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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

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

An integrated policy to safeguard taxpayers' money

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An integrated policy to safeguard taxpayers' money

The protection of the EU financial interests is an important element of the Commission's political agenda, in order to consolidate and to increase public trust and give assurance that taxpayers' money is being used correctly. The Lisbon Treaty has considerably reinforced available tools to act in this regard (Articles 85, 86 and 325 of the Treaty on the Functioning of the European Union - TFEU). Articles 310(6) and 325 TFEU oblige both the EU and its Member States to counter all forms of illegal activity affecting the EU financial interests. The EU has in place a comprehensive set of tools to prevent and detect misuse of the EU budget.

As part of an integrated approach which will include new Commission anti-fraud and anti-corruption strategies, this Communication responds to the challenge by setting out the line which will guide the Commission in the protection of EU public money against all forms of criminal conduct, including fraud. Protecting EU funds by effective and equivalent legal action throughout the Union has to become a priority for the national authorities.

In addition to general efforts to set specific common minimum rules on criminal law, an integrated policy to protect EU financial interests by criminal law and by administrative investigations must be consistent, credible and effective. Only then will it allow those responsible for crimes, including organised crime, committed to be prosecuted and brought to court and have a deterrent effect on potential perpetrators. The policy must also take into account that the protection of taxpayers' money often involves cross-border cases touching multiple jurisdictions requiring the active cooperation of different administrative and law enforcement authorities.

1. Why is there a need to act?

The EU's wide variety of legal systems and traditions make it a specific challenge to protect the financial interests of the Union against fraud and any other criminal activities. Whilst EU funding rules rightly become simpler[1], the capacity to combat the misuse of EU money needs to be further strengthened as well. This applies also to countries seeking to accede to the EU.

[1] Simplification has been identified as a key priority for the review of the EU Financial Regulation - COM(2010) 815, 22.12.2010.

The EU budget is taxpayer's money that must be used only for implementing the policies which the EU legislator has approved. Yet in 2009, Member States reported 279.8 million € worth of suspected fraud cases involving EU funds managed in their respective countries[2]. Whilst this is only an indicator of the financial dimension of the challenge, this figure shows that prevention efforts must be complemented by effective and equivalent criminal law measures.

Despite the progress made in the last 15 years, the level of protection for EU financial interests by criminal law still varies considerably across the Union. Criminal investigations into fraud and other crimes against the financial interests of the Union are characterised by a patchy legal and procedural framework: police, prosecutors and judges in the Member States decide on the basis of their own national rules whether and, if so, how they intervene to protect the EU budget. Despite the attempts to provide for minimum standards in this field, the situation has not changed noticeably: The Convention of 1995 on the protection of financial interests of the EU and related acts[3], which contains provisions on criminal sanctions, - albeit incomplete - was implemented fully by only five Member States[4].

Whenever damage is caused to the financial interests of the Union, all citizens, as taxpayers, become victims and the implementation of Union policies is jeopardised. The protection of EU financial interests against fraud and corruption is a priority for the Commission and the European Parliament has consistently called for it to be more effective and credible[5]. It has called in particular for the adoption of all necessary measures for the establishment of a European Public Prosecutor's Office. Within the Council, strong support for a stepped-up fight against fraud has been expressed[6].

The Commission intends to pursue this shared concern proactively. In doing so, it will rely on the Lisbon Treaty. The Treaty sets a clear framework for the EU to reinforce its action in the field of criminal law. The Commission has already taken several initiatives in this regard[7]. The Commission will place particular emphasis on the

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2 COM(2010) 382, p. 6. This figure refers to an early stage after opening of investigations on irregularities where there is a first suspicion of a criminal offence. The figure may not be considered to refer to cases of convicted fraud, nor does it mean that the amount involved is not recoverable.

3 Convention of 26 July 1995 (OJ C 316, 27.11.1995, p. 49) (fraud); First Protocol (OJ C 313, 23.10.1996, p. 2) and Convention of 26 May 1997 (OJ C 195, 25.6.1997) (corruption); Protocol of 29 November 1996 (OJ C 151, 20.5.1997, p. 2) (court interpretation); Second Protocol of 19 June 1997 (OJ C 221, 19.7.1997, p. 12) (money laundering).

