

Concrete examples taken from the operational practice of OLAF and EUROJUST in cooperation with the competent national judicial authorities may help to better understand the shortcomings and difficulties generated by national criminal legislation and practice for prosecution and mutual legal assistance.

#### **2.1.1. OLAF cases**

- **Fraud: case on jurisdiction**

- The investigation concerned 15 EU projects in which an expert named X from Member State A participated for several years. The above projects formed part of 6 different EU Programmes, and were awarded to 10 different companies or consortia. These companies or consortia then contracted with Mr. X, via a subcontractor, or via another member of the consortium. The EC had no direct contractual relationship with Mr. X.

Evidence suggests that over a number of years, Mr. X systematically claimed payment in respect of work alleged to have been carried out on 2 or 3 different EU projects on the same dates as indicated in timesheets. This double or triple claiming represents 34% of the 1449 days claimed and ticked in the timesheets. The document containing inaccurate information in relation to the implementation of the contracts were prepared in the Member State A and sent to the European Commission. Most of the contractors were aware of the fact that Mr. X was working on more than one project at the same time. The contractors and the leaders or members of consortia that contracted with Mr. X are potentially contractually liable for the irregular claims submitted.

The projects were under a number of EU programmes – TACIS – CARDS – PHARE and others and the contractors were companies mainly based in EU Members States. The contracts were performed in a number of (then) non-EU States. The concerned person moved from state to state as he performed his work and it is difficult to say where he was living at any given time. However many of his invoices had an address in Member State A and payments had been paid into a bank account in Member State B. On the basis of this evidence it was felt that the countries with the closes link to the fraud were Members States A and B. As Mr. X was living in Member State A, Member State A appeared to be the most appropriate jurisdiction for prosecution. However, the prosecutors in A declined the case on grounds of lacking jurisdiction – 2 years after the papers were sent to them.

- **Fraud and corruption: cases on time limitation legislation**

- An OLAF investigation case which has led to a criminal trial before the courts of Member State A related to several companies set up for the execution of EU projects in the research area. Although EU subsidies were granted to these companies, no real execution of such projects ever took place. Criminal law proceedings were declared time-barred on the basis of a new national law on time limitation in the Member State concerned.

Similar results have appeared in another complex set of cases investigated by OLAF about a wide network setting up an illicit operation of fraud against the EU, linked also with corruption. A large-scale network of private persons and companies in several MS had been set up in order to obtain fraudulently EU funds in the areas of research and structural funds. Investigations were conducted in parallel in the involved Member States. In Member State A the defendants were indicted in June 2005, but in February 2006 the Pre trial Judge dismissed the criminal case because in the meantime a new law entered into force. Meanwhile, in other Member States the suspected persons of this network have been convicted.

- **Corruption and fraud: cases on length of proceedings**

- OLAF had investigated a serious case of fraud and corruption where public officials were involved.

The case lasts now since many years after being transmitted by OLAF to the Member State X authorities. It is expected to be brought to the trial phase only now.

The reasons for this long delay are complex, but are only partly due to procedural problems related to the investigation of financial crimes in Member State X, as well as some specific problems on local level.

More prominently, the traditional instrument of mutual legal assistance in criminal matters, which was available in these cases in the cooperation between the authorities of Member State X and three other States, has functioned rather slowly. In particular, it has not allowed for a centralised management of the judicial investigations on a cross-border level. A centralised approach between the judiciaries of several Member States was very difficult to achieve. The result has been a considerable loss of time, which causes a danger of prescription.

- The insufficiencies of the traditional mutual legal assistance mechanisms have been faced also in a corruption case in the field of the EU-external policy action related to expenditure in favour of beneficiary administrations in third countries.

OLAF has invested considerable efforts to overcome the difficulties related to the use of the available mutual legal assistance instrument between the two Member States concerned by recommending the creation of a joint investigation team (JIT). The authorities of one of these States, however, did refuse the involvement of OLAF in the JIT notwithstanding the serious suspicions that OLAF had raised of systematic money laundering related to corruption, involving several other Member States, candidate countries, EFTA countries and third countries. The result of the investigations by OLAF and the action of the national judiciary on these serious criminal cases would need to have been far better coordinated and even centralised in order to give some successful results. However, efficient legal instruments to achieve this have not been available.

- In another case of corruption in the field of possible fraud, related to infrastructure expenditure, dating from 2004, the national procedure has remained blocked at the investigation stage after judicial intervention in March 2007. In this case two European arrest warrants are not executed by the requested Member States.
- A set of cases concerning serious fraud in the area of the EU policies on research and technology were investigated by OLAF against one person suspected of having organised the different

frauds. One of the cases is already time-barred and another one is at risk of becoming time-barred as well.

OLAF pursued the coordination between four Member States involved, in particular in order to freeze simultaneously the assets in several banks. Lacking the necessary competences for an operational steering of criminal investigative actions it has not been possible to reach the objectives of a coordination. Moreover, OLAF's recommendation to involve Eurojust has not been followed by the judiciary in these cases.

- **Corruption: case on admissibility of evidence gathered abroad and length of proceedings**

- In 2003, OLAF carried out investigations concerning a former staff member Mr X of a European agency located in the accession country A. Among other disciplinary and criminal offences, Mr X was alleged of having received bribes from a consortium based in Member State B that succeeded in a tender relating to an industry construction in A. The OLAF investigation results substantiated the allegations.

At the end of 2003, the case was referred to the competent judicial authorities in B. The regional criminal investigation department in B was responsible for conducting criminal investigations relating to that case. OLAF provided requested support and assistance, especially as regards European law related matters.

In 2009, the Prosecutor's office in B closed the judicial case against all suspects. Among them were Mr X but also managers of the consortium based in B. The judicial case was closed without any follow-up, the suspects were only charged with a total amount of 100.000 € to be paid partly to the public treasury and/or the public benefit.

When presenting the investigation results to OLAF, the regional criminal investigation department in B described the following problematic matters:

- the investigators faced initial problems relating to EU law, in particular specific EU international procurement procedures (not identical to national procedures), applicability of national criminal offences to EU officials and immunity of the latter, provisions of the Staff Regulations and different languages;
- the investigation lasted 6.5 years from the opening of the criminal/ judicial investigation in January 2004 to its closure in July 2010;
- the legality of the use of evidence collected during searches in A was questioned before the judicial authorities in B as well as the status of the member of the evaluation committee of the tender employed on the basis of a service contract.

### **2.1.2. Eurojust cases**

- **Fraud: case on the admissibility of evidence gathered abroad**

- In 2009, the authorities of a Member State A started an investigation towards a EU citizen suspected of fraud. As intermediary, he had claimed over 35.000 € from the European Education Program for workers of that Member State, in order for them to be educated in another Member State B in line with the Leonardo da Vinci Program over a 9-week period.

The suspect presented in his report the copies of the trainee certificates and travel documents of 20 workers, containing stamps of departure from the Member State A of origin and returning

from B, which corresponded with the required more than two months period of the education in B. During the investigation, it was found out that the 20 mentioned people did indeed leave the country, but only had been in the Member State of destination in limited periods of 1 week each. Thus, the project did not meet the criteria agreed in the contract and too much funding had been awarded to the intermediary.

Currently the case is before the court in the requesting Member State at the initial stages. 38 witnesses and 8 experts from the Member States A and B are to be heard by the judge. Also, the prosecution authorities wish to produce the documentary evidence and witness statements from the other Member State, which have been obtained following the execution of a letter of request.

