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*Committee on Budgetary Control*  
*Committee on Civil Liberties, Justice and Home Affairs*

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**2012/0193(COD)**

18.12.2013

**\*\*\*I**

## **DRAFT REPORT**

on the proposal for a directive of the European Parliament and of the Council  
on the fight against fraud to the Union's financial interests by means of  
criminal law  
(COM(2012)0363 – C7-0192/2012 – 2012/0193(COD))

Committee on Budgetary Control  
Committee on Civil Liberties, Justice and Home Affairs

Rapporteurs: Ingeborg Gräßle, Juan Fernando López Aguilar

Rapporteur for the opinion (\*):  
Tadeusz Zwiefka, Committee on Legal Affairs

(\*) Associated committee – Rule 50 of the Rules of Procedure

(Joint committee meetings – Rule 51 of the Rules of Procedure)

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

#### **Amendments by Parliament set out in two columns**

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

#### **Amendments by Parliament in the form of a consolidated text**

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2012)0363 – C7-0192/2012 – 2012/0193(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2012)363),
  - having regard to Article 294(2) and Article 325(4) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0192/2012),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinion submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Swedish Parliament, asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
  - having regard the opinion of the European Court of Auditors<sup>1</sup>,
  - having regard to the opinion of the Committee of the Regions<sup>2</sup>,
  - having regard to Rules 55 and 37 of its Rules of Procedure,
  - having regard to the joint deliberations of the Committee on Budgetary Control and the Committee on Civil Liberties, Justice and Home Affairs under Rule 51 of the Rules of Procedure,
  - having regard to the report of the Committee on Budgetary Control and the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A7-0000/2013),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

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<sup>1</sup> OJ C 383, 12.12.2012, p. 1.

<sup>2</sup> OJ C 391, 18.12.2012, p. 134.

## Amendment 1

### Proposal for a directive Recital 14 a (new)

*Text proposed by the Commission*

*Amendment*

***(14a) While it is appropriate to introduce certain minimum levels of penalties in respect of the offences defined in this Directive, nothing herein should be taken as interfering with the prerogatives of the courts and judges of the Member States to use their discretion in individual cases.***

Or. en

## Amendment 2

### Proposal for a directive Article 1

*Text proposed by the Commission*

*Amendment*

This Directive establishes necessary measures in the field of prevention of and fight against fraud and other illegal activities affecting the Union's financial interests by defining criminal offences and sanctions.

This Directive establishes necessary measures in the field of prevention of and fight against fraud and other illegal activities affecting the Union's financial interests by defining criminal offences and sanctions, ***with a view to affording effective and equivalent protection in the Member States and in Union institutions, bodies, offices and agencies.***

Or. en

## Amendment 3

### Proposal for a directive Article 2 – introductory part

*Text proposed by the Commission*

For the purposes of this Directive, ‘the Union's financial interests’ means all revenues and expenditures covered by, acquired through, or due to:

*Amendment*

For the purposes of this Directive, ‘the Union's financial interests’ means ***all the assets and liabilities managed by or on behalf of the Union and its institutions, bodies and agencies; and all its financial operations, including borrowing and lending activities, as well as, in particular,*** all revenues and expenditures covered by, acquired through, or due to:

Or. en

Justification

*This definition is wider and includes assets and liabilities as well as borrowing and lending activities.*

**Amendment 4**

**Proposal for a directive  
Article 4 – paragraph 1**

*Text proposed by the Commission*

1. Member States shall take the necessary measures to ensure that any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, is punishable as a criminal offence.

*Amendment*

1. Member States shall take the necessary measures to ensure that any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, ***or of distorting or destroying the natural competition among bidders,*** is punishable as a criminal offence.

Or. en

## *Justification*

*It is important to refer explicitly to irregular activities related to public tenders.*

### **Amendment 5**

#### **Proposal for a directive Article 4 – paragraph 3**

##### *Text proposed by the Commission*

3. Member States shall take the necessary measures to ensure that ***the following conduct***, when committed intentionally, ***is*** punishable as ***a criminal offence***:

***(a)*** the action of a public official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests (***passive corruption***);

***(b)*** the action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to a public official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests (***active corruption***).

