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The Directive on the Fight against Fraud to the Union's Financial Interests and its Transposition into the Spanish Law

by

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Abstract

This paper aims at analysing the content of the PIF Directive and assessing its transposition into the Spanish Law. To achieve these objectives, this paper starts with a detailed study of the criminal law obligations enshrined in the PIF Directive. Then, these obligations are compared with the content of the Spanish criminal code, which has been modified in the last years (2010, 2015 and 2019) with the purpose, among others, of adapting the Spanish law to the EU requirements as regards the protection of the Union's financial interests. The paper concludes, on the one side, that the PIF Directive leaves an extensive leeway to Member States in the definition of the crimes, sanctions and limitation period, which may hinder any desired harmonisation of national legislations. On the other side, it concludes that the Spanish criminal law fulfils, generally speaking, the mandate of the PIF Directive.

Key-words

PIF Crimes, PIF Directive, Spanish Criminal Code, Unions' Financial Interests

1. Introduction

The EU budget suffers enormous losses every year as a consequence of the conducts of fraud. These conducts are usually interlinked with other criminal behaviours such as corruption of public officials and misappropriation of public funds. In addition, money laundering typically appears intertwined with economic crimes such as those mentioned, damaging not only the EU financial interests but also the EU economy in general. Due to their devastating effects, the fight against these conducts has been a continuous concern in the agenda of the European Union. More specifically, since the nineties, the EU agenda on the protection of the financial interests has focused on the use of criminal law measures to combat behaviours that may affect them due to the deterrent effect of the criminal sanction. In 1995, the PIF Convention came to light, being the first legal instrument requiring Member States the criminalisation of conducts of fraud that might affect the financial interests of the former European Community. At the present, the PIF Directive, passed in 2017, emphasises the necessity of making use of criminal law resources to curb this kind of behaviours.

The PIF Directive is aimed at harmonising national criminal laws with the purpose of reaching a more effective fight against the offences that may put the Union's financial interests at risk. The deadline to transpose the obligations of the PIF Directive expired in July, 6th 2019. Therefore, some Member States, among them, Spain, have tried to adopt their national legislations to the mandate of the PIF Directive.

The objectives of this paper are, firstly, to analyse the content of the PIF Directive, and secondly, to assess its transposition into the Spanish Law. To achieve these objectives, this paper starts with a detailed study of the criminal law obligations enshrined in the PIF Directive. Then, these obligations are compared with the content of the Spanish criminal code, which has been modified in the last years (2010, 2015 and 2019) with the purpose, among others, of adapting the Spanish law to the EU requirements as regards the protection of the Union's financial interests. The paper concludes, on the one side, that the PIF Directive leaves an extensive leeway to Member States in the definition of the crimes, sanctions and limitation period, which may hinder the desired harmonisation of national legislations. On the other side, it concludes that the Spanish criminal law fulfils, generally speaking, the mandate of the PIF Directive.

2. Legislative background on the protection of the Union's financial interests through criminal law

The protection of the financial interests of the European Union has been a concern since the 1970s, when for the first time own resources were allocated to the former European Economic Community (Di Franceso Maesa, 2018). The protection of the financial interests through mechanisms of criminal law emerged in the 1990s, with the adoption of the so-called PIF Convention (Convention on the protection of the European Communities' financial interests[I]) and its Protocols within the third pillar, on the basis provided by Article K.3 of the Treaty of Maastricht.

The PIF Convention was the first legal instrument, which imposed criminal law obligations on Member States for the protection of the European Communities budget. Specifically, the Convention required Member States to take measures to punish conducts of fraud through criminal law sanctions. The PIF Convention, however, did not mention other practices, which could be very harmful for the financial interests of the European Communities, namely, the practices of corruption of public officials managing Communities' funds. To solve this problem, a Protocol was added to the PIF Convention (Protocol to the Convention on the protection of the European Communities' financial interests, of 27 September 1996, hereinafter, First Protocol[II]). The First Protocol, being aware that 'the financial interests of the European Communities may be damaged or threatened by other criminal offences, particularly acts of corruption by or against national and Community officials, responsible for the collection, management or disbursement of Community funds under their control' (Preamble) required Member States to consider corruption of any national official as a criminal offence, including any official of another Member State, and Community officials if the conduct damaged or was likely to damage the European Communities' financial interests. That was a true step forward in the fight against corruption since until that date, corruption was considered a merely national problem. Neither the PIF Convention nor the First Protocol dealt with some crucial issues in the fight against fraud and corruption affecting the financial interests of the European Communities, namely, money laundering, liability of legal persons and assets recovery. Therefore, a Second Protocol tackling these issues was added to the PIF Convention in 1997 (Second Protocol to the

Convention on the protection of the European Communities' financial interests, of 19 June 1997, hereinafter, Second Protocol[III]).

Despite the fact of having three new legal binding instruments to combat fraud and corruption affecting the EU budget through criminal law measures, the problem remained in subsequent years. Member States were reluctant to ratify the PIF Convention and its accompanying Protocols (Arnone & Borlini, 2014; Di Francesco Maesa, 2018:; Szarek-Mson, 2010), which took many years to enter into force. Even when the PIF Convention and the Protocols entered into force, Member States provided an uneven level of enforcement and implementation of the obligations concerning the protection of the Union’s financial interests through criminal law (European Commission, 2012; Kuhl, 2012; Mancano 2019; Vervaele 2014). Therefore, it was necessary to give a new impulse to the fight against practices damaging the Union’s financial interests. The Commission prepared a first pillar proposal for a directive on this topic (European Parliament & Council, 2001), but the Council rejected it because it considered inappropriate the use of the Article 280 of the Treaty establishing the European Community as legal basis (Di Francesco Maesa, 2018).

With the entry into force of the Lisbon Treaty in December 2009, the Commission issued a new proposal on the fight against fraud to the Union’s financial interests by means of criminal law in 2012 (European Parliament & Council, 2012). After five years of negotiations, the PIF Directive – Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law – (European Parliament & Council, 2017) was finally passed under the basis provided by Article 325 of the Treaty of Functioning of the European Union[IV]. The PIF Directive replaces the PIF Convention and the Protocols thereto. Built upon the *acquis* of these legal instruments, the PIF Directive seeks to strengthen the protection of the Union’s financial interests through stricter obligations for Member States. It imposes the obligation of sanctioning by means of criminal law a number of offences, which may put the EU budget at risk. Additionally, it foresees other measures regarding criminal law, like harmonisation of penalties and limitation periods. The following section analyses the content of the PIF Directive.

3. Content of the PIF Directive

3. 1. Offences to be criminalised by Member States

According to Articles 3 and 4 of the PIF Directive, Member States have the obligation to consider some conducts that may put the Union's financial interests at risk as a criminal offence. The offences referred by the PIF Directive are fraud, corruption of public officials, misappropriation of funds, and money laundering.

