



Fraud against the European Union's Financial Interest



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Through Act XVIII of 7th April 2020, a new sub-section has been added to the Criminal Code which transposes the provisions of the EU Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 (commonly known as the 'PIF Directive'). The Directive seeks to harmonise the definitions and sanctions related to fraud offences, including corruption and bribery, affecting the 'Union's financial interests' as defined. The notion of intention applies to all criminal offences covered by the Directive.

Amongst others, the Directive covers serious VAT offenses that threaten such interests, in particular carousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation. VAT offenses are considered to be serious when they are connected with Malta and at least another Member State, result from intentional acts or omissions with the aim of taking undue advantage of the common VAT system and involve a total damage of at least EUR10 million. VAT fraud refers to cross-border fraudulent schemes in relation to:

- the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the EU budget;
- non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
- the presentation of correct VAT related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Upon conviction, such VAT fraud is punishable with an imprisonment term ranging from 4 to 8 years.

In addition, the new provisions cover three other types of fraudulent acts and omissions affecting the Union budget; (a) in respect of non-procurement related expenditure, (b) in respect of procurement-related expenditure (i.e. related to public contracts) and (c) in respect of revenue other than revenue arising from VAT own resources.

Upon conviction, such offences carry with them an imprisonment punishment ranging from 6 months to 4 years, which punishment increases to 4 to 8 years when the damage/advantage is over EUR100,000.

Any person, including public officers, intentionally involved in active or passive corruption or acts of misappropriation is also subject to the provisions of the new sub-section when their acts or omissions have an effect on the Union budget. For this purpose, the definition of 'public officer' in the Criminal Code has been widened to include a 'Union official' or a 'national official' of a Member State other than Malta and any 'national official' of a third country.

- Passive corruption refers to when a public officer, directly or through an intermediary, requests or receives advantages of any kind for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the European Union's financial interests. Upon conviction, the penalty for passive corruption is a 6 month to 4 year imprisonment term, increasing to a 4 to 8 year imprisonment term if the damage/advantage is over EUR100,000.
- Active corruption refers to when any person promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public officer for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the European Union's financial interests. Upon conviction, the penalty for active corruption is a 6 month to 4 year imprisonment term, increasing to a 4 to 8 years imprisonment term if the damage/advantage is over EUR100,000.
- Misappropriation refers to when any public officer who is directly or indirectly entrusted with the management of funds or assets, commits or disburses funds or appropriates or uses assets contrary to the purpose for which they were intended in any way which damages the European Union's financial interests. Upon conviction, the penalty for misappropriation is a 3 to 18 month imprisonment term, increasing to a 4 to 8 year imprisonment term if the damage/advantage is 'considerable'.



Whoever incites, aids, abets or attempts any of the above offences is liable to the sanction of the relevant offence.

All the above penalties increase by 1 or 2 degrees where the offence is committed within the framework of a criminal organisation.

Furthermore, the new sub-section establishes also the extent of corporate liability for the above-mentioned offences that affect the Union budget, distinguishing between two types of corporate offences;

- Offences committed by a person having a leading position within the legal entity, whether acting individually or as part of an organ of the body corporate, for the benefit of a body corporate. Here, the criteria to determine whether the person is in a leading position are their power to represent, their authority to take decisions on behalf of and their authority to exercise control within, the body corporate.
- Offences committed for lack of supervision or control by such person having a leading position, making the commission of the offense possible by a person under its authority, for the benefit of the body corporate.

The penalty for corporate offenders is a fine of not less than EUR20,000 and not more than EUR20 million. Simultaneously the legal person may be excluded from the entitlement to public benefits or aid, may be temporarily or permanently excluded from public tender procedures, suspended or revoked of any licence, permit or other authority to engage in any trade, business or other commercial activity, may be placed under judicial supervision, may be wound up compulsorily, or forced to temporarily or permanently close the establishments which have been used for the commission of the criminal offence. Corporate liability does not exclude the possibility of criminal proceedings against the individual perpetrators.

With respect to corporate liability, one would have to see to what extent the criteria laid down for determining 'a leading position' extend beyond the board of directors and C-suite executives. Similarly it is not entirely clear whether offences for the lack of oversight would capture independent parties like sub-contractors and agents and/or, whether having policies and procedures clearly laid down and agreed to by such parties could quash the lack of oversight argument.

The Maltese courts shall have jurisdiction over the offences laid down in the new sub-section even when there is a partial link with Malta, but always with due respect to the principle of *ne bis in idem* (i.e. one cannot be charged twice for the same offence).



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