##### *Amendment*

3. Member States shall take the necessary measures to ensure that ***passive corruption and active corruption***, when committed intentionally, ***are*** punishable as criminal ***offences***.

***For the purposes of this Directive, passive corruption shall consist of*** the action of a public official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

***For the purposes of this Directive, active corruption shall consist of*** the action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to a public official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

Or. en



## Amendment 6

### Proposal for a directive Article 4 – paragraph 4

*Text proposed by the Commission*

4. Member States shall take the necessary measures to ensure that ***the intentional*** act by a public official to commit or disburse funds, or appropriate or use assets, contrary to the purpose for which they were intended and ***with the intent to damage*** the Union's financial interests, ***is punishable as a criminal offence (misappropriation)***.

*Amendment*

4. Member States shall take the necessary measures to ensure that ***misappropriation, when committed intentionally, is punishable as a criminal offence***.

***For the purposes of this Directive, misappropriation shall consist of an act by a public official to commit or disburse funds, or appropriate or use assets, contrary to the purpose for which they were intended, and which damages the Union's financial interests.***

Or. en

## Amendment 7

### Proposal for a directive Article 5 – paragraph 1

*Text proposed by the Commission*

1. Member States shall take the necessary measures to ensure that inciting, aiding or abetting the criminal offences referred to in ***Title II*** is punishable as a criminal offence.

*Amendment*

1. Member States shall take the necessary measures to ensure that inciting, aiding or abetting the ***commission of any of the*** criminal offences referred to in ***Articles 3 and 4*** is punishable as a criminal offence.

Or. en

*Justification*

*Technical change.*

## Amendment 8

### Proposal for a directive Article 5 – paragraph 2

*Text proposed by the Commission*

2. Member States shall take the necessary measures to ensure that an attempt to commit the criminal offence referred to in Article 3 *or* in Article 4, **paragraph 4**, is punishable as a criminal offence.

*Amendment*

2. Member States shall take the necessary measures to ensure that an attempt to commit **any of** the criminal offences referred to in Article 3 **and** in Article 4**(4)**, is punishable as a criminal offence.

Or. en

*Justification*

*Technical change.*

## Amendment 9

### Proposal for a directive Article 6 – paragraph 1 – introductory part

*Text proposed by the Commission*

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in **Title II** committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:

*Amendment*

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in **Articles 3, 4 and 5** committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:

Or. en

*Justification*

*Technical change.*

## **Amendment 10**

### **Proposal for a directive Article 6 – paragraph 2**

*Text proposed by the Commission*

2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, of any of the criminal offences referred to in **Title II** for the benefit of that legal person by a person under its authority.

*Amendment*

2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, of any of the criminal offences referred to in **Articles 3, 4 and 5** for the benefit of that legal person by a person under its authority.

Or. en

*Justification*

*Technical change.*

## **Amendment 11**

### **Proposal for a directive Article 6 – paragraph 3**

*Text proposed by the Commission*

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in **Title II** or criminally liable under Article 5.

*Amendment*

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in **Articles 3 and 4** or criminally liable under Article 5.

Or. en

*Justification*

*Technical change.*

## Amendment 12

### Proposal for a directive Article 7 – paragraph 1

*Text proposed by the Commission*

1. As regards natural persons, Member States shall ensure that the criminal offences referred to in **Title II** shall be punishable by effective, proportionate and dissuasive criminal penalties, including fines and imprisonment as specified in Article 8.

*Amendment*

1. As regards natural persons, Member States shall ensure that the criminal offences referred to in **Articles 3, 4 and 5** shall be punishable by effective, proportionate and dissuasive criminal penalties, including fines and imprisonment as specified in Article 8.