3.1.1. Fraud

Ever since the former European Economic Community (EEC) was provided with 'own resources' in 1970 (European Council, 1970), the conduct of fraud has been a major concern because attacks on the budget are attacks on the very existence of the Union (Manacorda, 1999). Every year, fraud causes millions of Euros to be lost from the EU budget. Although quantifying fraud against the EU's financial interests is a complex task, the Commission estimated it at EUR 467 million in 2017 (European Commission, 2018). Typical fraudulent activity includes: evading payments of customs duties and taxes, and obtaining benefits to which they are not entitled (Csúri, 2016). Former EU legal instruments tried to prevent such conduct but with limited success. In 1995, the PIF Convention required Member States for the first time the criminalisation of fraud that damaged or was likely to damage the financial interests of the European Communities. Nevertheless, as said before, the criminal law measures of the PIF Convention did not sufficiently contribute to curb fraud losses. The new PIF Directive emphasises the idea of making use of criminal law resources to fight against practices of fraud due to the deterrent effect of the criminal sanction on the potential perpetrators' decision (European Commission, 2012). Moreover, the Directive offers an updated definition of fraud, which clarifies the language on VAT fraud (Juszczak & Sason, 2017). Like the PIF Convention, the PIF Directive differentiates between fraud affecting expenditure and fraud affecting revenue. Regarding expenditure, the definition has been formulated, making a distinction in Article 3 (2) of the Directive between non-procurement-related expenditure (e.g. grants) and procurement-related expenditure. The first follows the definition provided by the PIF Convention, according to which the offence of fraud includes

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

The definition of fraud concerning procurement-related expenditure contains a further requirement, according to which, the person must act 'in order to make an unlawful gain for the perpetrator or another person by causing a loss to the Union's financial interests' (Article 1 (2) (b)). It should be noted, however, that in this case, damage must actually have been caused; it is not sufficient the risk of damage (Juszczak & Sason, 2017).

When it comes to revenue, during the negotiations the most debated point was the inclusion of the VAT fraud among types of conduct to be considered a criminal offence by Member States legislation. On the one hand, the Council wanted to exclude VAT fraud from the scope of application of the PIF Directive. The problem was the nature of the harm against the Union's financial interests, which is only indirect in VAT fraud. Therefore Member States were reluctant to include VAT fraud among the PIF crimes. To avoid transferring to the EU more powers than needed in the field of criminal law where the competence is mostly national, Member States included high thresholds in the understanding that only beyond these thresholds the harm to the EU budget could be real. On the other hand, the Commission and the Parliament did want to include it among the PIF crimes. The Court of Justice of the European Union (CJEU) shed light in this matter in the *Taricco* case[V], confirming the Commission and Parliament's opinion that VAT fraud falls under the scope of the definition of fraud *ex* Article 1 of the PIF Convention. Finally, negotiators reached a 'compromise solution' (Anghel Tudor, 2019: 141) whereby VAT fraud would be included in the PIF Directive (Article 3(2) (d)) while making its criminalisation conditioned upon two additional requirements: fraud should be cross-national (linked to two Member States at least) and its produce be at least EUR 10 million (Article 2 (2)).

Some scholars have criticised the provisions concerning the criminalisation of VAT fraud in the PIF Directive as too narrow, therefore appraising it as a step backward from its treatment under the PIF Convention (Di Francesco Maesa, 2018: 1462). Granted, VAT fraud was not expressively mentioned in the PIF Convention, but the Court of Justice interpretation that VAT fraud was included in the PIF Convention, without additional requirements, had changed the situation. By contrast, the PIF Directive obliges Member States to consider only the most serious forms of VAT fraud a criminal offence, such as carousel fraud, Missing-Trader-Intra-Community (MTIC) fraud and fraud committed by a criminal organization (Juszczak & Sason, 2017). The problem here is the wide margin left to the Member States in defining serious cases of VAT fraud. Some Member States may opt for the limit of EUR 10 million, while others may reduce this limit considerably, hindering the desired attempt to harmonise the definition of such offences.

3.1.2. Corruption

Along with fraud, what may also seriously damage the Union's financial interests is the practice of corruption of public officials managing EU funds. Estimating the cost of corruption is highly difficult. The EU Anti-Corruption Report calculated the cost of corruption for the EU economy at EUR 120 billion per year, just a little less than the annual budget of the Union (European Commission, 2014). This figure only includes losses in tax revenue and investments, ignoring further indirect cost components. Other studies offer larger figures. The one carried out by van Ballegoij and Zandstra (2016) estimated that the cost of corruption at the EU level may oscillate between EUR 179 and 990 billion. As observed, the variation is very significant. The explanation is that the study calculates the loss to the EU economy in three different scenarios (the 'magnificent seven', the 'catch me if you can', and the 'goodfellas'). 'The "magnificent seven" scenario calculates how much countries lose relatively in economic terms by not reaching the corruption level of the seven best performing Member States. The 'catch me if you can' scenario calculates how much countries lose relatively in economic terms by not reaching the EU average corruption level. The 'goodfellas' scenario divides Member States into four different groups with similar institutional characteristics and levels of corruption. The scenario analyses how much countries lose relatively in economic terms by not reaching the level of the best performer within the corresponding peer group' (Ballegoij and Zandstra, 2016: 6). The losses vary from one scenario to another: EUR 870 to 990 billion in the first, EUR 179 to 256 billion in the second, and EUR 218 to 282 billion in the third. The study considers the third scenario to be the most feasible because it takes into account the difference in corruption levels between Member States (Ballegoij and Zandstra, 2016).

In addition, there is another problem that may rise the global figure: the practices of corruption are frequently linked with fraud to the EU budget since public officials may be bribed to facilitate the diversion of the EU money (Csúri, 2016: 124). For these reasons, fighting corruption at the EU level has been traditionally linked to the fight against fraud, and several relevant legal acts have been adopted.

One of the biggest problems in a coordinated fight against corruption at the EU level is the lack of uniform definitions. A good example of this is the concept of 'public official'. The First Protocol to the PIF Convention offered an own definition of 'Community official' but each national legislation would define and provide meaning to the concept of 'national official', giving rise to high disparity across Member States. As provided by Article 1 (c) of the First Protocol, the concept of 'national official' had to be understood 'by reference to the definition of 'official' and 'public officer' in the national law of the Member State in which the person in question performs that function'. This provision was strongly criticised by scholars (Benito Sánchez, 2019; Kaiafa-Gbandi, 2010; Mitsilegas, 2013; Wolf, 2007) because the same conduct could be deemed an offence in one Member State and not in another, depending on the definition in each Member State, a situation that could clearly hinder cooperation between countries in the fight against such practices. In order to avoid this problem, it was obvious that a common definition of 'public official' was needed. Now, the PIF Directive offers an autonomous definition of 'national official' in Article 4 (4) (a) (ii):

> [t]he term 'national official' shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official.

Moreover, the definition of 'public official' in the PIF Directive is completed in Article 4 (b) with a reference to a *functional* or *material* concept, according to which, 'public official' is also

> any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

The *functional* concept has as a direct consequence the enlargement of the scope of application of the criminal law in this matter. Indeed, the new definition has been designed to cover all residual situations that could not be considered a criminal offence under the previous legal provisions (PIF Conventions and the Protocols).

The new concept of 'public official' contained in the PIF Directive is undoubtedly a step forwards, since it offers an autonomous concept of EU law, which once the Member States transpose into national legislation, will avoid problems derived from the existence of so many different and competing definitions.