4 First report on the implementation of the Protection of Financial Interests instruments - COM(2004) 709; Second Report - COM(2008) 77, which sets out in the annex the concrete implementation issues encountered in Member States, such as significant differences regarding the scope of fraud and corruption offences, as well as lacking consideration for the specificities of the EU framework.

5 E.g. Resolution of 6 May 2010, 2009/2167(INI), and of 6 April 2011, 2010/2247(INI), on the protection of the Communities' financial interests and the fight against fraud.

6 See, e.g., the Council Resolution concerning a comprehensive EU policy against corruption - 14 April 2005; conclusions of the Working Group on the European Public Prosecutor's Office organised by the Spanish Presidency (First semester 2010), and the statement of the Belgian Presidency (second semester 2010) on the Stockholm Programme.

7 See notably Green Paper on obtaining evidence in criminal matters, COM(2009)624, and measures on procedural rights, such as Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1, or

communication aspects of future legislative initiatives in order to raise the awareness of the legal professions on this subject and, when appropriate, of the general public. The Commission will also continue to seek that any further EU policy developments address from their conception the need for protecting EU financial interests.

2. What are the criminal policy challenges?

In March 2011, the Commission proposed the reform of the Anti-Fraud Office (OLAF) as a means of strengthening the effectiveness and efficiency of administrative investigations. Further challenges include how to overcome difficulties in obtaining accurate data on the extent of fraud and prosecution in the Member States, how to improve cooperation in cross-border cases and how to enhance effective court action in criminal law.

-The number of cases referred to Eurojust by national authorities for coordination and advice with respect to all serious crime has steadily increased since the body's creation in 2002 (208 cases) to 2009 (1372 cases).[8] Given the current mandate of Eurojust, this gives an indication of the evolution of cases with cross-border dimension.

-60% of interviewees in a recent study (national prosecutors specialised in financial interests) consider a European dimension as a factor hampering cases; thus, 54 percent sometimes limit their investigations to the national elements. 40 % perceive disincentives in national law for bringing European cases. 37% have already decided not to contact an EU institution in relevant cases, mainly because it was time-consuming[9].

2.1. Insufficient protection against criminal misuse of the EU budget

Since the adoption of the White Paper on the Reform of the Commission in 2000[10], the Commission has paid particular attention to sound financial management[11] and strengthened its internal control systems to combat fraud. Initiatives included the reform of staff regulations in 2004 (with the inclusion of provisions regarding conflict of interest, and the obligation to report potential illegal activities, including fraud or corruption to the hierarchy or to OLAF[12]) and the revision of the Internal Control Standards and Underlying Framework in 2007 [13]. As a result, the control structures currently in place not only aim to ensure the legality and regularity of transactions but also mitigate the risk of fraud and irregularities.

This includes also a comprehensive set of preventive instruments, concerning controlling, auditing and reporting, early warning and fraud-proofing[14]. However,

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Commission proposal for a Directive on the right to information in criminal proceedings, COM(2010)392/3.

8 See Eurojust Annual Report 2009, Annex, Figure 1, p. 50.

9 See Staff Working Document SEC(2011) 621.

10 See The White Paper on the Reform of the Commission COM(2000)200

11 See Art. 28 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

12 Staff Regulation - Regulation (EEC) 31/62 as ammended

13 See Communication on the revision of the Internal Control Standards and Underlying Framework - Strengthening Control Effectiveness SEC(2007)1341

14 Institutional tools on controlling, auditing, reporting (Regulation (EC) No 2035/2005 - OJ L 345, 28.12.2005; Regulation (EC) No 1083/2006 - OJ L 371, 27.12.2006; Regulation (EC) No

more effective means are also needed to fight criminal activities against the EU budget.

Member States are under legal obligation (Article 325 TFEU and the Convention on the protection of financial interests) to counter illegal activities at the expense of the EU and make fraud against the EU budget punishable criminal conduct. At present, however, imposed penalties for fraud range from small fines to long prison sentences. Moreover, Member States' legislation do not consistently provide for punishment of corrupt elected or appointed office holders and corrupt officials[15].