But this revealed to be a complex process: Under the law of the Member State in question, when such statements are contested by either one of the parties before the court, the evidence will have to be submitted in person or by videoconferencing.

- **Intra-community VAT fraud: case on jurisdiction**

- The authorities of a Member State requested EUROJUST to exchange information with other Member States in a VAT fraud case. It involved a citizen of Member State A located in Member State B and suspected to deal with import/export of cars whilst frauding the VAT through a company in Member State C.

The case yielded no result, as it was closed in Member State C on legal grounds. This was justified by reference to VAT refund requests having been submitted only abroad from the perspective of Member State C.

VAT fraud has different variants. One involves traders who simply default on the payment of the owed VAT and another involves hijacking the VAT registration numbers of legitimate companies. There are normally several other companies ('buffer companies') forming a chain of sales transactions that give the appearance of legitimate trading. When the goods are repeatedly exported and re-imported then this criminal practice can be repeated, under the so-called common name of carousel fraud, as in the case at hand.

Until recently, carousel fraud was mostly committed in intra-community supplies of goods (e.g. mobile phones or computer chips). Several Member States have now also been confronted with carousel fraud related to greenhouse gas emission allowances, which are considered as supplies of services within the EU.

## 2.2. Judicial activity in Protection of Financial Interest cases: a statistical analysis

The following tables show some statistics on cases investigated by OLAF which have been transmitted to the criminal judicial authorities. These statistics illustrate the quantitative aspects of bringing legal action against fraud at the expense of the EU.

**Table 2.2.a: Overview of judicial action by Member State**

The following table shows the activities level of the judicial authorities in the Member States concerning cases forwarded to them by OLAF. The figures have been collected over a period of nearly 12 years, since OLAF has taken up its activities in the cooperation with the national judicial authorities.

### *Overview of progress on judicial actions<sup>1</sup>*

Member State	All actions			Actions with judicial decisions					
	Actions transferred to Member State	Actions pending judicial decision	Actions with judicial decision	Dismissed before trial	Dismissals as % of results	Acquittal	Acquittals as % of results	Convictions	Convictions as % of results
1	10	8	2	0	0,0%	0	0,0%	2	100,0%
2	21	1	20	2	10,0%	2	10,0%	16	80,0%
3	17	3	14	3	21,4%	0	0,0%	11	78,6%
4	22	1	21	6	28,6%	2	9,5%	13	61,9%
5	98	27	71	23	32,4%	6	8,5%	42	59,2%
6	113	40	73	13	17,8%	17	23,3%	43	58,9%
7	296	125	171	43	25,1%	30	17,5%	98	57,3%
8	34	6	28	7	25,0%	5	17,9%	16	57,1%
9	392	37	355	152	42,8%	17	4,8%	186	52,4%
10	4	2	2	1	50,0%	0	0,0%	1	50,0%
11	8	6	2	1	50,0%	0	0,0%	1	50,0%
12	44	16	28	14	50,0%	1	3,6%	13	46,4%
13	83	25	58	32	55,2%	1	1,7%	25	43,1%
14	32	11	21	11	52,4%	2	9,5%	8	38,1%
15	157	54	103	32	31,1%	32	31,1%	39	37,9%
16	27	13	14	8	57,1%	1	7,1%	5	35,7%
17	4	0	4	3	75,0%	0	0,0%	1	25,0%
18	8	4	4	1	25,0%	2	50,0%	1	25,0%
19	392	185	207	116	56,0%	49	23,7%	42	20,3%
20	256	107	149	115	77,2%	4	2,7%	30	20,1%
21	16	1	15	8	53,3%	4	26,7%	3	20,0%
22	174	75	99	45	45,5%	40	40,4%	14	14,1%
23	7	4	3	3	100,0%	0	0,0%	0	0,0%
24	12	3	9	8	88,9%	1	11,1%	0	0,0%
25	0	0	0	0	NA	0	NA	0	NA
26	5	5	0	0	NA	0	NA	0	NA
27	0	0	0	0	NA	0	NA	0	NA
<b>Total</b>	<b>2232</b>	<b>759</b>	<b>1473</b>	<b>647</b>	<b>43,9%</b>	<b>216</b>	<b>14,7%</b>	<b>610</b>	<b>41,4%</b>

Note: An action represents a criminal action pursued against a unique natural or legal person in one country's jurisdiction; Each case may contain multiple actions; Actions are included here from follow-up in active investigations, closed cases (in follow-up stage) and from monitoring cases.

Although it may be explained by the size of Member States that the absolute number of cases by Member State greatly varies, it should be noted that also percentage figures differ widely. This may be due, partly, to the diverging national practices when opening criminal investigations. Some national judicial authorities may open more extensively proceedings, while others do so more restrictively. However, there are diverging records with respect to the capacity to bring judicial investigations and

<sup>1</sup> Date of extraction: 1 February 2011.

prosecution to a conviction within reasonable time. May be that some results are less representative because they are based on a very small number of cases. However, even ignoring the extreme examples of the Member States with 0%, respectively 100% closure rates, the percentages of actions that are dismissed before trial vary between 10% and 89%.

The general activities level suggests that the number of actions in which no judicial decision has yet been taken is relatively high and represents about 1/3 of the actions transferred to the Member States judicial authorities (759 of 2232). By the average in 2/3 of the actions transmitted a judicial decision has been taken (1473 out of 2232). But the percentages widely differ from one Member State to another. This may be considered an indicator which reflects the speed of the judicial prosecutorial action.

At the trial phase the activities of the national judicial authorities equally greatly differ. Ranging from 0% acquittal rate to up to 50%. The average conviction rate is of 41 % for all cases in which concrete judicial action (investigative steps, procedural steps other than closing) was taken following an OLAF recommendation. But the conviction rate once again greatly varies from one Member State to another with differences concerning the more representative activities of in between 80% and 14 %.

**Table 2.2.b: Breakdown of dismissals by Member State and reason**

The table under 2.2.a) above shows that an important percentage of the actions transmitted by OLAF to the national judicial authorities are dismissed before trial. The table below further specifies the reasons for the cases opened by the national judiciary in the follow up to an OLAF investigation, but which were dropped without going to trial. **The reasons for dismissal equally differ greatly in the practice of the Member State judicial authorities.** The lack of evidence (which not only reflects the insufficient level of suspicion but also the loopholes of the applicable provisions of substantive and procedural criminal law) and the prescription (which reflects the speed of judicial follow-up in as much as the difficult challenges in implementation of the rules on time debarment) appear as significant justifications for dropping cases in certain Member States. Sometimes also the low priority or the lack of public interest are presented as reasons by the Member States.

Overall, it appears from the following figures that:

- A total of 72.5 % of dismissed cases are closed for mandatory reasons (lack of evidence, prescription, lack of legal basis, procedural errors)
- A total of 27.5% of dismissed cases are closed for discretionary reasons.