The definition of 'corruption' as a crime follows what was stipulated in the First Protocol to the PIF Convention in 1996. According to this, Member State shall consider active and passive corruption of public officials a criminal offence when the conduct damages or is likely to damage the Union's financial interests. We can distinguish between the notions of 'passive corruption' (the conduct of the public official who requests or receives a bribe) and 'active corruption' (the conduct of the person who promises, offers or gives a bribe to a public official). Due to space constraints, only the amendments to the definition of the crime is explored here.

Traditionally, criminal codes in Europe have distinguished two modalities of corruption offences depending on if the conduct of the public official violates or not official duties. The most serious case is that in which a public official acts 'in breach of his duties'. The less serious case is that in which a public official acts 'in accordance to his function' but contrary to the general official duty of acting impartially. An example of this distinction can be observed in the criminal codes of Germany, Italy and Spain. The *Strafgesetzbuch* distinguishes between *Bestechlichkeit* (§ 332, breach of duty) and *Vorteilsannhame* (§ 331, not breach of duty). The *Codice penale* differentiates between *corruzione per un atto contrario ai doveri d'ufficio* (Article 319, breach of duty) and *corruzione per l'esercizio della funzione* (Article 318, not breach of duty). The *Código penal* does the same between *cohecho propio* (Article 419, breach of duty) and *cohecho impropio* (Article 420, breach of duty).

This distinction between conducts obviously affects the criminal penalty, which is heavier in those cases in which the public official acts 'in breach of his duties'. In those cases, it had been traditionally understood that the damage on the legal interest (the fairness of the Public Administration) is more significant than in those cases in which the civil servant does not breach official duties.

This view started to change at the end of the 1990s. The Criminal Law Convention on Corruption, adopted by the Council of Europe in 1999, represents the beginning of this change. The Convention does not make any distinction in its Articles 2 and 3, which define active corruption and passive corruption respectively, on the basis of an action or omission of the public official 'in the exercise of his or her functions'. The Explanatory Report to the Convention considers that the legal interest can be 'severely undermined' in both cases, so that no distinction is needed (Council of Europe, 1999). Although the civil servant acts without violating official duties, the fairness of the Public Administration is anyway damaged, or at least put at risk, because he receives money (or another advantage) by a citizen or a company, something inadmissible in a democratic state, where public officials are remunerated by public budget, not by citizens or companies (Council of Europe, 1999). The United Nations Convention against Corruption adopted in 2003 follows the path of the Council of Europe Convention. It does not distinguish either between more or less serious corruption offences (Article 15).

In line with these two international legal documents on corruption, but contrary to what was stipulated by the First Protocol to the PIF Convention in 1996, the PIF Directive also does not make any distinction between corruption that violates or not official duties. The main consequence of this change of perspective is the enlargement of the conducts under the threat of the criminal law. From the PIF Directive on, any conduct related to a bribery is punishable although the public official does not act 'in breach of official duties' because the EU budget may also be put at risk by any such behaviour where a public official acts in accordance with his function but contrary to the general duty of acting impartially, for instance, by giving preferential treatment by speeding up the processing of a case.

3.1.3. Misappropriation

One of the main novelties of the PIF Directive is the requirement to consider the misappropriation of funds a criminal offence. This is a true improvement with respect to former legal documents on the protection of the EU budget since all of them had ignored these practices, despite the significant annual losses to the EU budget. The impact assessment for the proposal for the PIF Directive estimated such losses at EUR 15.1 million (European Commission, 2012).

The offence of misappropriation of public funds has been present in the criminal codes of some Member States for decades. Some examples are the *Codice Penale* of Italy (Articles 314 - 316ter) and the *Código Penal* of Spain (Articles 423 - 435bis). These criminal codes place this offence among 'offences against the public administration'. Other criminal codes in which this offence has existed for years are the French and the German. These latter include a regulation of misappropriation that does not distinguish between public or private assets (*Code pénal*, Articles 314-1 to 314-4; *Strafgesetzbuch*, § 266). Although the definition of this crime may vary from one set of legislation to another, the key element is the *diversion* of money. The PIF Directive defines the offence of misappropriation as 'the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests' (Article 4 (3)). Where such conduct is committed intentionally, the Member States are now obliged to sanction it via criminal law.

One might assume that some forms of misappropriation are included in the definition of fraud provided in Article 3 of the PIF Directive, in relation to expenditures since it mentions 'the misappropriation or wrongful retention of funds or assets from the Union budget' and 'the misapplication of such funds or assets for purposes other than those for which they were originally granted'. Article 4 (3), however, covers other types of conduct carried out by a public official, for instance, the use of a credit card linked to a bank account where EU funds are deposited to fund public projects for personal purchases (European Commission, 2012).

3.1.4. Money laundering

Money laundering is defined as 'the process of concealing the origin, ownership or destination of illegally or dishonestly obtained money by hiding it within legitimate economic activities' (Transparency International, 2009: 16). Practices of money laundering constitutes a grave risk to the EU economy since the objective of these practices is to legitimise, or make regular, the assets coming from criminal offences, which are then introduced into the formal economy by various mechanisms as if they had been obtained by legal means. The Union's concern about the effects of money laundering on the EU economy began more than three decades ago with the first Anti-Money Laundering Directive was passed in 1991 (European Council, 1991). The need to protect the Union's financial interests through the criminalisation of money laundering was firstly exposed by the Second Protocol to the PIF Convention in 1997. The PIF Directive (Article 4 (1)) imposes the same obligations, requiring Member States to adopt the necessary measures to ensure that money laundering, involving property derived from the offences referred to by the Directive, constitutes a criminal offence. Actually, the only novelty here is the consideration of the crime of misappropriation of EU funds as a 'predicate offence', that is, an offence whose proceeds may become the subject of a money laundering offence. The Second Protocol to the PIF Convention already stipulated that fraud and corruption should be considered 'predicate offences'.

As regards the definition of the offence of money laundering, the PIF Directive refers to the Fourth Anti-Money Laundering Directive (European Parliament & Council, 2015). The recently passed Fifth Anti-Money Laundering Directive (European Parliament & Council, 2018) does not change anything since, as pointed out by its Article 1 (2), the new Directive 'does not apply to money laundering as regards property derived from criminal offences affecting the Union's financial interests, which is subject to specific rules laid down in Directive (EU) 2017/1371'.

3.1.5. Participation forms and inchoate crimes

According to the criminal law theory, the category 'participation' includes any kind of contribution to the offence carried out by other persons than the perpetrator (Klip, 2012), such as the instigator or the accomplice The category 'incomplete' or 'inchoate' offence refers to those conducts that shall be punished even before the undesirable harm materialises, the classical example being the attempted offence (Klip, 2012). None of these concepts has been defined by specific EU legal instruments, although many of them use this terminology[VI]. Consequently, it seems to be that the Union law leaves the definitions to Member States (Keiler, 2011).

The PIF Directive employs the terms 'incitement', and 'aiding and abetting' to describe the forms of participation that must be placed under the remit of the criminal law by national legislations (Article 5). Likewise, the attempt to commit a PIF crime shall be considered punishable by the criminal law in Member States (Article 5). The reference to the attempted offence represents a progress in the protection of the EU financial interests since the former legal instruments did not impose obligations in this regard.