This state of affairs hinders equivalent criminal law protection across the EU and is highly likely to lead to differing outcomes in similar individual cases, depending on the applicable national criminal provisions. It could also allow the possibility for criminals to choose where to operate criminal activity, or to move elsewhere after the commission of the offence, even if they only relate to conduct in a single Member State.

2.2. Insufficient legal action to fight criminal activity

Given the extent of the financial issue at stake, the protection of the EU budget merits more frequent and more thorough investigation and prosecution by criminal justice authorities. This is not an easy task, as crime at the expense of EU public money often involves cross-border investigation and proceedings in several Member States.

Under the current framework, such criminal investigations are handled by individual Member States' prosecution services acting under their respective criminal law. However, the competent authorities of Member States do not always appear to have sufficient legal means at their disposal and appropriate structures in place to adequately prosecute cases affecting the EU. This applies equally to accession countries.

Differences in the legal framework of the Member States and the resulting operational and organisational barriers to cross-border investigations within the EU mean that the financial interests of the EU are not equivalently protected across the EU as regards criminal law.

The rate of conviction in cases involving offences against the EU budget is positively influenced by the seriousness and the solidity of the cases sent to the judicial authorities and on the quality and adequacy of the evidence provided, but it is nevertheless worth mentioning that it can vary from 14% to 80% in Member States (the average being 41%)[16].

National judicial authorities do not open criminal investigations systematically upon

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1198/2006 - OJ L 223, 15.8.2006; Regulation (EC, Euratom) No 1553/89 - OJ L 155, 7.6.1989; Regulation (EC, Euratom) No 1150/2000 - OJ L 130, 31.5.2000), early warning (Commission decisions C(2004) 193 and C(2008) 3872, fraud proofing (Prevention of fraud by building on operational results: a dynamic approach to fraud-proofing - COM(2007) 806).

15 Member States legislations do not always provide for punishment of corruption of elected persons and of members of parliament. See also Staff Working Document SEC(2011) 621, comparative law tables under section 3.1.

16 See Staff Working Document SEC(2011) 621, Table 2.2.a and Table 2.2.c which show that certain Member States have high conviction rates, whereas in other Member States the conviction rates are extremely low.

OLAF recommendations. Sometimes it is difficult to discern the specific motive for such lack of action. Moreover, very often cases involving fraud against the EU budget are subject to a summary examination and not acted upon further[17]. This leads to a lack of equivalence of criminal law protection throughout the Union.

In a certain number of cases involving fraud against the EU budget, national criminal investigative authorities refrain from opening investigations (referring to discretionary reasons such as the lack of public interest or the low priority). Criminal investigations involving several Member States tend to be lengthy[18] and subject to differing evidentiary standards reducing therefore the likelihood of a conviction.

Since 2000, 93 out of a total of 647 OLAF cases were dismissed by national prosecution services for no specific reason. 178 cases were dismissed due to discretionary reasons.Whilst there may have been good reasons to have done so in individual instances, these figures indicate a rather high closing rate.

Lengthy criminal proceedings, particularly when these are ultimately dropped, may also substantially delay disciplinary sanctions, as the outcome of criminal prosecutions for the same facts must, in cases involving EU staff, be awaited[19]. Generally it takes a period of five years for a judicial decision to be taken after OLAF opened a file. In addition, rules on time limitation differ widely among Member States.

3. The reasons for shortcomings in this area of crime

These shortcomings partly result from the variety of legal traditions and systems which lead to divergent judicial practices of Member States. However, very concrete gaps in the quality of justice - which the Union can bridge - are involved as well:

3.1. No common level playing field in criminal law

The aforementioned challenges reveal shortcomings in the national legal frameworks for the protection of public money. EU rules, hampered as they are by the incomplete and inadequate transposition of the Convention on the protection of the financial interests, have had little impact. Consequently, Member States' judicial authorities use their traditional national criminal law tools to fight crime against the EU budget: there are different ways and means to tackle a single reality. This is hardly appropriate for the complex cases which by their nature go beyond the national context and require more than a national response.