Or. en

*Justification*

*Technical change.*

## Amendment 13

### Proposal for a directive Article 7 – paragraph 2

*Text proposed by the Commission*

2. In cases of **minor** offences involving damages of less than EUR **10,000** and advantages of less than EUR **10,000** and not involving **particularly serious** circumstances, Member States may provide instead for other than criminal penalties.

*Amendment*

2. In cases of offences involving damages of less than EUR **5 000** and advantages of less than EUR **5 000** and not involving **aggravating** circumstances, Member States may provide instead for **sanctions** other than criminal penalties.

Or. en

## Amendment 14

### Proposal for a directive Article 7 – paragraph 3

*Text proposed by the Commission*

3. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials.

*Amendment*

3. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials, *as defined in Article 4(5)*.

Or. en

## **Amendment 15**

### **Proposal for a directive**

#### **Article 8 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. Member States shall take the necessary measures to ensure that criminal offences as referred to in Articles 3 and 4, paragraphs 1 and 4, involving an advantage or damage of at least EUR **100,000** shall be punishable by

(a) a minimum penalty of at least **6 months** imprisonment;

(b) a maximum penalty of at least 5 years of imprisonment.

*Amendment*

1. Member States shall take the necessary measures to ensure that criminal offences as referred to in Articles 3 and 4, paragraphs 1 and 4, involving an advantage or damage of at least EUR **50 000** shall be punishable by

(a) a minimum penalty of at least **three months'** imprisonment;

(b) a maximum penalty of at least 5 years of imprisonment.

Or. en

## **Amendment 16**

### **Proposal for a directive**

#### **Article 8 – paragraph 2**

*Text proposed by the Commission*

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in **Title II** shall be punishable by a maximum penalty of at least 10 years of imprisonment where the offence was committed within a criminal organisation **in the sense** of Framework

*Amendment*

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in **Articles 3, 4 and 5** shall be punishable by a maximum penalty of at least 10 years of imprisonment where the offence was committed within a criminal organisation **within the meaning**

## **Amendment 17**

### **Proposal for a directive Article 8 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 8a**

##### **Aggravating circumstances**

***Member States shall take the necessary measures to ensure that, where it is established that a criminal offence referred to in Articles 3, 4 or 5 has been committed within a criminal organisation within the meaning of Framework Decision 2008/841, that fact shall be treated as an aggravating circumstance for sentencing purposes.***

Or. en

#### *Justification*

*It is better to consider this case as an aggravating circumstance than a different criminal offence.*

## **Amendment 18**

### **Proposal for a directive Article 9 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 9a**

##### **Ne bis in idem rule**

***Member States shall apply in their national criminal law the 'ne bis in idem' rule, under which a person whose trial***

*has been completed in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was imposed, it was enforced, is in the process of being enforced or may no longer be enforced under the laws of the sentencing State.*

Or. en

## **Amendment 19**

### **Proposal for a directive Article 11 – paragraph 1**

#### *Text proposed by the Commission*

1. Member States shall take the necessary measures to establish their jurisdiction over the criminal offences referred to in ***Title II*** where:

- (a) the offence is committed in whole or in part within their territory; ***or***
- (b) the offender is one of their nationals.

#### *Amendment*

1. Member States shall take the necessary measures to establish their jurisdiction over the criminal offences referred to in ***Articles 3, 4 and 5*** where:

- (a) the offence is committed in whole or in part within their territory;
- (b) the offender is one of their ***own*** nationals ***or is resident in their territory;***  
***or***
- (c) ***the offender is subject to the Staff Regulations of the European Union or the Conditions of employment of other servants of the European Union.***

Or. en

#### *Justification*

*The amendment of paragraph 1(b) aims to widen the scope of the Directive. The introduction of a third category of offender in paragraph 1(c) reflects the OLAF operational experience: officials with non-EU nationalities and not on the EU territory (but in delegations) should be included in the PIF jurisdiction.*

## **Amendment 20**

### **Proposal for a directive Article 13**

*Text proposed by the Commission*

This Directive shall be without prejudice to the recovery of sums unduly paid in the context of the commission of the criminal offences referred to in ***Title II***.