**Breakdown of dismissals by Member State and reason**

Member State	Lack of evidence	Prescription	No Public Interest	No legal basis	Low priority	Procedural errors	Other	Unspecified	Total
1	0	0	0	0	0	0	0	0	0
2	1	0	0	0	0	0	1	0	2
3	3	0	0	0	0	0	0	0	3
4	0	1	0	2	0	0	1	2	6
5	8	6	3	2	0	0	3	1	23
6	9	1	0	0	0	0	3	0	13
7	22	8	1	2	0	0	7	3	43
8	6	0	0	0	0	0	1	0	7
9	85	13	26	0	9	0	19	0	152
10	1	0	0	0	0	0	0	0	1
11	0	0	1	0	0	0	0	0	1
12	12	0	0	0	1	0	1	0	14
13	16	0	1	0	2	4	9	0	32
14	8	0	0	2	1	0	0	0	11
15	11	4	1	0	12	0	1	3	32
16	4	1	0	1	0	0	2	0	8
17	2	0	1	0	0	0	0	0	3
18	1	0	0	0	0	0	0	0	1
19	36	66	0	3	0	0	6	5	116
20	29	4	25	39	1	0	2	15	115
21	5	0	0	1	0	0	0	2	8
22	34	5	0	0	0	0	2	4	45
23	3	0	0	0	0	0	0	0	3
24	2	0	0	6	0	0	0	0	8
25	0	0	0	0	0	0	0	0	0
26	0	0	0	0	0	0	0	0	0
27	0	0	0	0	0	0	0	0	0
<b>Total</b>	<b>298</b>	<b>109</b>	<b>59</b>	<b>58</b>	<b>26</b>	<b>4</b>	<b>58</b>	<b>35</b>	<b>647</b>

as  
percentage 46,1% 16,8% 9,1% 9,0% 4,0% 0,6% 9,0% 5,4% 100,0%  
Note: An action represents a criminal action pursued against a unique natural or legal person in a country's jurisdiction; Each OLAF case with judicial follow-up may contain multiple actions; Actions are included here from follow-up in active investigations, closed cases (in follow-up stage) and from monitoring cases.

**Table 2.2.c: Combined figures on prosecutorial activity - dismissal reasons vs. cases brought to court**

Combining the results of the two foregoing tables, the following table puts into perspective the prosecutorial activity of national judiciaries in cases relating to the protection of EU financial interests by applying the main reasons for case dismissals to the overall number of cases forwarded by OLAF to national authorities. It appears that more than one in ten of these cases are closed for reasons which include, in particular discretionary reasons, before they ever reach court. The discretionary reasons referred to by the national reporting authorities are the lack of public interest and the low priority.

**Table 2.2.c: Combined figures on prosecutorial activity - dismissal reasons vs. cases brought to court**

Member State	All actions			Actions with judicial decisions							
	Actions transferred to Member State	Actions pending judicial decision	Actions with judicial decision	Dismissed before trial (Mandatory)	Mandatory as % of results	Dismissed before trial (Discretionary)	Discretionary as % of results	Acquittal	Acquittals as % of results	Convictions	Convictions as % of results
1	10	8	2	0	0.0%	0	0.0%	0	0.0%	2	100.0%
2	21	1	20	1	5.0%	1	5.0%	2	10.0%	16	80.0%
3	17	3	14	3	21.4%	0	0.0%	0	0.0%	11	78.6%
4	22	1	21	3	14.3%	3	14.3%	2	9.5%	13	61.9%
5	98	27	71	16	22.5%	7	9.9%	6	8.5%	42	59.2%
6	113	40	73	10	13.7%	3	4.1%	17	23.3%	43	58.9%
7	296	125	171	32	18.7%	11	6.4%	30	17.5%	98	57.3%
8	34	6	28	6	21.4%	1	3.6%	5	17.9%	16	57.1%
9	392	37	355	98	27.6%	54	15.2%	17	4.8%	186	52.4%
10	4	2	2	1	50.0%	0	0.0%	0	0.0%	1	50.0%
11	8	6	2	0	0.0%	1	50.0%	0	0.0%	1	50.0%
12	44	16	28	12	42.9%	2	7.1%	1	3.6%	13	46.4%
13	83	25	58	20	34.5%	12	20.7%	1	1.7%	25	43.1%
14	32	11	21	10	47.6%	1	4.8%	2	9.5%	8	38.1%
15	157	54	103	15	14.6%	17	16.5%	32	31.1%	39	37.9%
16	27	13	14	6	42.9%	2	14.3%	1	7.1%	5	35.7%
17	4	0	4	2	50.0%	1	25.0%	0	0.0%	1	25.0%
18	8	4	4	1	25.0%	0	0.0%	2	50.0%	1	25.0%
19	392	185	207	105	50.7%	11	5.3%	49	23.7%	42	20.3%
20	256	107	149	72	48.3%	43	28.9%	4	2.7%	30	20.1%
21	16	1	15	6	40.0%	2	13.3%	4	26.7%	3	20.0%
22	174	75	99	39	39.4%	6	6.1%	40	40.4%	14	14.1%
23	7	4	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
24	12	3	9	8	88.9%	0	0.0%	1	11.1%	0	0.0%
25	0	0	0	0	NA	0	NA	0	NA	0	NA
26	5	5	0	0	NA	0	NA	0	NA	0	NA
27	0	0	0	0	NA	0	NA	0	NA	0	NA
<b>Total</b>	<b>2232</b>	<b>759</b>	<b>1473</b>	<b>469</b>	<b>31.8%</b>	<b>178</b>	<b>12.1%</b>	<b>216</b>	<b>14.7%</b>	<b>610</b>	<b>41.4%</b>

Note:

An action represents a criminal action pursued against a unique natural or legal person in one country's jurisdiction; Each OLAF case with judicial follow-up may contain multiple actions; Actions are included here from follow-up in active investigations, closed cases (in follow-up stage) and from monitoring cases.

### 3. NATIONAL CRIMINAL LAW CONCEPTS: SIMILARITIES AND DISCREPANCIES

The new legal challenges for the protection of financial interests may be perceived both on the levels of substantive law and procedure.

Substantive criminal law in the EU still suffers from a series of shortcomings: this concerns both deficiencies in implementation of existing instruments by Member States and loopholes in the instruments on approximation of criminal law (3.1.). The tables in this section demonstrate, accordingly, persisting strong divergences across Member States in definitions and sanctions on the main "harmonised fraud" offences (3.2.), as well as on several criminal law offences that have not been harmonised but are of particular relevance for the protection of the EU financial interests (3.3.).

#### 3.1. Limits of the substantive criminal law framework

The main substantive criminal law instrument at EU level for the protection of EU financial interests is the Protection of Financial Interests Convention.<sup>2</sup> It mainly covers fraud, corruption and money-laundering at the expense of the EU and requires Member States to introduce criminal liability in these fields, as defined in the Convention. However, the Convention does not apply to the entire field of criminal activity relevant for the protection of EU financial interests. Its shortcomings can be summarised as follows:

- No obligation on Member States to establish competence for prosecution of crimes affecting EU financial interests, unless committed at least partly on the territory of the Member State concerned, or by one of its nationals
- No obligation on Member States to provide criminal sanctions for legal persons
- No obligation on Member States to provide certain minimum standards on general provisions, to the extent applicable to the protection of EU financial interests, in order to ensure equivalently proportionate punishment of perpetrators and participants, attempt and commission, instigating, aiding and abetting
- No obligation on Member States to provide certain minimum standards on time limitation (duration and/or suspension during proceedings)
- No obligation on Member States to criminalise corruption of service providers linked to public institutions by service contract
- No obligation on Member States to enact a certain minimum level of penalties for crimes affecting the financial interests of the Union, besides the general obligation to provide custodial sentence for serious fraud.

Moreover, two reports on the implementation of the have identified certain deficiencies in the implementation.<sup>3</sup>

Independently from the particular scope of application of the Protection of Financial Interests Convention or its concrete implementation, the table below shows that discrepancies in the implementation of the basic criminal law concepts relevant for the protection of EU financial interests persist.