The problem is the lack of definitions concerning the terminology, just like the lack of instructions concerning the applicable criminal sanctions for these situations, which may lead to differences in the implementation of the Directive (Di Francesco Maesa, 2018). In any case, it must be assumed that it is very complex to establish harmonised rules in this respect since the concepts of 'participation forms' and 'inchoate crimes' have a long tradition in the criminal law systems of the Member States, which in some cases comes from the ninetieth century. Therefore, it will not be easy to unify criteria. Member States would probably show great reluctance to alter these traditional notions.

3.2. Criminal law sanctions

The PIF Convention opened up a way of harmonising criminal sanctions for offences affecting the financial interests of the EU, by requiring Member States to adopt 'effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition' (Article 5 (1)). This attempt at harmonisation was a flawed one, to the extent that it left to national authorities the task of adopting criteria to grade, in the light of their respective legal systems, the seriousness of criminal offences, resulting in an uneven ranking of penalties across Member States (Carrera Hernández, 2001). This idea may be illustrated well through comparative examination of the treatment of passive corruption in Germany, Italy and Spain. While all three criminal codes punish this offence with a penalty of imprisonment, striking variation is observed. The same offence would be punished with imprisonment between 6 months and 5 years in Germany (*Strafgesetzbuch* Code § 332), between 6 and 10 years in Italy (*Codice Penale*, Article 319), and between 3 and 6 years in Spain (*Código Penal,* Article 419). Thus, the criminal sanction for the perpetrator may vary between 6 months and 10 years for the same offence.

To avoid situations like the one described above, the PIF Directive can be seen as a step forward when it comes to the harmonisation of penalties since it provides Member States with more precise requirements. Like the PIF Convention, the PIF Directive has allowed securing uniformity across Member States in a key aspect: that the set of conducts described above are sanctioned with penalties of imprisonment (not only fines). The novelty here is that it foresees a maximum penalty of at least four years of imprisonment when the offence involves 'considerable damage or advantage' (Article 7 (3)). According to the same legal article, 'considerable damage or advantage' shall be understood as referring to cases involving more than €100,000. Nevertheless, this attempt at harmonising criminal sanctions continues to be very limited since the PIF Directive does not offer rules concerning minimum penalties; and with respect to maximum penalties, Member States may foresee very broad-ranging limits. This situation may seriously hinder any desired harmonisation, the lack of uniform penalties continuing to be an opportunity for potential perpetrators. When they have to decide the territory on which the PIF crime will be committed (e.g. VAT fraud), they will be able to choose the Member State in which the crime is punished with lower penalties, just for the case they are caught by authorities.

3.3. The aggravating circumstance of 'criminal organisation'

The European Union has been concerned about organised crime for many years, as evidenced by a number of legal initiatives adopted in this matter. In 1999, the conclusions of the European Council of Tampere on the creation of an area of freedom, security and justice in the European Union included the fight against organised crime as one of the priorities of the Union. Likewise, two programmes – the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, and the Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens – underline the need to combat organised crime. In 2008, the Framework Decision 2008/841/JHA on the fight against organised crime (European Council, 2008) was adopted, requiring Member States to make a criminal offence any conduct related to participation in a criminal organisation.

The links between organised crime and the offences referred by the PIF Directive seem to be clear. In 2000, the United Nations Convention against Transnational Organized Crime[VII] pointed out the relations between criminal networks and the offences of corruption and money laundering. Therefore, among the offences mentioned in the Convention due to the relation to organised criminality, we find corruption (Article 8) and money laundering (Article 7). The links between these criminal conducts are also a reality at the EU level. Indeed, the Preamble of the PIF Directive (recital 2) points out that attacks to the Union's financial interests are often committed by organised criminal networks. Moreover, the European Parliament published a report on the relationship between organised crime and fraud to the EU budget (European Parliament, 2011). Other studies have investigated the links between organised crime and corruption (Gounev & Bezlov, 2010; Villoria Mendieta, 2012). In order to curb the damage caused to the EU's financial interests by criminal gangs, the PIF Directive requires Member States to consider that the commission of the offence in the framework of a criminal organisation represents an aggravating circumstance, referring to the 2008 Framework Decision to define 'criminal organisation' (Article 8).

The PIF Directive, however, does not specify any provision concerning the criminal penalty for those cases where there is an aggravating circumstance. In addition, the Directive does not explain either if the obligation contained in Article 8 concerning the aggravating circumstance can be fulfilled in that case in which the national criminal law considers the participation in a criminal organisation as a separate offence. The text of the PIF Directive does not say anything to this respect. The Preamble of Directive does point out this possibility but, as known, the Preamble is not a valid legal basis for this claim. Consequently, differences in the punishment of criminal behaviour among Member States may be very significant. The Directive could arguably have contained more concrete provisions to allow for the complete harmonisation of penalties, thus preventing that legislative divergences at the national level become a relevant factor when potential criminals decide in which Member State(s) the offence against the EU's financial interests will be committed.

3.4. Liability of legal persons

When it comes to persons responsible for a criminal offence, traditionally the criminal law theory in the continental Europe – contrary to Common Law system – has been only focused on natural persons (individuals) since they are the only ones that can be motivated by the law. Consequently, the legal systems of these countries have rejected the idea of considering the legal persons (companies) criminal liable, following the Roman aphorism *societas delinquere non potest*. However, the development of economic criminality has brought about a change because economic crimes are essentially committed in the framework provided by a legal person. For instance, it is almost impossible to imagine a case of VAT fraud without the support of a company. For these reasons, some Member States have been including criminal liability of legal persons into their legislations for the last years (Vermeulen et al, 2012). This is the case, for instance, of, France, The Netherlands, Portugal and Spain, whose criminal codes include provisions on the responsibility of legal entities[VIII]. Other States, such as Germany and Italy do not recognise criminal liability for legal persons, but this does not mean that companies remain unpunished where involved in economic crimes. In these cases, companies can be sanctioned with non-criminal sanctions. In the case of Germany, the responsibility of legal entities is regulated in the *Gesetz über Ordnungswidrigkeiten* (§ 30) (Act on regulatory offences). The liability may derive from an offence of criminal or administrative nature (Martínez-Buján Pérez, 2016). In the case of Italy, the liability of legal persons is regulated by the Decreto Legislativo 231/2001[IX]. Formally, the responsibility of legal entities in Italy is administrative. However, this type of liability has been described as quasi-criminal since it derives from a *criminal* offence and the trial is ruled by *criminal law* guaranties (Fiorella, 2006; Selvaggi, 2006; Valenzano, 2015).

The EU law takes into account the diversity of legal models concerning the responsibility of the legal persons. Thus EU legal instruments on criminal matters do not impose the obligation of considering legal persons responsible from the point of view of the criminal law. However, when a Member State does not implement criminal liability for companies, it must implement other measures, having equivalent effect (Klip, 2012). This idea is reflected in the PIF Directive. In line with the Second Protocol to the PIF Convention, Article 6 of the PIF Directive obliges Member States to take measures to ensure the liability of legal entities involved in the perpetration of offences covered by it (fraud, corruption, misappropriation and money laundering). The sanctions can be criminal or non-criminal; but in any case, they must be effective, proportionate and dissuasive (Article 9), which shall include fines, and may include others. As example of other sanctions, the PIF Directive mentioned those contained in the Second Protocol to the PIF Convention: (a) exclusion from entitlement to public benefits or aid; (c) disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) judicial winding-up,) while adding two new: (b) exclusion from public tender procedures, and (f) closure of establishments which have been used for committing the criminal offence.