The analysis of one Member State's judicial activity in cases forwarded by OLAF shows that there is a lack of equivalence in the criminal law protection of EU financial interests. In this specific Member State, in 73% of external investigation cases, the authorities did not undertake any further action and no criminal investigation was ever opened with regard to 62% of OLAF cases.

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17 See Staff Working Document SEC(2011) 621, Table 2.2.a and Table 2.2.c which show the percentages of actions sent to the national judicial authorities and dismissed before trial.

18 See Staff Working Document SEC(2011) 621, Table 2.2.a: statistics of the last 12 years on actions pending judicial decision as opposed to actions with judicial decision show important discrepancies among Member States.

19 Annex IX, Article 25 of the EU Staff Regulation.

Notwithstanding past attempts to approximate the EU rules[20] there are still considerable differences in Member State laws:

- There is wide variation across the Union in definitions of relevant criminal offences, such as embezzlement or abuse of power, in the sanctions which those offences attract, and in time limitations for criminal offences. As this results in certain cases of highly inappropriate conduct not being covered by criminal law provisions at all in some Member States, or only by weaker provisions, the level of deterrence varies across the Union.

- The concept of public official in relation to anti-corruption rules varies. This leads to cases of impunity in some Member States, whereas in others conviction of an individual for the same behaviour would result in a penal sanction and removal from public office.

- Whereas in some Member States the heads of businesses and legal persons can be held criminally liable for criminal conduct on behalf of the company, in others they cannot. This situation leads to so-called "forum shopping".

OLAF is often confronted with a recurrent problem as regards the definition of conflict of interests[21]. Investigations show that in some Member States the beneficiary of a public procurement can participate in the design of a public tender without committing a criminal offence. Punishment of such behaviour has to rely on a criminal offence such as corruption.

Whilst efforts have already been made to remedy this fragmentation, the limitations of the former legal framework of the Union, which only partially covered criminal law, made it difficult for the Union to develop sufficiently credible legal options.

Fifteen years after the signing of the Convention on the protection of financial interests and as a result of an incomplete implementation in Member States, inconsistencies and loopholes in the applicable criminal and procedural laws hamper effective action in the protection of the financial interests allowing criminal offences to go unpunished in some Member States.

3.2. Insufficient cooperation between authorities

As protecting the EU budget often involves investigating cross-border cases and enforcing decisions abroad, deficiencies in cooperation mechanisms are clearly visible:

3.2.1. Limits to mutual legal assistance

Complex procedures reduce the number of cases where mutual legal assistance is even requested. This is the case for instance in asset recovery, including rules on

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[20] See e.g. Commission Proposal on criminal law protection of financial interests - COM(2001) 272, as amended by COM(2002) 577. This holds true despite existing EU public procurement legislation, such as Directive 2004/17/EC on the water, energy, transport and postal service markets (OJ L 134, 30.4.2004, p. 1).

[21] Cf. Green Paper on the modernisation of EU public procurement policy - COM(2011) 15, section 5.

freezing and confiscation which form a vital element in the fight against fraud. Judicial authorities in the Member States may be reluctant to trigger such measures, because of their complexity, the lengthy procedures associated with mutual legal assistance rules and the uncertainty whether the efforts will be worth the results, particularly when it comes to cross-border cases.

Even where mutual legal assistance between administrative and judicial authorities of Member States is requested, it is often not followed up with sufficient expediency.

In some cases of corruption and fraud, criminal actions have been pending for many years since they were first reported by OLAF to national judicial authorities. The reasons for these long delays are mainly due to the length of the mutual legal assistance procedures and the lack of steering of the prosecution at EU level.

3.2.2. Unused evidence

The results of EU administrative investigations frequently remain unused by national criminal courts because of restrictive procedural rules which include limits on the use of evidence collected in a foreign jurisdiction. At times the use of such evidence is not considered sufficient to open criminal investigations.

3.2.3. Restriction of prosecution to domestic cases

Cases are not prosecuted sufficiently when national authorities do not have the authority to investigate situations of fraud involving events, suspects and victims beyond the domestic remit, including when the prejudice is not to the national but rather to the EU budget.

Some national authorities only prosecute cases when the relevant EU interests are compromised exclusively on their territory.