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<sup>2</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests of 26 July 1995, OJ C 316, 27.11.1995, p. 49.

<sup>3</sup> First report on the implementation of the Protection of Financial Interests instruments (COM(2004)709 final and SEC(2004)1299 final); Second Implementation Report on the Protection of Financial Interests instruments (COM(2008)77 final and SEC(2008) 188 final).

### 3.1.1. Synopsis of criminal law concepts harmonised on EU level with direct relevance to the protection of public finances interests

This non-exhaustive table summarises relevant criminal law provisions for protection of EU financial interest cases of a selection of Member States. It does not purport to be representative of the legal situation across the EU, but it might help to give an indication of persisting discrepancies across Member States in terms of the core criminal offences affecting EU public money, and regarding the penalties they carry. Such discrepancies may have different effects on crime: first, comparatively weak penalties in some Member States may reduce the effect against relevant crime. Secondly, loopholes in the definitions of criminal offences in some Member States may attract criminals, or legal persons set up by them, in order to escape a more stringent legal framework in their Member State of origin.

EU Protection of Financial Interests Convention	BG Criminal code (last amendment 27.04.2010)	DE Strafgesetzbuch <sup>4</sup> (last amendment 2.10.2009)	FR Code pénal (last amendment 7.1.2011)	UK Theft Act 1968 Criminal Law Act 1977 Freedom of Information Act 2000 Fraud Act 2006 Bribery Act 2010
<p style="text-align: center;"><b>(1)</b> <b>FRAUD</b></p> <p style="text-align: center;"><b>Article 1 of Convention</b></p> <p>(a) in respect of expenditure, any intentional act or omission relating to:</p> <ul style="list-style-type: none"> <li>- 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,</li> <li>- non-disclosure of information in violation of a specific obligation, with the same effect,</li> <li>- the misapplication of such funds</li> </ul>	<p><b>Deceit</b> <b>Article 209</b></p> <p>(1) A person who for the purpose of acquiring material benefit for himself or for another evokes or maintains in somebody a misleading idea, and thereby causes material damage to that person or to another, shall be punished for deceit by deprivation of liberty for one to six years.</p> <p><b>Article 223</b></p> <p>(1) A person who gives untrue information about the quantity, quality or the kind of the produced article or about the work done with the aim to obtain undue material benefit, shall be punished by deprivation of liberty for up to three years or by probation, if this does not</p>	<p><b>Section 263</b> <b>Fraud</b></p> <p>(1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts</p> <p>(2) The attempt shall be punishable.</p> <p style="text-align: center;"><b>Section 264 Subsidy fraud</b></p> <p>(1) Whosoever</p> <ol style="list-style-type: none"> <li>1. makes <u>incorrect or incomplete statements</u> about facts relevant for granting a subsidy ... to a public authority</li> <li>3. withholds, contrary to the law... information about facts relevant to</li> </ol>	<p><b>Article 313-1</b></p> <p>Fraudulent obtaining is the act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful manoeuvres, thereby to lead such a person, to his prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation.</p> <p><b>Article 313-3</b></p> <p>Attempt to commit the offences set out under this section of the present code is subject to the same penalties.</p> <p>The provisions of article 311-12</p>	<p><b>2 Fraud by false representation</b></p> <p>(1) A person is in breach of this section if he—</p> <ol style="list-style-type: none"> <li>(a) dishonestly makes a false representation, and</li> <li>(b) intends, by making the representation— <ol style="list-style-type: none"> <li>(i) to make a gain for himself or another, or</li> <li>(ii) to cause loss to another or to expose another to a risk of loss.</li> </ol> </li> </ol> <p>(2) (...)</p> <p>(...)</p> <p><b>3 Fraud by failing to disclose information</b></p> <p>A person is in breach of this section if he—</p>

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Translation of the German Criminal Code by Prof. Dr. Michael Bohlander.

<p>for purposes other than those for which they were originally granted;</p> <p>(b) in respect of revenue, any intentional act or omission relating to:</p> <ul style="list-style-type: none"> <li>- 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,</li> <li>- non-disclosure of information in violation of a specific obligation, with the same effect,</li> <li>- misapplication of a legally obtained benefit, with the same effect.</li> </ul>	<p>constitute a graver crime.</p> <p>(2) A person who receives an undue remuneration for what he has produced or for the work he has done, knowing that it was determined on the basis of such untrue data, shall be punished by probation or by a fine from BGN one hundred to three hundred, if this does not constitute a graver crime.</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 6 years, in minor cases max 1 year, in case of EU funds max 10 years, further aggravating circumstances up to 20 years</li> <li>- confiscation</li> </ul>	<p>the subsidy from the subsidy giver; or</p> <p>4. uses a certificate, which was acquired through incorrect or incomplete statements ...</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 5 years or, under aggravating circumstances (such as abuse of power of office) max 10 years; or</li> <li>- a fine</li> </ul>	<p>are applicable to the misdemeanour of fraudulent obtaining.</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 5 years or, under aggravating circumstances (such as abuse of power of office) max 7 years; or</li> <li>- a fine</li> </ul>	<p>(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and</p> <p>(b) intends, by failing to disclose the information—</p> <ul style="list-style-type: none"> <li>(i) to make a gain for himself or another, or</li> <li>(ii) to cause loss to another or to expose another to a risk of loss.</li> </ul> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 10 years; or</li> <li>- a fine</li> </ul>
<p style="text-align: center;"><b>(2)</b> <b>CORRUPTION</b></p> <p style="text-align: center;"><b>Article of 1<sup>st</sup> Protocol</b></p> <p>the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute passive corruption.</p> <p style="text-align: center;"><b>Article 3 of 1<sup>st</sup> Protocol</b></p> <p>the deliberate action of whosoever promises or gives, directly or through an intermediary, an</p>	<p><b>Article 225b</b></p> <p>(1) A person who <u>for work done or service rendered</u> receives an undue material benefit, if the act does not constitute a graver crime, shall be punished by deprivation of liberty for up to two years and by a fine from BGN one hundred to three hundred.</p> <p>(2) If the act under the preceding paragraph is committed for a second time or the benefit is of large amount, the punishment shall be deprivation of liberty for up to three years.</p> <p>(3) In minor cases under paragraph (1) the punishment shall be a fine from BGN one hundred to three hundred, imposed administratively.</p> <p>(4) The object of the crime shall be confiscated in favour of the state.</p> <p><b>Article 225c</b></p> <p>(1) The individual performing a job</p>	<p><b>Section 331</b> <b>Taking bribes</b></p> <p>(1) A public official or a person entrusted with <u>special public service functions</u> who demands, allows himself to be promised or accepts a <u>benefit</u> for himself or for a third person for the discharge of an official duty shall be liable</p> <p><b>Section 332</b> <b>Taking bribes meant as an incentive to violating ones official duties</b></p> <p>(1) A public official or person entrusted with <u>special public service functions</u> who demands, allows himself to be promised or accepts a <u>benefit</u> for himself or for a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official</p>	<p><b>Article 435-1</b></p> <p>For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unjustified request or <u>acceptance</u> at any time, directly or indirectly, by a community civil servant or national civil servant of another member State of the European Union or by a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community of any offer, promise, donation, <u>gift or reward of any kind, to carry out or abstain from carrying out an act of his</u></p>	<p><b>1 Offences of bribing another person</b></p> <p>(a) offer, promise or giving of financial or other <u>advantage</u> to another person</p> <ul style="list-style-type: none"> <li>(i) to induce a person <u>to perform improperly</u> a relevant function or activity, or</li> <li>(ii) to reward a person for the <u>improper performance</u> of such a function or activity.</li> </ul> <p>OR</p> <p>(a) offer, promise or giving of a financial or other advantage to another person, knowing or believing that the acceptance of the advantage would itself constitute the improper</p>