The problem with this regulation concerning the responsibility of legal persons is the broad margin left to Member States. They can choose, firstly, between criminal and non-criminal sanctions. Secondly, only the penalty of fine is a compulsory sanction according to the PIF Directive, while the other sanctions are optional for Member States. In this situation, harmonisation seems to be very distant in this matter.

3.5. Limitation period

Discovering cases of financial crimes such as those mentioned in the PIF Directive is a very complex task. Contrary to traditional crimes (theft, injuries…), crimes like corruption, fraud or money laundering are 'victimless crimes', in criminological terminology. Packer (1968: 151) defined the 'victimless crimes' as 'offenses that do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities'. For this reason, this type of offences remain hidden to authorities for years since citizens may not even be aware of the commission of one of those crimes. Consequently, it may take years to discover the perpetration of the crime and to identify the perpetrator.

Lengthy investigations may become problematic when a short limitation period is attached to the offence in the criminal legislation. Once that period has expired, no legal proceedings can be carried out against the alleged offenders, which has as a consequence the impunity of the person(s) involved in the perpetration of the criminal offence. To solve this problem, the PIF Directive pays special attention to the limitation period for the offences it covers. The former legal instruments on the protection of the Union's financial interests did not set any rule concerning prescription periods, which led to a notable lack of legal equivalence in this matter (European Commission, 2012). However, according to Article 12 of the PIF Directive, Member States shall ensure a 'sufficient period' after the offence has been committed, and in the case of offences punishable by a maximum sanction of at least four years of imprisonment, the limitation period shall be at least five years.

The new PIF provisions are an attempt at harmonising (along with criminal sanctions), the limitation periods in the national law of the Member States. However, the rules concerning harmonisation in this point are very vague. Firstly, because the expression 'sufficient period' may be understood by Member States in a very different sense. Secondly, because the PIF Directive does not establish any period of prescription for those offences in which there is not a 'considerable damage or advantage'. Thirdly, even for those cases in which the PIF Directive advocates for a limitation period of 5 years, this is only a minimum threshold, so Member States can foresee very different rules for prescription of offences. Consequently, the current disparity among national legislations may persist in the future.

4. The transposition of the PIF directive into the Spanish law

The Spanish Criminal Code was amended at the beginning of 2019 through the Law 1/2019[X] (hereinafter, Law 1/2019) with the aim of transposing a number of EU Directives into the Spanish legislation, among them, the PIF Directive, as said in the Preamble of the Law (para. 3). In this section, it will be analysed the way in which the Spanish Legislature has implemented the obligations of the PIF Directive and the degree of compliance with these obligations. The analysis follows the structure used in the previous section: definition of the crimes, sanctions, aggravating circumstance, liability of legal persons and limitation period.

4.1. Definitions of the crimes and criminal sanctions

4.1.1. Fraud

Fraud offences are punished by Articles 305 to 310bis of the Spanish Criminal Code (hereinafter, SCC), within the Title XIV ('Offences against the Exchequer and the Social Security'). The adoption of the SCC in 1995 coincided with the adoption of the PIF Convention. Therefore, the PIF Convention had a significant influence in the description of the fraud crimes. As a result, the SCC incorporated a number of offences against the then Community's financial interests, along with the offences against the Spanish Exchequer (national, regional and local Exchequer) (Martínez-Buján Pérez, 2015; Nieto Martín, 1996).

Like the PIF Convention and the PIF Directive, the SCC also distinguishes between fraud concerning revenues and fraud concerning expenditures. On the one hand, the conduct of fraud affecting the Union's revenues constitutes an offence as provided by Article 305.3 of the SCC (fraud affecting the Spanish Exchequer is in Article 305.1). On the other hand, the conduct of fraud affecting the Union's expenditures, basically, grant fraud, constitutes an offence as provided by Article 308.1 SCC (it also includes fraud affecting the Spanish Exchequer concerning grant fraud).

In the following paragraphs, those provisions are studied, firstly, the offences regarding revenues, and secondly, the offences regarding expenditures.

Revenues. Since the adoption of the Spanish criminal code in 1995, the EU budget has been protected with more intensity that the Spanish budget, going even beyond the principle of assimilation derived from the judgement in the Greek Maize case[XI]. According to the Spanish legislation prior to the entry into force of the Law 1/2019, the conduct of fraud as concern revenues affecting the EU budget was a criminal offence when the amount of money was higher than 4000€. The conduct of fraud to the Spanish Exchequer was a criminal offence, however, when the amount of money was higher than 120000€. Frauds below these sums were *mere* administrative law offences.

This enormous difference in the treatment of these behaviours has changed by effect of the aforementioned Law 1/2019, although even so, the protection of the Union's financial interests continues to be bigger. Now, fraud concerning revenues at the EU level constitutes a criminal offence if the amount of money is higher than 10000€. When the conduct is related to the Spanish Exchequer, the limit continues to be 120000€.

The most striking consequence of the Law 1/2019 as regards monetary limits is the decrease of the protection of the Union's financial interests because until the entry into force of the Law, the criminal offence of fraud started in 4000€. After the entry into force of the Law, the criminal offence of fraud starts in 10000€. That is, the Law 1/2019 has decriminalised frauds to the Union's financial interests between 4000€ and 10000€. Although the new monetary limit fulfils the limit mentioned in the PIF Directive (Articles 2 and 7), the decriminalisation of some conducts of fraud by the Spanish legislative seems to go against the purpose of the PIF Directive, which is to strengthen the use of the criminal law to protect the EU budget due to the deterrent effect of the criminal sanction (European Parliament & Council, 2017; European Parliament & Council, 2012; Mancano, 2019). Moreover, before the adoption of the Law 1/2019, the criminal sanction foreseen in Article 305.3 of the SCC was aggravated if the amount of money was higher than 50000€. Now, the aggravation begins in 100000€.

To sum up, the monetary limit of the SCC after the entry into force of the Law 1/2019 fulfils the requirements of the PIF Directive, but there is not a rational justification for the decriminalisation of some cases of fraud concerning revenues. Likewise, there is no justification for the lower protection for frauds between 50000€ and 100000€.

Another difference in the treatment of fraud to the EU budget and fraud to the Spanish budget is related to the 'tax regularization'. As provided by Article 305.1 *in fine*, as regards fraud to the Spanish Exchequer, the fraudster will be exempt of criminal responsibility if his tax situation is brought into compliance[XII]. This option is not possible in the case of a fraud to the EU budget. Again, one can observe here a stronger protection of the Union's budget.

