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Issues in regulating Eurocrimes: Case study of crimes against the financial interests of the European Union

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Issues in regulating eurocrimes – case study of crimes against the financial interests of the European Union

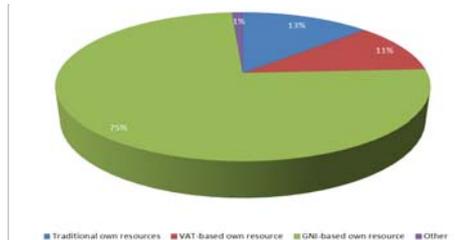
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Introduction

Revenues in 2012



Approximately 75% of expenditure from the EU budget is implemented directly by the EU Member States

EU budget

2011 €126.5 billion
2012 €129.1 billion
2013 €132,8 billion

Expenditures 2012 in 100%

SUSTAINABLE GROWTH	45.9
Competitiveness for growth and employment	10.0
Cohesion for growth and employment	35.8
PRESERVATION AND MANAGEMENT OF NATURAL RESOURCES	40.8
Direct aids & market related expenditure	29.9
Rural development, environment & fisheries	10.8
CITIZENSHIP, FREEDOM, SECURITY AND JUSTICE	1.4
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Current EU legal framework

- legal basis former TEC Article 280, now TFEU Article 325
- The Convention on the Protection of the European Communities' financial interests ('PIF Convention')
- Protocols to the Convention
- Council Regulation 2988/95 on the protection of the European Communities' financial interests ('PIF Regulation')
- Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property
- other EU legislation (on-the-spot checks, recovery)
- international agreements

criminal + administrative rules



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PIF Convention

- **Article 1(1) definition of fraud affecting the European Communities' financial interests, fraud in respect of (a) expenditure; (b) revenue**
- **Article 1(2) obligation to transpose Article 1(1) into national criminal law so that the fraudulent crimes constitute criminal offences**
- **Article 1(3) intentional preparation or supply of false, incorrect or incomplete statements or documents having fraudulent effect constitutes a criminal offence**
- **Article 2 penalties to be imposed**
- **Article 3 criminal liability of heads of businesses**
- **Article 4 jurisdiction**
- **Article 5 extradition and prosecution in cases where Member States do not extradite their own nationals**
- **Article 6 cooperation between Member States when the fraud constitutes a criminal offence concerning at least two Member States.**
- **Article 7 ne bis in idem rule**
- **Article 8 referral of cases to the Court of Justice**



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Protocols

- **First Protocol to the Convention on the protection of the European Communities' financial interests 1996** – definition of the concepts of 'official' and 'active and passive corruption', harmonisation of penalties for corruption offences. The protocol entered into force in October 2002;
- **Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities** –The protocol entered into force in October 2002; and
- **Second Protocol to the Convention on the protection of the European Communities' financial interests 1997** – liability of legal persons, confiscation, money laundering and cooperation between EU Member States and the Commission for the purpose of protecting the financial interests of the Community and personal data related. Obligation on Member States to make money-laundering an offence and to make legal persons liable. This protocol entered into force in May 2009.



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PIF Regulation

homogenous to the PIF Convention, but administrative measures and penalties concerning irregularities with regard to EU law

- Article 1 - definition of “irregularity”- particular effect on the principle of *mens rea* in national law!
- Article 2 proportionate, effective and dissuasive administrative checks, measures and penalties
- Article 3 limitation periods for proceedings and for establishing administrative penalties
- Article 5 administrative penalties to be imposed for intentional irregularities or those caused by negligence
- Article 7 EU administrative measures and penalties to economic operations
- Article 8 measures to ensure the regularity and reality of transactions involving the EU’s financial interests
- Article 9 responsibility of the Commission to carry out checks in particular circumstances



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European Anti-Fraud Office (OLAF)

- established in 1999, being part of the European Commission with a special independent status for conducting anti-fraud investigations
- mission of OLAF is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions
- OLAF's main competences
 - Carry out **external administrative investigations**
 - The checks and verifications OLAF carries out externally do not affect the powers of the Member States in the area of criminal prosecution
 - Carry out **internal administrative investigations**
 - OLAF has the right of immediate and unannounced access to any information held by the Community institutions, bodies, offices and agencies. It may also ask anyone concerned for oral information, and carry out on-the-spot checks on economic operators

Eurojust and Europol



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Case studies - Fraud

PIF Convention

Article 1 Fraud

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



BG Criminal code (2010)

Deceit

Article 209

- (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.