<p>advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption.</p>	<p>for a legal entity or a sole trader under the Commercial Act, who requests or accepts a gift or any benefit, that appears undue, or accepts an offer or a promise for a gift or benefit <u>in order to perform an act, or fail so to do</u>, in breach of his/her obligations with regard to commercial activities, shall be punished</p> <p>(2) The individual performing commercial activities, who offers, promises or provides a gift or any benefit to a person performing a job with a legal entity or a sole trader, in order to perform an act, or fail so to do, in breach of his/her obligations, shall be punished</p> <p>(4) The individual who acts as intermediary with regard to some acts under the preceding paragraphs, where his conduct does not qualify under more serious crimes, shall be punished</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 5 years for passive corruption of employees/staff/civil servants, max 3 years for active corruption, or max 1 year for intermediaries</li> <li>- a fine</li> <li>- expropriation of the object of the crime</li> </ul>	<p>duties shall be liable</p> <p><b>Section 333</b> <b>Giving bribes</b></p> <p>(1) Whosoever offers, promises or grants <u>a benefit</u> to a public official, a person entrusted with <u>special public service functions</u> or a soldier in the Armed Forces for that person or a third person for the discharge of a duty shall be liable</p> <p><b>Section 334</b> <b>Giving bribes as an incentive to the recipients violating his official duties</b></p> <p>(1) Whosoever offers, promises or grants <u>a benefit</u> to a public official, a person entrusted with <u>special public service functions</u> or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable.</p> <p><b>Section 108e</b> <b>Bribing delegates</b></p> <p>(1) Whosoever undertakes to <u>buy or sell a vote</u> for an election or ballot in the European Parliament or in a parliament of the Federation, the member states, municipalities or municipal associations, shall be liable.</p> <p><i>[The definition of public official was extended to judges or officials of other Member States or the European Communities, Commissioners and Members of European Court of Auditors, to the</i></p>	<p><u>office</u>, mission or mandate, or facilitated by his office, duty or mandate, is punished</p> <p><b>Article 435-2</b></p> <p>For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or <u>advantage of any kind</u> to a community civil servant or national civil servant of another Member State of the European Union or to a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community <u>to carry out or abstain from carrying out an act of his office</u>, mission or mandate, or facilitated by his office, duty or mandate, is punished...</p> <p>The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph.</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 10 years or</li> <li>- fine</li> </ul>	<p>performance of a relevant function or activity.</p> <p><b>2 Offences relating to being bribed</b></p> <p>(1) A person ("R") is guilty of an offence if any of the following cases applies.</p> <p>(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).</p> <p>(3) Case 4 is where—</p> <p>(a) R requests, agrees to receive or accepts a financial or other advantage, and</p> <p>(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.</p> <p>(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.</p> <p><b>3 Function or activity to which bribe relates</b></p> <p>(2) The following functions and activities fall within</p>
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### 3.1.2. Synopsis of criminal law concepts with relevance to the protection of the EU financial interests defined only on a national level

	<b>BG</b> Criminal code (last amendment 27.04.2010)	<b>DE</b> Strafgesetzbuch (last amendment 2.10.2009)	<b>FR</b> Code pénal (last amendment 7.1.2011)	<b>UK</b> Theft Act 1968 Criminal Law Act 1977 Freedom of Information Act 2000 Fraud Act 2006 Bribery Act 2010
<b>(1)</b> <b>ABUSE OF POWER</b>	<p><b>Embezzlements</b> <b>Article 201</b> An official who appropriates from another sums of money, objects or other valuables, deposited with him in his capacity or entrusted to him for safekeeping and management, and disposes with them to his own interest or to the personal interest of another, shall be punished for embezzlement by official</p> <hr/> <p><b>Sanctions:</b> -imprisonment up to 8 years, in case the EU is a victim up to 15 years, in further aggravating circumstances up to 20 years -confiscation</p>	<p><b>Section 266</b> <b>Embezzlement and abuse of trust</b> (1) Whosoever - <u>abuses the power</u> accorded to him ... or - <u>violates his duty</u> to safeguard the property interests ... and thereby causes damage</p> <hr/> <p><b>Sanctions:</b> - imprisonment max 5 years or a fine</p> <p><b>Section 264 Subsidy fraud</b> (2) In especially serious cases...: 2. <u>abuses his powers or his position as a public official</u>; or 3. uses the <u>assistance of a public official</u> who abuses his powers or his position.</p> <hr/> <p><b>Sanctions:</b> (2) imprisonment from six months to ten years</p>	<p><b>Article 432-12</b> The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment</p> <hr/> <p><b>Sanctions:</b> - imprisonment max 5 years or - a fine.</p>	<p><b>4 Fraud by abuse of position</b> (1)A person is in breach of this section if he— (a)<u>occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,</u> (b)<u>dishonestly abuses</u> that position, and (c)intends, by means of the abuse of that position— (i)to make a gain for himself or another, or (ii)to cause loss to another or to expose another to a risk of loss. (2)A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.</p> <hr/> <p><b>Sanctions:</b> - imprisonment max 10</p>

				years; or - a fine  <b>Common law: Misconduct in office</b>
(2)  <b>EMBEZZLEMENT (MALVERSATION)</b>	<p><b>Article 206</b></p> <p>(1) A person who unlawfully appropriates a movable object of another, which is in his possession or which has been left with him for safekeeping, shall be punished for embezzlement.</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 6 years or max 15 years for "particularly large scale"</li> <li>- confiscation</li> </ul> <p><b>Article 217</b></p> <p>(1) A person who consciously inflicts damage to the property of another, which has been entrusted to him for management or safekeeping, shall be punished</p> <p>(2) The same punishment shall be imposed on a representative or a proxy who has acted consciously against the lawful interests of the represented person.</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 3 years, in case of considerable or irrevocable damages max 5 years or</li> <li>- a fine</li> </ul> <p><b>Article 220</b></p> <p>(1) An <u>official</u> who consciously concludes a <u>disadvantageous transaction</u> and therefrom considerable damages ensue for the economy or for the institution, enterprise or organisation which he represents, shall be punished by deprivation</p>	<p><b>Section 246 Unlawful appropriation</b></p> <p>(1) Whosoever unlawfully appropriates <u>chattels</u> belonging to another ...</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 3 years or</li> <li>- a fine</li> <li>- unless more severe penalty under other provisions.</li> <li>- if property was entrusted to the offender: imprisonment max 5 years or a fine.</li> </ul> <hr/> <p><b>Section 266 Embezzlement and abuse of trust</b></p> <p>Cf. above</p>	<p><b>Article 314-1</b></p> <p>the act whereby a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 3 years or</li> <li>- a fine</li> </ul> <hr/> <p><b>Article 432-15</b></p> <p>The destruction, misappropriation or purloining of a document or security, of private or public funds, papers, documents or securities representing such funds, or of any other object entrusted to him, committed by person holding public authority or discharging a public service mission, a public accountant, a public depositary or any of his subordinates</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- imprisonment max 10 years (max 1 year in case of negligence of an office holder) or</li> <li>- a fine</li> </ul>	<p><b>Theft Act 1968</b></p> <p>1 Basic definition of theft. (1)A person ... dishonestly <u>appropriates property</u> belonging to another with the intention of permanently depriving</p> <hr/> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>- on conviction on indictment : imprisonment for a term max 7 years</li> </ul>