The asymmetric treatment between fraud at the EU level and fraud at the Spanish level may have serious consequences in the incrimination of VAT fraud. The VAT is a national tax subject to some standard EU rules. Nevertheless, VAT fraud does not only affect the national Exchequer. It may indirectly affect the Union's financial interests because Member States contributions to the EU budget are calculated on the basis of their VAT intake (European Commission, 2012). The key question here is where to include VAT fraud indirectly affecting the EU financial interests. Since VAT is essentially a national tax, VAT fraud should be included in Article 305.1 (national fraud). However, as VAT fraud may affect the Union's financial interests, this conduct may also be included in Article 305.3 (EU fraud). The Spanish case law has traditionally considered that these conducts fall under the scope of Article 305.1 (national fraud). In line with this interpretation, the criminal offence of VAT fraud starts in 120000, and not in 10000, even when it affects the Union's financial interests. Only fraud concerning traditional own resources (TOR) (e.g. customs duties and sugar levies) fall under the scope of application of Article 305.3 (Díaz Morgado, 2016; De la Mata et al, 2018).

Expenditures. Fraud concerning expenditures, e.g. grant fraud, constitutes an offence provided by Article 308 of the SCC. After the entry into force of the Law 1/2019, this Article includes both fraud to the Union's financial interests, and fraud to the Spanish Exchequer. Previously, fraud concerning expenditures affecting the EU budget was in Article 306, while Article 308 only contained fraud concerning expenditures affecting the Spanish budget. Similarly to the case of a fraud concerning revenues, the treatment of a fraud concerning expenditures was different, giving more protection to the EU budget than to the Spanish budget[XIII]. The Law 1/2019 has unified the protection, so now, the monetary limits to consider a conduct of fraud as a criminal offence are the same, irrespective of the fact that the budget affected belongs to the EU or to Spain. According to Article 308, the conduct of fraud will be considered as a criminal offence when the amount of money is higher than 10000€. In addition, the offence will be aggravated when the amount is higher than 100000€. This decision of the Spanish Legislature is a powerful one because there is no reason to treat differently these conducts of fraud. Nevertheless, the negative critic to the Spanish legislation is, again, that some conducts of fraud have been decriminalised, namely, those between 4000€ and 10000€. The new monetary limits meet the terms of the Directive, but it is difficult to understand the decision of the Spanish legislative – by the way, very punitive in the last reforms of the criminal code – of decriminalising some conducts of fraud concerning expenditures.

Furthermore, a new problem arises in this point, and it is related to the 'tax regularization'. Before the Law 1/2019, tax regularization was only possible with respect to the offence of fraud affecting the Spanish Exchequer since tax regularization was mentioned in Article 308, but not in Article 306. Now, as both forms of fraud (EU and Spain) are in Article 308, the tax regularization, and consequently, the possibility of the exemption of penalty, refers to both of them. The consequence is clear. For instance, a case of grant fraud to the EU budget (even, enormous amounts of money) may finish with the exemption of penalty if the fraudster brings his tax situation into compliance with the law. There will not be a criminal offence in cases like this. This clearly breaks the mandate of the PIF Directive, which does not mention any possibility to this respect. Indeed, just the contrary, the PIF Directive insists on strengthening the use of the criminal law.

To complete this chaos, the Spanish Legislature, through the Law 1/2019, forgot to remove Article 306 from the criminal code, where fraud concerning expenditures affecting the EU budget was located. As a result, these cases may be included both in Article 306 and 308; an absolute nonsense that might have as a consequence important problems related to the concurrence of two provisions being applicable at the same time (Rodríguez-Ramos Ladaria, 2019). The more logic solution is to understand that Article 306 has been *de facto* abolish by the Law 1/2019.

When it comes to criminal law sanctions for fraud, the PIF Directive requires firstly that Member States foresee 'effective, proportionate and dissuasive criminal sanctions' (Article 7 (1)) for the offences referred, and secondly, it obliges to foresee penalties of imprisonment (Article 7 (2)). The Spanish Criminal Code, in Articles 305.3 and 308, does foresee penalties of imprisonment, so it complies with the requirements of the PIF Directive. In both provisions, the imprisonment oscillates between 1 and 5 years. Additionally, the perpetrator will receive a fine up to 6 times the amount of money defrauded. Nevertheless, both Articles include a mitigated penalty for less serious cases; those in which the amount of money defrauded oscillates between 10000€ and 100000€. In these cases, the SCC offers two alternative penalties: imprisonment (from 3 months to 1 year) and fine (up to three times the amount defrauded). Therefore, it might be concluded that the SCC infringes the mandate of the PIF Directive, which expressively demands penalties of imprisonment. In any case, the option for the penalty of imprisonment does exist. In addition, the two alternative penalties are an option employed by the Spanish Legislature in other places of the criminal code to respect the principle of proportionality of penalties, which obliges to foresee less serious penalties for less serious offences.

Thirdly, the PIF Directive (Article 7 (3)) requires higher penalties in cases of 'considerable damage or advantage', specifically, a maximum penalty of at least 4 years of imprisonment. The SCC complies with this requirement because for those serious cases the penalty of imprisonment oscillates between 1 and 5 years, both in Article 305.3 and 308. Moreover, the SCC foresees additional penalties: a) a fine of up to six times the amount of money of the damage or advantage, b) the ban of receiving public grants or aids, and c) the deprivation of the right to enjoy fiscal benefits or incentive for a period between 3 and 6 years.

Fourthly, the same Article 7 (3) of the PIF Directive recognises that Member States 'may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law'. The SCC does foresee other situations in which the penalty must be aggravated (from 2 to 6 years of imprisonment). These situations are related only to the conduct described in Article 305, not in Article 308 (grant fraud). These are a) the amount defrauded exceeded 600000€, b) the fraud was committed within a criminal organisation, and c) the perpetrator used natural or legal persons or other entities as proxies, or tax heavens, to hinder the prosecution of the crime.

4.1.2. Corruption

The offences of corruption (*cohecho*) are placed in Articles 419 to 427bis of the SCC, within the Chapter V of Title XIX ('Felonies against the Public Administration'). The Spanish legislation meets the requirements of the PIF Directive as regards the criminalisation of corruption thanks to the reforms of the criminal code carried out in 2010[XIV], 2015[XV], and the aforesaid reform of the Law 1/2019. The two first reforms were aimed at adapting the Spanish legislation to international commitments on this matter (Benito Sánchez, 2015), particularly, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[XVI] (hereinafter, EU Convention on corruption), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[XVII] (hereinafter, OECD Convention), and the United Nations Convention on Corruption[XVIII] (hereinafter, UNCAC). The amendment of 2019 only modified the offences of corruption with respect to the concept of 'public official', in order to adapt it to the mandate of the PIF Directive.

As provided by the PIF Directive, the Spanish criminal code penalises both passive and active corruption of public officials. The definition of these crimes does not make any reference to the Union's financial interests since any conduct of corruption involving EU public officials or officials of Member States will be a criminal offence.