Article 223

- (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 constitute a graver crime.
- (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.

Sanctions:

- 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
- confiscation

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Case studies - Fraud

PIF Convention

Article 1 Fraud

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 - non-disclosure of information in violation of a specific obligation, with the same effect,
 - the misapplication of such funds for purposes other than those for which they were originally granted;
- (b) in respect of revenue, any intentional act or omission relating to:
- the 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.



DE Strafgesetzbuch (2009)

Section 263

Fraud

- (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.
- (2) The attempt shall be punishable.

Section 264 Subsidy fraud

- (1) Whosoever makes incorrect or incomplete statements about facts relevant for granting a subsidy ... to a public authority withholds, contrary to the law... information about facts relevant to the subsidy from the subsidy giver;

or
uses a certificate, which was acquired through incorrect or incomplete statements ...

Sanctions:

- imprisonment max 5 years or, under aggravating circumstances (such as abuse of power of office) max 10 years; or
- a fine

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Case studies - Fraud

PIF Convention

Article 1 Fraud

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



FR Code pénal (2011)

Article 313-1

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.

Article 313-3

Attempt to commit the offences set out under this section of the present code is subject to the same penalties.

The provisions of article 311-12 are applicable to the misdemeanour of fraudulent obtaining.

Sanctions:

- imprisonment max 5 years or, under aggravating circumstances (such as abuse of power of office) max 7 years; or
- a fine.

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Case studies - Fraud

PIF Convention

Article 1 Fraud

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



UK*

2 Fraud by false representation

- (1) A person is in breach of this section if he—
- (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (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) (...)

(...)

3 Fraud by failing to disclose information

- A person is in breach of this section if he—
- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
 - (b) intends, by failing to disclose the information—
 - (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.

Sanctions:

- imprisonment max 10 years; or
- a fine

*Theft Act 1968 Criminal Law Act 1977 Freedom of Information Act 2000 Fraud Act 2006 Bribery Act 2010

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Case studies - Corruption

Protocol to the PIF Convention

BG (2010)

CORRUPTION

Article of 1st Protocol

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.

Article 3 of 1st Protocol

the deliberate action of whosoever promises or gives, directly or through an intermediary, an 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.



Article 225b

- (1) A person who for work done or service rendered 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.
- (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.
- (3) In minor cases under paragraph (1) the punishment shall be a fine from BGN one hundred to three hundred, imposed administratively.
- (4) The object of the crime shall be confiscated in favour of the state.

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Protocol to the PIF Convention

BG (2010) cont.

CORRUPTION

Article of 1st Protocol

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the deliberate action of whosoever promises or gives, directly or through an intermediary, an 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.



Article 225c

- (1) The individual performing a job 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 in order to perform an act, or fail so to do, in breach of his/her obligations with regard to commercial activities, shall be punished
- (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
- (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

Sanctions:

- imprisonment max 5 years for passive corruption of employees/staff/civil servants, max 3 years for active corruption, or max 1 year for intermediaries
- a fine
- expropriation of the object of the crime

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Protocol to the PIF Convention

DE Strafgesetzbuch (2009)

CORRUPTION

Article of 1st Protocol

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Article 3 of 1st Protocol

the deliberate action of whosoever promises or gives, directly or through an intermediary, an 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.



Section 331

Taking bribes

(1) A public official or a person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of an official duty shall be liable

Section 332

Taking bribes meant as an incentive to violating ones official duties

(1) A public official or person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit 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 duties shall be liable

Section 333

Giving bribes

(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier in the Armed Forces for that person or a third person for the discharge of a duty shall be liable

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Protocol to the PIF Convention

DE Strafgesetzbuch (2009) cont.

CORRUPTION

Article of 1st Protocol

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.

Article 3 of 1st Protocol

the deliberate action of whosoever promises or gives, directly or through an intermediary, an 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.



Section 334

Giving bribes as an incentive to the recipients violating his official duties

(1) Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions 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.

Section 108e

Bribing delegates

(1) Whosoever undertakes to buy or sell a vote 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.

[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]

Sanctions:

- passive corruption: imprisonment max 3 years for taking bribes, in exchange for specific act max 5 years
- active corruption: max 2 years for giving bribes, if for specific act max 5 years
- in all cases: or fine

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Protocol to the PIF Convention

FR Code pénal (2011)

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Article 435-1

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 acceptance 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, gift or reward of any kind, to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished

Article 435-2

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 advantage of any kind to a community civil servant or national civil servant of another Member State of the European Union or

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FR Code pénal (2011) cont.