	<p>of liberty from one to six years, and the court may rule deprivation of the right under Article 37 (1), sub-paragraph 6.</p> <hr/> <p><b>Sanctions:</b>  - imprisonment max 8 years, or in case of "particular large size, representing a particularly grave case" max 10 years, or  - a fine</p>			
<p><b>(3) BREACH OF PROFESSIONAL SECRECY</b></p>	<p><b>Article 284</b>  (1) An official who, to the detriment of the state, of an enterprise, an organisation or private person, <u>informs another or publishes information</u> which has been entrusted or accessible to him officially and of which he <u>knows it constitutes an official secret</u>, shall be punished  (2) The punishment for an act under paragraph 1 shall be also imposed on a person who is not an official, who works in a state institution, enterprise or public organisation</p> <hr/> <p><b>Sanctions:</b>  - imprisonment max 2 years</p>	<p><b>Section 353b Breach of official secrets and special duties of confidentiality</b>  (1) Whosoever unlawfully discloses a secret which has been <u>confided</u> or <u>become known</u> to him in his capacity as  1. a <u>public official</u>;  2. a person entrusted with <u>special public service</u> functions;  or  3. exercises duties or powers under the laws on <u>staff representation</u>  - and thereby <u>causes</u> [including by negligence] <u>a danger</u> to important public interests  (2) Whosoever makes it publicly known  1. which he is obliged to keep <u>secret on the basis of a resolution of a legislative body</u> or  2. which he has been <u>formally put under an obligation</u> to keep secret by another official agency...  - and thereby <u>causes a danger</u> to important public interests  (4) The offence may only be <u>prosecuted upon authorisation</u>.</p>	<p><b>Article 226-13</b>  The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission</p> <hr/> <p><b>Sanctions:</b>  - imprisonment max 1 year or  - a fine</p>	<p><b>Official Secrets Act 1989</b>  <b>Common law: Bribery/ Misconduct in office</b>  - special offences for certain officials in certain fields, not applicable to EU officials</p> <hr/> <p><b>(Freedom of Information Act 2000 S. 30 Investigations and proceedings conducted by public authorities:</b>  Categories of information exempted from divulgence  No criminal sanctions)</p>

		<p><b>Sanctions:</b>          -para (1): imprisonment max 5 years/ max 1 year if negligence, or fine          -para (2): imprisonment max 3 years, or fine          - in case of violation of tax secret (Section 355), imprisonment max 2 years</p>		
<p>(4)  <b>FRAUD IN PUBLIC PROCUREMENT</b></p>	<p>No specific provision</p>	<p><b>Section 298</b>  <b>Restricting competition through agreements in the context of public bids</b></p> <p>- to make an offer based on an <u>unlawful agreement</u> whose purpose is to cause the organiser to accept a particular offer</p> <p>- to voluntarily <u>prevents the organiser</u> from accepting the offer or from providing his service</p> <hr/> <p><b>Sanctions:</b>          - imprisonment max 5 years or          - a fine</p>	<p><b>Article 313-6</b></p> <p>In a public sale or tendering process, the rejection of a bid or tender, or the restriction of bids or tenders, by gifts, promises, understandings or any other fraudulent means</p> <hr/> <p><b>Sanctions:</b>          - imprisonment max 6 months or          - a fine</p> <hr/> <p><b>Article 432-14</b></p> <p>any person holding public authority or discharging a public service mission or holding a public electoral mandate (...) who obtains or attempts to obtain for others an <u>unjustified advantage</u> by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality</p> <hr/> <p><b>Sanctions:</b>          - imprisonment max 2 years or          - a fine</p>	<p>No specific provision</p>

### 3.2. Insufficient cooperation between the authorities – working together faces problems

The Commission, in 2009, has mandated an expert study<sup>5</sup>. Its aim has been to take stock of the experience of interviewed prosecutors of the Member States<sup>6</sup> dealing with offences against the EU financial interests and with transnational crimes, defence lawyers, as well as practitioners of the competent European bodies (EUROJUST, OLAF, EUROPOL).

In parallel to the developments concerning facts and figures, it may be noted that the practitioners who have been interviewed in this study share some concerns with regard to practice in investigating and prosecuting fraud and transnational crimes<sup>7</sup>.

#### 3.2.1. Limits to mutual legal assistance - Obstacles when requiring and providing assistance

The transnational collection and transmission of evidence is seen in a moderately positive light both in asking for and in providing assistance. There is a general wish of being able to participate in the collection of evidence in another Member State.

- 83 Percent stated to have standard mechanisms for asking for assistance. However, only 46 percent reported to always use these mechanisms. This may indicate deficiencies, but it may also mean that they are not considered appropriate in all cases. Additionally, the success of these mechanisms was mainly (49 percent) seen as depending on the effort made by the individual prosecutor; only 23 percent held these mechanisms to be generally successful.
- In providing legal assistance, 54 percent encountered no problems in obtaining and transferring the evidence but 14 percent answered that they had in fact difficulties. While 74 percent<sup>8</sup> had never refused a request for legal assistance, 20 percent had done so at least once. The reasons for this were mainly of a legal nature (including practical legal differences), though in some cases the request was considered too general or the offence - petty.

These numbers correspond with the experiences of the experts in seeking legal assistance.

- 66 percent had never encountered a refusal of their requests, while 31 percent had encountered such a refusal. Just as in providing legal assistance, the reasons were mainly of a legal nature, but the lack of resources or time was also invoked. Some added that their requests, though not refused, had not been executed or had been handled very slowly.
- The feed-back on cases was seen as deficient. When asked if the cases they provided assistance for had been brought to a successful conclusion, over 77 percent gave no answer or said they did not know. Only 17 percent<sup>9</sup> answered in the affirmative, while 6 percent knew their case had not been concluded successfully.

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<sup>5</sup> EURONEEDS study: "Evaluating the need for and the needs of a European Criminal Justice system", Max-Planck Institut für ausländisches und internationales Strafrecht (Marianne Wade), expected to be published in the course of 2011.

<sup>6</sup> 17 Member States and Croatia are covered by the study.

<sup>7</sup> The results in percentage presented in this section refer to the answers of the national prosecutors dealing with offences against the EU financial interests.

<sup>8</sup> This percentage is higher in comparison with the national prosecutors dealing with transnational crimes, from whom only 53% have never refused a request.

<sup>9</sup> This is even lower compared to the national prosecutors dealing with transnational crimes, from whom 25% have answered in the affirmative.

- A very clear majority of 80 percent<sup>10</sup> would prefer to become directly involved in collecting evidence abroad when they request legal assistance. Some interviewees stated clearly that this was not because other member states made any difficulties in executing these requests. Rather, the main reason given is that this would enable the prosecutor to decide quickly which measures to take next and how to react.

### 3.2.2. Unused evidence - Limited recourse to the EU instruments and bodies for assistance

European mechanisms and institutions are regarded as helpful by most, but there is a great divide between mechanisms and bodies that are used fairly frequently and those that are hardly used at all.