In one Eurojust case involving several Member States and non-EU countries, the suspicion of a large-scale customs evasion (worth more than 1 million €) was not prosecuted by any of the national authorities of the Member States involved. In another customs case, no practical solution could be found as regards the position of a Member State's judicial authorities and customs refusal to contribute to OLAF’s coordination activities. The refusal of cooperation was due to a rigid interpretation of national judicial competence law.

3.3. Insufficient investigation powers

OLAF carries out administrative investigations, and the judicial cooperation body Eurojust supports Member States' judicial authorities by providing coordination and advice, on serious crime including in the fight against fraud. Both EU bodies could play a more active role in the protection of financial interest of the Union:

- OLAF's reform to improve its efficiency and effectiveness is now underway. It should further reinforce OLAF's capacity by concentrating its activities on priority cases and equipping it with the adequate legal means to pursue administrative investigations. Nevertheless, the different criminal procedure laws and practices in the Member States result in uneven responses across the Union.

- Eurojust currently faces limitations regarding the steering of prosecutions related to

the protection of EU financial interests. Its 2008 reform did not update its tasks and structure in line with the ambitions set by the Lisbon Treaty. At present Eurojust is neither able to initiate criminal investigations nor to prosecute crimes on its own.

4. New tools to protect EU financial interests introduced by the Lisbon Treaty

The Lisbon Treaty equips the Union with strengthened competences in the field of the protection of EU financial interests and in the field of judicial cooperation in criminal matters. The Union has taken the first steps with the adoption of the Stockholm Programme[22] as well as within the Commission Work Programme 2011[23].**Four ways to protect EU financial interests under the Treaty on the Functioning of the EU:**

(i) Measures on procedural judicial cooperation in criminal matters (Article 82).

(ii) Directives containing minimum criminal law rules (Article 83).

(iii) Legislation on fraud affecting the financial interests of the Union (Articles 310(6), 325(4)).

(iv) Article 85 allows granting Eurojust investigative competences and Article 86 allows for the establishment of a European Public Prosecutor Office (EPPO) from Eurojust to combat crimes affecting the financial interests of the Union.

Should criminal law, including further developed definitions of offences and minimum rules on sanctions, be deemed necessary to achieve the legitimate purpose of fighting fraud against the EU budget, certain guiding principles will need to be observed:

Firstly, it must be respectful of fundamental rights. The EU Charter of Fundamental Rights contains several relevant provisions in the context of criminal proceedings such as the right to an effective remedy and to fair trial, the presumption of innocence and the right of defence, the principle of legality, the protection of personal data and the prohibition of double jeopardy. These are further specified by legislation (e.g. on data protection[24]). Future Commission proposals will be subject to an in-depth assessment of their impact on fundamental rights[25].

Secondly, given the different approaches to criminal law in the Member States, particular attention will need to be given to the added value that approximation in the field of criminal law will bring to the protection of EU financial interests.

Thirdly a reflection will be conducted on the strengthening of the role that bodies at a European level, including OLAF, Eurojust and – alternatively or cumulatively – a possible European Public Prosecutor's Office, may play to better investigate,

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22 OJ C 115, 4.5.2010, p. 1 (for example as regards orientations on financial investigations and on asset recovery, point 4.4.5).

23 COM(2010) 623 (for example anti-fraud strategy or OLAF legislation, see no 32 of Annex I and no 81 of Annex II).

24 Directive 95/46/EC (for Member States) (OJ L 281, 23.11.1995, p. 31), and Regulation (EC) No 45/2001 (for EU institutions) (OJ L 8, 12.1.2001, p. 1).

25 See Strategy for the effective implementation of the Charter of Fundamental Rights - COM(2010) 573.

prosecute and assist in cases of crime at the expense of EU public money.

The European Union stands at a crossroads. Work needs to be undertaken at three levels: procedures (4.1), substantive criminal law (4.2) and institutional aspects (4.3).

4.1. Strengthening criminal and administrative procedures

The first step will be to make it easier for prosecutors and judges across the Union to fight fraudsters, even if they are located abroad, further building upon existing instruments, such as the European Judicial Network in Criminal Matters and the European Judicial Training Network.