CORRUPTION

Article of 1st Protocol

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.

Article 3 of 1st Protocol

the deliberate action of whosoever promises or gives, directly or through an intermediary, an 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.



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 to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished...

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.

Sanctions:

- imprisonment max 10 years or
- fine

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Protocol to the PIF Convention

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CORRUPTION

Article of 1st Protocol

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Article 3 of 1st Protocol

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1 Offences of bribing another person

- (a) offer, promise or giving of financial or other advantage to another person
- (i) to induce a person to perform improperly a relevant function or activity, or
- (ii) to reward a person for the improper performance of such a function or activity.

OR

- (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 performance of a relevant function or activity.

2 Offences relating to being bribed

- (1) A person ("R") is guilty of an offence if any of the following cases applies.
- (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).
- (3) Case 4 is where—
- (a) R requests, agrees to receive or accepts a financial or other advantage, and

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CORRUPTION

Article of 1st Protocol

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.

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- (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (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.

3 Function or activity to which bribe relates

- (2) The following functions and activities fall within this subsection—
- (a) any function of a public nature,
- (b) any activity connected with a business,
- (c) any activity performed in the course of a person's employment,
- (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).

Sanctions:

- imprisonment max 10 years
- fine

*Theft Act 1968 Criminal Law Act 1977 Freedom of Information Act 2000 Fraud Act 2006 Bribery Act 2010

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Shortcomings of EU law and national law

- **crimes included in the PIF Convention**
 - fraud
 - corruption
- **crimes not included in the PIF Convention**
 - abuse of power
 - embezzlement
 - breach of professional secrecy
 - fraud in public procurement
- **criminal liability for heads of business in PIF Convention**
- **confiscation**



Shortcomings of EU law and national law

- 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- **jurisdiction**
- 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.



Shortcomings of enforcement

- admissibility of evidence
- length of proceedings
- cooperation with OLAF, Eurojust and Europol
- mutual assistance



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Judicial activity in PIF cases: a statistical analysis

▪ Overview of progress on judicial actions

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
Total	2232	759	1473	647	43,9%	216	14,7%	610	41,4%

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.

▪ Reasons for dismissal

Member State	Lack of evidence	Prescription	No Public Interest	No legal basis	Low priority	Procedural errors	Other	Unspecified	Total
Total	298	109	59	58	26	4	58	35	647

percentage as 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.



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A glimpse to the future – new COM proposal

- **Article 1: Subject matter**
- **Article 2: Definition of the Union's financial interests – this provision sets out a definition of the Union's financial interests which applies throughout the instrument – Value Added Tax fraud**
- **Article 3: Fraud affecting the Union's financial interests – definition of fraudulent behaviour to be criminalised in the Member States.**
- **Article 4: Fraud related offences affecting the Union's financial interests**
- **Article 5: Incitement, Aiding and Abetting, Attempt – requires Member States to criminalise also forms of preparation of and participation in such offences.**
- **Article 6: Liability of legal persons – this is a provision applicable to all offences mentioned above, which requires Member States to ensure liability of legal persons, while excluding that such liability is alternative to that of natural persons.**



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A glimpse to the future – new COM proposal

- **Article 7: Penalties for natural persons – minimum set of criminal sanctions for natural persons.**
- **Article 8: Minimum imprisonment ranges –minimum imprisonment terms for particularly serious offences, based on thresholds set out for each offence..**
- **Article 9: Minimum sanction types for legal persons**
- **Article 10: Freezing and confiscation**
- **Article 11: Jurisdiction**
- **Article 12: Prescription for offences affecting the Union's financial interests**
- **Article 13: Recovery**
- **Article 14: Interaction with other applicable legal acts of the Union**
- **Article 15: Cooperation between the Member States and the European Commission (OLAF)**
- **Article 16: Repeal of the criminal law conventions for the protection of the European Communities' financial interests**



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A glimpse to the future – institutions

- **further strengthening Eurojust**

Article 85 TFEU

[..] In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

- **establishing the EPPO**

Art 85 TFEU

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. [...]

- **reform of OLAF**



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**Do You Have
Any Questions?
We would be happy to help.**

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