Of the existing EU mechanisms, the European Arrest Warrant is most often used in investigating crimes against the EU budget:

- 40 percent use it frequently, while 26 percent use it at least occasionally. The Databases and FinCen are used rarely by the interviewed practitioners.

Amongst the bodies, OLAF is used frequently by 20 percent and occasionally by 9 percent of the prosecutors interviewed, the majority of 66 percent however using it rarely or never. Eurojust is also used frequently by 34 percent and at least occasionally by another 31 percent. Europol and the EJM are used rarely or never by the interviewed practitioners.

This corresponds to the highest frequency of use of the European Arrest Warrant, as regards the EU instruments, and of OLAF and Eurojust as regards the bodies. As a reason for their preference, 49 percent of the interviewed indicated the nature of the cases, while the efficiency gain was named by 40 percent (more than one answer was possible).

The existing mechanisms and bodies prove to be satisfactory on the whole:

- While 91 percent hold that they at least improve access to evidence or suspects from other member states and 77 percent also believe they work well, **however, 37 percent have at least once decided not to contact an EU institution in a relevant case, mainly because this was found to be too time-consuming, or for other, individual, reasons.**
- An overwhelming majority found indeed that Eurojust, Europol and OLAF assisted them in their work, mainly because they save time and resources. The greater probability of obtaining admissible evidence was only of secondary importance. 43 percent contacted these institutions in all relevant cases, 26 percent did not<sup>11</sup>.

**There is still a need to further increase the awareness for the observation of procedural standards to guarantee that the evidence can be used in court:**

- When requesting legal assistance, 54 percent made sure that procedural safeguards and defence rights were attended to abroad concerning coercive measures, while the rest did not.

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<sup>10</sup> This willingness is considerably higher than that of the national prosecutors dealing with transnational crimes, from whom only 59% prefer to be directly involved.

<sup>11</sup> 41 percent of the national prosecutors dealing with transnational crimes contacted these institutions in all relevant cases, while 30 percent did not.

- The percentage is much higher when prosecutors execute another member state's request: there, 83 percent paid attention to these standards and 71 percent tried to attend to the rules of the requesting member state.

### **3.2.3. Restriction of prosecution to domestic cases - Difficulties when dealing with offences having a European dimension - National disincentives**

- A significant portion of the interviewees (37 percent) perceived a rise in crime against the EU budget over the past years, while the rest felt they could not estimate this (34 percent) or perceived no rise at all (29 percent).
- 60 percent felt that cases were sometimes hampered by the European dimension. This ratio is significantly higher than in other areas of crime.
- Probably as a consequence of this, 54 percent of the interviewees admitted to sometimes limiting their investigation to the national aspects of a case even though they recognise its European dimension. This number could be higher in reality, as prosecutors might be hesitant to answer the question in the affirmative.

There are some structural differences between their organisation's stance to domestic and protection of EU financial interest cases perceived among practitioners:

- 40 percent found disincentives within their national systems for bringing such cases. The resources were generally found to be equal to that given to comparable national cases, though for some this means that they are equally restricted.
- Also, internal performance indicators treated work on European cases not identically to national cases for 34 percent of the interviewees.

As regards the evaluation of investigation and prosecution by practitioners of the European bodies (OLAF, Europol and Eurojust), there seems to be a general agreement that "European" offences are treated with the same priority as national ones. However, the majority of these interviewees who deal with Protection of Financial Interests (57%) consider that such cases are not fully recognised by the national authorities and that they are neither investigated nor prosecuted adequately (64%). While there may be a series of non-tangible reasons of organizational sociology having this effect, the main tangible causes would seem to be practical difficulties with the request of judicial and administrative co-operation and inadmissible evidence under the law of the prosecuting Member State. The result of all these aspects taken together is high case closing rates<sup>12</sup>.

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<sup>12</sup> See also statistics on judicial action under point 2.2.

## **4. HOW CAN THE EU ACT? Commission consultations, conceptual documents and experts studies available**

### **4.1. Strengthening procedures – Policy action by the Commission**

The main policy actions achieved by the Commission in the last years are presented in the following initiatives:

- the 2002 public consultation based on the Green paper on criminal-law protection of the financial interests and the establishment of a European Prosecutor<sup>13</sup>
- the 2003 follow-up report on the Green paper<sup>14</sup>
- the two reports adopted by the Commission in 2004 and 2008 on the implementation of the Protection of Financial Interests Convention and its protocols<sup>15</sup>

### **4.2. Relevant publications by judicial authorities in the Member States**

The EU action has been supported more recently by the following Member States' initiatives:

- the 2009 conclusions of the EPPO Working Group, as follow up of the conference organized by the Spanish Fiscalía General Del Estado
- the publication (August 2010) of the results of the Conference organised by the French Cour de cassation (Quelles perspectives pour un ministère public européen?)

### **4.3. Experts studies mandated by the Commission**

- the Corpus Juris<sup>16</sup> (1997)

This study (1997) had elaborated a set of thirty-five penal rules designed to ensure a fair, simple and efficient system of protection of the EU financial interests, including the setting up of the European Public Prosecutor. These rules follow seven guiding principles as built up in the case law of the ECJ and the ECHR. The rules cover both substantive criminal law – by defining specific offences relevant for Protection of Financial Interests and some general criminal law rules-, and criminal procedure – by designing the institutional set-up of the EPPO, enshrining the principle of judicial control and defining the basic procedural rights and guarantees.

- a further comprehensive law research<sup>17</sup> (2000)

This study is prepared as a follow-up to the Corpus Juris study in order to further reflect on the concrete implementation of the original Corpus Juris proposal into the legislation of the Member States. It contains syntheses of comparative law on the feasibility of Corpus Juris, as well as national reports covering the 15 Member States and transversal reports on the main issues on the horizontal and vertical

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<sup>13</sup> COM(2001)715.

<sup>14</sup> COM(2003)128.

<sup>15</sup> COM(2004)709 final, SEC(2004)1299 and COM(2008)77final, SEC(2008)188.

<sup>16</sup> Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union, under the responsibility of M. Delmas-Marty, Economica, Paris, 1997

<sup>17</sup> The Implementation of the Corpus Juris in the Member States, M. Delmas-Marty / J.A.E. Vervaele, Intersentia, Utrecht, 2000 (4 volumes). Translated versions are available at [http://ec.europa.eu/anti\\_fraud/green\\_paper/links.html](http://ec.europa.eu/anti_fraud/green_paper/links.html)

cooperation among the Member States and the EU. The study was conducted by independent researchers in 1998-1999 upon the request of the European Parliament and of OLAF.

- the publication of the study on structures and perspectives for European criminal Justice, with detailed Country reports<sup>18</sup>

The study develops a comprehensive and coherent strategy for the organisation of effective criminal prosecution in the EU, especially regarding crimes against the EU financial interests. It analyses the current state of criminal prosecution in Europe as regards substantive and procedural legislation and the administration of the criminal justice affairs. It compares the different national reports and general principles for the organisation of criminal prosecution in Europe.

- study on the future institutional and legal framework of judicial cooperation in criminal matters in the EU: final results expected by end 2011<sup>19</sup>

The Commission commissioned a "Study on the strengthening of Eurojust" in 2010, in order to prepare an impact assessment. The Study will address problem definitions, recommendations for action and impacts in 5 areas covered by Art.85: (i) Eurojust's internal structure; (ii) involvement of the European Parliament and national Parliaments in the evaluation of Eurojust's activities; (iii) providing Eurojust with powers to initiate criminal investigations/propose the initiation of prosecutions; (iv) providing Eurojust with powers to coordinate investigations and prosecutions; (v) providing Eurojust with powers to resolve conflicts of jurisdiction. The results of the study are expected by the end of this year and on that basis the Commission will consider presenting relevant proposals during 2012.