The incriminatory elements, both concerning the *actus reus* and the *mens rea*, as described by Article 4 (2) of the PIF Directive are present in Articles 419 and subsequent of the SCC. Even the aforementioned novelty of the PIF Directive as regards the conduct of the public official ('acting in accordance with the duties') is already included in the definitions of the crimes of the SCC. This is so because the SCC has traditionally distinguished between the offence of corruption when the public official acts in breach of his duties (*cohecho propio*, Article 419), and the offence of corruption when the public official acts in accordance with his duties (*cohecho impropio*, Article 420). Additionally, the SCC punishes as passive corruption two more conducts: the so-called 'subsequent bribery' (Article 421), that is, cases in which the corrupt agreement takes place after the action or omission of the public official; and the bribery offered to the public official just in view of his office or duty (Article 422), that is, the public official will not act or refrain from acting. On the other hand, active corruption is a criminal offence as provided by Article 424 of the SCC. The incriminatory elements are the same than those foreseen to passive corruption.

The concept of public official is the only element of the definition of the crime that has been modified by the Law 1/2019 to transpose the PIF Directive. Nevertheless, the concept of the Spanish criminal code was already compatible with the concept of the PIF Directive thanks to former reforms of the SCC. Article 427 of the SCC, within the aforementioned Chapter V of Title XIX of the SCC was modified in 2010 to extend the application of the offences of corruption to those cases in which EU public officials or officials of Member States were involved, to comply with the aforesaid EU Convention on corruption. Then, in 2015, the SCC was again modified. This reform also affected the concept of public official, which was enlarged to include officials of any third country (not only EU Member States) and officials of any international organisation (not only the EU), as demanded by the UNCAC. So, the concept of public official as provided by Article 427 as modified in 2015 includes:

> a) any person holding a legislative, administrative or judicial office of any country of the European Union or other foreign country, whether appointed or elected.
> b) any other person exercising a public function for a country of the European Union or other foreign country, including for a public agency or public enterprise of the European Union or of other public international organization
> c) any other official or agent of the European Union or of a public international organisation.

Finally, the Law 1/2019 has just added the letter d) to the Article 427 to include what prescribed by Article 4 (4) (b) of the PIF Directive.

> d) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

This modification does not seem to be necessary because the persons mentioned in the new letter d) of Article 427 could be include in letter b) of the same Article (García Arroyo, 2019). In any case, now there is no doubt that the concept of the SCC completely fulfils the requirements of the PIF Directive.

As regards criminal sanctions for corruption offences, the SCC complies with the mandate of the PIF Directive. On the one hand, the crimes of passive and active corruption in which the public official acts in breach of his duties are punishable with a penalty of imprisonment between 3 and 6 years, plus a fine between 12 and 24 months[XIX]. The public official will receive, in addition, the penalty of barring from public employment and office for a period between 9 and 12 years, and the penalty of deprivation of the right to passive suffrage for the same period.

On the other hand, the offences of passive and active corruption in which the public official acts in accordance with his duties are punishable with a lower penalty of imprisonment (from 2 to 4 years) and the same fine. The additional penalties of barring from public employment and office, and of deprivation of the right to passive suffrage will have a duration between 5 and 9 years.

As observed, the limits of the penalty of imprisonment comply with the obligations of the PIF Directive since the maximum limit is 6 years in most serious cases of corruption, and 4 years in the remaining ones.

4.1.3. Misappropriation

The Spanish criminal code criminalises the conducts of misappropriation of public funds in Articles 432 to 435bis, within Chapter VII of Title XIX (‘Felonies against the Public Administration’). The Spanish legislation meets the requirements of the definition of the crime as stipulated by Article 4 (3) of the PIF Directive. The same as with respect to the definition of the offences of corruption, the SCC does not include in the definition of the crime of misappropriation any reference to the Union's financial interests because any conduct of misappropriation committed by a public officer will be punishable.

The aforesaid Law 1/2019 amended this Chapter VII to include a new provision concerning the definition of public official in relation to misappropriation offences. Until the entry into force of the Law, misappropriation of public funds was an offence exclusively related to the Spanish Public Administration[XX]. As mentioned before, the Law 1/2019 has expanded the concept of public official to officials of the EU and other public international organisations, and officials of Member States and other foreign countries since the aforementioned Article 427, in which the definition of public official is placed, is also applicable to misappropriation offences as provided by the new Article 435bis.

When it comes to criminal law sanctions for the offence of misappropriation, the Spanish legislation fulfils the requirements of the PIF Directive. A misappropriation offence, as provided by Article 433 of the SCC, is punishable with a penalty of imprisonment between 2 and 6 years, a fine between 12 and 24 months, and the barring from public employment and office for a period between 1 and 10 years.

The SCC even foresees specific aggravating circumstances in relation to the crime of misappropriation, which raise the penalty of imprisonment for a period between 4 and 8 years, and the barring from public employment and office for a period between 10 and 20 years. The aggravating circumstances are: a) serious damage or hindrance caused to the public service; and b) damage or advantage higher than 50000€. When the damage or advantage exceeds 250000€, the penalty of imprisonment may be raised to 12 years, and the barring from public employment and office to 30 years.

4.1.4. Money laundering

Money laundering is a criminal offence as provided by Articles 301-304 of the Spanish criminal code, within Chapter XIV of Title XIII ('Felonies against property and against social-economic order'). Through a number of reforms undertaken in previous years, the Spanish Legislature has met the requirements of different international and EU legal instruments in this matter (Blanco Cordero, 2015). The PIF Directive has not provoked any reform of these offences since they were already in line with the provisions of the different Anti-Money Laundering Directives.

The definition of the crime complies with the definition provided by the aforesaid Forth Anti-Money Laundering Directive (Article 1(3)), to which the PIF Directive refers. The SCC also fulfils the requirements concerning penalties, since the offence of money laundering is punishable with a penalty of imprisonment between 6 months and 6 years, plus a fine up to three times the values of the proceeds.

4.1.5. Participation forms and inchoate crimes

According to the Spanish Criminal Code, punishable forms of participation in the crime of another are the ones committed by the instigator and the accessory or accomplice (Articles 28 and 29). Unlike other criminal codes, the Spanish one distinguishes, in addition, between 'necessary accomplice' (Article 28.b) and 'non-necessary accomplice' (Article 29), depending upon his support to the crime.

The PIF Directive requires, in its Article 5, the criminalisation of incitement, and aiding and abetting. Although the PIF Directive does not offer a definition of these concepts, it can be understood that 'incitement' corresponds to what the SCC names 'instigation' (Article 28.a), and 'aiding and abetting' corresponds to the different types of accomplice in the SCC (Articles 28.b and 29).

According to the Spanish law, the instigator and the necessary accomplice are punished with the same penalty of the perpetrator or principle; the non-necessary accomplice receives a lower penalty. In any case, the PIF Directive does not give further instructions concerning the penalty for the secondary participants. It may be understood, therefore, that the SCC does comply with the requirements of the PIF Directive in this point.

As regards the criminalisation of the attempt of committing one of the PIF crimes, it must be highlighted that according to the SCC, the attempt is punishable with respect to all offences[XXI] as provided by Article 16. Again, the Spanish legislation complies with the Directive in this point.

4.2. The aggravating circumstance of 'criminal organisation'

The Spanish criminal code contains, since the reform of 2010, an autonomous offence of participation in a criminal organisation or group in Articles 570bis to 570quater, within the Chapter VI of the Title XXII ('Felonies against public order'). The definition of the offence meets the requirements of the aforementioned Framework Decision

2008/841/JHA, to which the PIF Directive refers as regards the concept of 'criminal organisation'.