Asset recovery plays a central role in the protection of EU financial interests. Often the fear of losing the illegally acquired assets is higher than the fear of the criminal sanction as such. Moreover, it is only fair that public money lost to criminal activities should be available again for public action once it is found. As called for by the Stockholm Programme[26], the Commission is preparing a legislative proposal on asset recovery and confiscation. The Commission has already proposed, under the review of the EU Financial Regulation, that amounts receivable by the Union shall not be treated less favourably than entitlements belonging to public bodies in the Member States where the recovery proceeding has been conducted[27].

Whilst bases for exchange between police and judicial authorities across the Union exist, this is not yet the case for cross-cutting exchanges of information among police, customs, tax authorities, the judiciary and other competent authorities. The Commission intends to remedy this situation by replacing its 2004 proposal[28] on mutual administrative assistance for the protection of financial interests.

Mutual trust of judicial and of administrative authorities are fostered if equivalent procedural standards apply. This would provide an enhanced basis for ensuring that evidence taken in relation to the protection of the EU's financial interests is mutually recognised by Member States. The Commission will consider legislative action for ensuring evidentiary value of OLAF investigative reports, as well as upon other measures that might facilitate transnational gathering of evidence.

4.2. Strengthening substantive criminal law

Criminal law is a cornerstone of EU action to prevent and fight damage to the EU budget.

Due to the remaining loopholes in, and deficient implementation of, the Convention on the protection of financial interests, an initiative on the protection of EU financial interests will be prepared, replacing its pending proposal on the criminal-law protection of financial interests[29]. Any new measure must guarantee consistency and fairness in application of criminal sanctions relating to fraud, depending on the

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26 OJ C 115, 4.5.2010, p. 1, section 4.4.5.
27 COM(2010) 815, Article 79.
28 COM(2004) 509 as amended by COM(2006) 473.
29 COM(2001)272 as amended by COM(2002)577.

particular way the offence was committed. Definitions of additional core offences, including on embezzlement and abuse of power should be envisaged as a part of the measure, to the extent relevant for the protection of EU financial interests. The approximation of rules on jurisdiction and time limitation will also be further analysed in order to improve criminal investigation results.

This proposal may include, to the extent relevant for the protection of EU financial interests, more systematic rules on aiding and abetting, instigation, attempt, as well as on intent and negligence. It may also set out clearer rules on the criminal liability of appointed and elected office holders, and of legal persons regarding the protection of financial interests.

4.3. A strengthened institutional framework

Any EU measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union aiming to afford effective and equivalent protection throughout the Union requires assessment of whether the EU is adequately equipped in terms of structures to tackle threats against EU financial interests. To this end, and in line with the Lisbon Treaty, a thorough analysis will be conducted on the ways in which the European structures need to be reinforced to deal with criminal investigative measures:

- Eurojust capacities need to be modernised, possibly equipping it with powers to trigger on its own initiative criminal investigations into criminal activities affecting the Union's financial interests[30].

- Moreover, a specialised European prosecution authority such as a European Public Prosecutor's Office could contribute to establishing a common level playing field by applying common rules on fraud and other offences against the financial interests of the Union in a consistent and homogeneous way, investigating, prosecuting and bringing to court the perpetrators of, and accomplices in offences against the Union's financial interests[31].

- OLAF is undergoing a reform to strengthen the effectiveness and the efficiency in the exercise of its mission. OLAF is currently the only investigative EU body entrusted with the task of protecting EU financial interests. It should be considered how OLAF's role would be adapted in a new institutional set-up, clarifying the interaction between judicial and administrative procedures.

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30 Article 85 TFEU.

31 Article 86 TFEU.

Our vision for 2020: **take the necessary measures, in criminal and administrative law, to minimise criminal activities at the expense of the EU budget**

A policy of zero tolerance on fraud against the EU requires putting in place adequate measures so that acts of fraud are prosecuted evenly across the Union. The Union should aim at an effective, proportionate and dissuasive level of protection of its financial interests through speedy criminal procedures and sanctions across the Union, increasing their deterrent effect. To this end, taxpayers' money has to be equivalently protected across the Union by enhanced criminal prosecution, which is not stopped at national borders, and by common minimum criminal law rules, making full use of the opportunities enshrined in the Lisbon Treaty.