- study on Criminal Investigation and Prosecution of Crimes Affecting the Financial Interests of the EU – the Member States` dimension (2011)

This comparative law study is conducted by the University of Luxembourg and shall be published in the course of 2011. The aim of the study is to provide European decision makers, practitioners and the academic community with detailed and comprehensive knowledge on the common features and differences between the legal systems and cultures within the EU in tackling crimes affecting the financial interests of the European Union. It contains comprehensive national reports on the EU Member States<sup>20</sup> covering besides general aspects of criminal procedural law, the details of investigation measures, prosecutorial measures, the use of evidence, procedural safeguards as well as information sharing between administrative and judicial authorities, which are of relevance for the offences affecting the EU financial interests. The analysis is completed by several transversal and special reports on selected problems in this field<sup>21</sup>.

- the "Euroneeds study" on evaluating the need for and the needs of a European Criminal Justice System (2011)

The main aspects of this study are summarized under section 3.2 above.

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<sup>18</sup> Study conducted by Freiburg Max Planck Institute expected to be published in the course of 2011.

<sup>19</sup> Study conducted by the University of Ghent.

<sup>20</sup> All Member States except Cyprus are covered by the study.

<sup>21</sup> For instance, report on judicial review, report on vertical cooperation in administrative investigations.

## ANNEX I: Figures on fraud and irregularities from the Commission

*Number of irregularities and amounts — 2009<sup>22</sup>*

Area	Number of irregularities reported				Total estimated financial impact of irregularities, including suspected fraud (€million)				Estimated financial impact of suspected fraud only (€million)			
	2006	2007	2008	2009	2006	2007	2008	2009	2006	2007	2008	2009
<b>Agriculture</b>	3 249	1 548	1 133	1 621	87	155	102.3 (~0.24 % of allocations)	125 (~0.24 % of allocations)	29.8 (~0.06% of allocations)	44.8 (~0.1% of allocations)	4 (~0.01 % of allocations)	13.3 (~0.03% of allocations)
<b>Cohesion Policy</b>	3 216	3 832	4 007	4 931	703	828	585.2 (~0.11 % of allocations)	1 223 (~2.53% of allocations)	157.56 (~0.41% of allocations)	141 (~0.31% of allocations)	57 (~0.11 % of allocations)	109 (~0.23 % of allocations)
<b>Pre-accession funds</b>	39	332	523	706	14	32	61 (~0.9 % of allocations)	117 (~ 0.78% of allocations)	1.57 (~0.03% of allocations)	5 (~0.38% of allocations)	13 (~0.9 ~% of allocations)	57 (~0.38% of allocations)
<b>Direct expenditure</b>	-	411	932	705	-	33	34.7 (~0.17 % of allocations)	27.5 (~0.17 % of allocations)	-	18.1 (~0.17% of allocations)	3.2 (~0.02 % of allocations)	1.5 (~ 0.01 % of allocations)
<b>Total expenditure</b>	6 860	6 123	6 595	7 963	804	1 048	783.2(~ 0.07 % of the expenditure in the four areas)	1.492.5 (~1.13% of the total expenditure in the four areas)	188.93 (~0.2% of the expenditure in the four areas)	208.9 (~0.22% of the expenditure in the four areas)	77.2 (~ 0.07 % of the expenditure in the four areas)	180.8 (~0.13 % of the expenditure in the four areas)
<b>Own resources<sup>23</sup></b>	5 705	5 321	6 075	4 648	353	377	375 (~0.46 % of the total amount of own	343 (~0. 23 % of the total amount of own	134.3 (~0.94% of the total amount of own	106.57 (~0.62% of the total amount of	75 (~0.46 % of the total amount of own	99 (~0.68% of the total amount of own

<sup>22</sup>

Comparison of Article 325 report 2009, p.6, Table 1 and Article 280 report 2007, p. 7, Table 1.

							resources) <sup>24</sup>	resources)	resources)	own resources)	resources)	resources)
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<sup>23</sup> Customs duties and agricultural levies.

<sup>24</sup> This percentage is based on an estimate of traditional own resources in the 2009 general budget, and not on accounts.

## ANNEX II: AMOUNTS INVOLVED IN FRAUD<sup>25</sup>

AMOUNTS INVOLVED IN FRAUD PER MEMBER STATE PERIOD 2007-2009								
MEMBER STATE	2007			2008			2009	
	CASES	FRAUD CASES	FRAUD IN €	CASES	FRAUD CASES	FRAUD IN €	CASES	FRAUD IN €
AT	94	31	34°103°931	103	25	11°299°158	166	11°299°158
BE	462	56	2°193°816	368	46	3°411°591	286	3°411°591
DE	1°614	222	15°081°027	1°696	214	14°684°577	927	14°684°577
DK	54	2	213°813	47	6	671°103	44	671°103
ES	464	196	10°482°321	485	216	14°900°293	432	14°900°293
FI	34	21	1°207°186	21	11	651°465	31	651°465
FR	327	153	6°064°600	317	123	4°415°700	285	4°415°700
GR	57	57	2°976°051	37	37	1°751°545	12	1°751°545
IE	34	4	134°805	53	13	0	49	0
IT	288	101	11°231°037	320	179	19°490°171	312	19°490°171
LU	0	0	0	1	0	0	0	0
NL	1°145	341	22°388°674	912	101	2°455°234	742	2°455°234
PT	23	2	394°483	29	5	1°676°333	22	1°676°333
SE	44	3	0	71	3	0	58	0
UK	1°161	193	15°453°616	1°078	144	12°668°045	791	12°668°045
<b>EUR-15 TOTAL</b>	<b>5°801</b>	<b>1°382</b>	<b>121°925°360</b>	<b>5°538</b>	<b>1°123</b>	<b>88°075°215</b>	<b>4°157</b>	<b>88°075°215</b>
BG	15	8	79°536	19	15	447°721	34	447°721
CY	11	3	26°456	14	3	378°947	11	378°947
CZ	50	3	559°995	65	5	79°088	67	79°088
EE	12	1	41°304	17	1	100°592	11	100°592
HU	69	16	2°505°463	71	26	2°438°843	59	2°438°843
LT	41	7	77°041	64	15	469°924	47	469°924
LV	41	0	0	25	0	0	19	0
MT	10	5	285°766	3	2	259°214	6	259°214
PL	159	68	5°940°049	141	49	1°793°594	142	1°793°594
RO	37	19	3°211°696	75	27	1°501°929	59	1°501°929
SI	27	6	187°055	26	5	277°754	50	277°754
SK	21	10	189°623	17	4	125°579	22	125°579
<b>EUR-12 TOTAL</b>	<b>493</b>	<b>146</b>	<b>13°103°984</b>	<b>537</b>	<b>152</b>	<b>7°873°185</b>	<b>527</b>	<b>7°873°185</b>
<b>EUR-27 TOTAL</b>	<b>6°294</b>	<b>1°538</b>	<b>135°029°344</b>	<b>6°075</b>	<b>1°275</b>	<b>95°948°400</b>	<b>4°684</b>	<b>95°948°400</b>