Moreover, the SCC foresees specific aggravating circumstances concerning organised crime in some of the PIF offences, namely, fraud and money laundering. More precisely, the provision with respect to fraud is in Article 305bis, and the provision with respect to money laundering is in Article 302.1. In summary, Spain meets the obligations of the PIF Directive in this respect.

4.3. Liability of legal persons

Traditionally, the Spanish criminal law system had followed the Roman aphorism *societas delinquere non potest*, in line with most of the European countries (Vermeulen, 2012). Nevertheless, in 2010, the Spanish criminal code was modified to abolish that system, and to adapt the Spanish legislation to international requirements, particularly, those coming from the OECD Convention (Berdugo Gómez de la Torre, 2012). From that date on, legal persons may be held liable for a number of criminal offences as provided by Article 31bis and subsequent of the SCC. Indispensable requirements for incriminating a legal person is that the crime is committed by a person working for it, who acts on its behalf and in its benefit. Among the offences for which a legal person may be considered liable are included the ones referred by the PIF Directive. Since the reform of 2010, fraud, corruption and money laundering were in the list. The reform of 2019 added the offence of misappropriation. So, now the corresponding Articles are 302.2 (money laundering), 310bis (fraud), 427bis (corruption), and 435.5º (misappropriation). However, with respect to misappropriation, it is difficult to imagine cases in which the legal person may be held liable since Public Administrations – the place where typically misappropriation by a public official is committed – are out of the concept of legal person provided by the Spanish Criminal Code (Article 31quinquies).

As regards the sanctions, when a legal person is considered liable for an offence, it shall be always punished with a fine, and optionally, the judge may impose others. The fine may vary because it depends on the concrete offence and on the damage caused or advantage obtained. The other criminal sanctions are in line with the mandate of Article 9 the PIF Directive. As provided by Article 33.7 SCC, these sanctions for legal persons are b) dissolution, c) suspension of its activities, d) closure of its establishments, e) prohibition of carry out commercial activities, f) barring from obtaining public aids, and from public tender procedures, and g) judicial intervention.

In conclusion, Spain complies with the mandate of the PIF Directive as far as liability of legal persons is concerned.

4.4. Limitation period

Provisions on limitation periods are found in Article 131 of the Spanish criminal code. Offences with penalties of imprisonment lower than 5 years have a limitation period of 5 years. Offences with penalties of imprisonment between 5 and 10 years, such as money laundering (Article 301.1), aggravated fraud (Article 305bis), serious cases of corruption (Article 419), and misappropriation (Article 432), have a limitation period of 10 years. Spain complies with the obligations described in the PIF Directive in this respect.

5. Conclusions

The PIF Directive represents a progress as regards the harmonisation of the criminal law of the Member States as a mechanism to protect the Union's financial interests because it foresees obligations to be implemented by the Member States, which are more precise than those referred in previous legal instruments (PIF Convention and its Protocols). Nevertheless, the provisions of the PIF Directive leave an extensive leeway to Members States concerning the definition of the crimes, sanctions and limitation periods. In addition, with respect to liability of legal persons, Member States may opt for imposing criminal sanctions or others non-criminal. This situation may provoke that the current disparity among national legal systems persists, which is an important obstacle for a coordinated strategy against these offences. This is the reason why, it can be concluded that the PIF Directive seems to be far from the goal of harmonising criminal law systems.

When it comes to the transposition of the PIF Directive into the Spanish law, one may conclude that, in general, the Spanish criminal law complies with the mandate of the PIF Directive, particularly, thanks to the reforms of the criminal code carried out in 2010, 2015 and 2019. The Spanish criminal code criminalises the four PIF crimes in the terms described by the Directive. It also meets the requirements concerning the responsibility of secondary participants, the attempt, and the criminalisation of the participation in a criminal organisation. With respect to the liability of legal persons, Spain has opted for a system of criminal responsibility with sanctions very similar to those mentioned in the Directive. So, Spain fulfils the Directive in this point. The limitation period is also within the limit imposed by the Directive. As regards sanctions, most of the penalties complies with the provisions of the Directive. However, there are some cases of less serious fraud with respect to which the Spanish criminal code foresees a penalty of fine as alternative to the penalty of imprisonment. In this point, the Spanish criminal code seems to go against the mandate of the PIF Directive, which expressively demands penalties of imprisonment. In any case, in favour of the Spanish legislative, it can be concluded that the option of imposing a penalty of imprisonment does exist in the criminal code for less serious offences of fraud (along with the fine), and that the rule of two alternative penalties is a usual rule in some offences of the Spanish criminal code to respect the principle of proportionality of the penalties.

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[I] 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 of 27.11.1995. Entry into force: 17.10.2002.

[II] Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, of 27 September 1996, OJ C 313 of 23.10.1996. Entry into force: 17.10.2002.

[III] Second Protocol drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, of 19 June 1997, OJ C 221 of 19.7.1997. Entry into force: 19.5.2009.

[IV] The legal basis for the adoption of the PIF Directive was, however, strongly discussed during the negotiations. See in detail Di Francesco Maesa (2018) and Juszczak & Sason (2017).

[V] ECJ, Case C-105/14, *Ivo Taricco and Others*, 2015, para. 41.

[VI] Among others, European Council (2009), European Parliament & Council (2015), European Parliament & Council (2011), European Parliament & Council (2008).

[VII] United Nations Convention against Transnational Organized Crime. UN General Assembly Resolution 55/25 of 15.11.2000. Entry into force: 29.9.2003.

[VIII] See Art. 121.2 *Code Pénal* (France), Art. 11 *Código Penal* (Portugal), Art. 51 *Wetboek van Strafrecht* (The Netherlands), Art. 31bis et seq. *Código Penal* (Spain).

[IX] Italy. Decreto Legislativo 8-6-2001, n. 231 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300' (Gazzetta Ufficiale n. 140, 19-6-2001).

[X] Spain. Ley Orgánica 1/2019, de 20 de febrero, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, para trasponer Directivas de la Unión Europea en los ámbitos financieros y de terrorismo, y abordar cuestiones de índole internacional (Boletín Oficial del Estado, n. 45, 21.2.2019).

[XI] ECJ, Case C-68/88, *Commission v. Greece*, 1989, ECR 2965.

[XII] The terms of the compliance are in Article 305.4 of the Spanish criminal code.

[XIII] The monetary limits were the same: 4000€ (EU) and 10000€ (Spain).

[XIV] Spain. Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Boletín Oficial del Estado n. 152, 23.6.2010).

[XV] Spain. Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Boletín Oficial del Estado n. 77, 31.3.2015).

[XVI] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, of 26 May 1997, OJ C 195 of 25.6.1997. Entry into force: 28.9.2005.
[XVII] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21.11.1997. Entry into force: 15.2.1999.
[XVIII] United Nations Convention against Corruption. UN General Assembly Resolution 58/4 of 31.10.2003. Entry into force: 14.1.2005.
[XIX] According to the Spanish criminal code, the daily quota of the fine may oscillate between 2€ and 400€.
[XX] It includes the national, regional and local Public Administration.
[XXI] Except with respect to those crimes that, by nature, do not admit the attempt, e.g. conduct crimes (*Tätigkeitsdelikte*).

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