*Amendment*

This Directive shall be without prejudice to the recovery of sums unduly paid in the context of the commission of the criminal offences referred to in ***Articles 3, 4 and 5***.

***Member States shall take the necessary measures to ensure the prompt recovery of such sums and their transfer to the Union budget, without prejudice to the relevant Union sector-specific rules on financial corrections and recovery of amounts unduly spent. Member States shall also keep regular records of the sums recovered and inform the relevant Union institutions or bodies about those sums, or of the reasons for which they could not be recovered.***

Or. en

**Amendment 21**

**Proposal for a directive  
Article 15 – paragraph 1**

*Text proposed by the Commission*

1. The Member States and the Commission shall cooperate with each other in the fight against the criminal offences referred to in ***Title II***. To that end the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.

*Amendment*

1. ***Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters***, the Member States and the Commission shall, ***within their respective competences***, cooperate with each other in the fight against the criminal offences referred to in ***Articles 3, 4 and 5***. To that end the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.

Or. en



## Amendment 22

### Proposal for a directive Article 15 – paragraph 2

*Text proposed by the Commission*

2. The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against the criminal offences referred to in **Title II**. The Commission and the competent national authorities shall take account in each specific case of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

*Amendment*

2. The competent authorities in the Member States may, ***within their respective competences***, exchange information with the Commission ***and with Eurojust*** so as to make it easier to establish the facts and to ensure effective action against the criminal offences referred to in **Articles 3, 4 and 5**. The Commission, ***Eurojust*** and the competent national authorities shall take account in each specific case of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission ***and Eurojust***, may set specific conditions covering the use of information, whether by the Commission, ***Eurojust*** or by another Member State to which that information may be passed.

Or. en

## Amendment 23

### Proposal for a directive Article 17 a (new)

*Text proposed by the Commission*

*Amendment*

#### ***Article 17a***

##### ***Report***

***The Commission shall by [24 months after the deadline for implementation of the Directive] submit a report to the European Parliament and to the Council, assessing the extent to which the Member State have taken the necessary measures in order to comply with this Directive, subject to appropriate information being***

*made available by Member States.*

Or. en

## EXPLANATORY STATEMENT

The rapporteurs welcome the Commission's proposal for a on the fight against fraud to the Union's financial interests by means of criminal law. In particular, the rapporteurs share the view that the fraud and related illegal activities affecting the Union's financial interests pose a serious problem to the detriment of the Union budget and thereby the taxpayers, who urgently call the European institutions to ensure that public money is devoted to structural growth, fiscal consolidation and jobs.

When it comes to fraud to the Union's budget, the rapporteurs also are seriously concerned about the existence of differences among the Member States' legal and sanctioning systems. In this respect, the rapporteurs acknowledge the existence of a well-structured *acquis communautaire* in the field of fight against fraud. Yet, this has been implemented by the Member States so far by adopting only insufficiently harmonised and approximated rules and provisions, including sanctions. This fragmented legal framework creates incentives, for the potential perpetrators, to move across the European territory to the most favourable judicial system. The European Parliament believes that the Union and the Member States shall respond with a unique voice to fraud and any other illegal activities affecting the financial interests of the Union through deterrent measures and, as such, shall afford an effective and equivalent protection in all Member States.

In this regard, the Commission's legislative proposal moves in the right direction, by inserting provisions aimed to approximate the national legal systems, including criminal law measures, in order to counteract fraud and other illegal activities detrimental to the Union's budget. However, the rapporteurs would like to further improve the proposal by ensuring the adoption of:

- A more precise and comprehensive definition of fraud detrimental to the Union's budget. On this point, the European Parliament welcomes the Commission's proposal, which naturally includes VAT fraud in the directive;
- A provision which facilitates the approximation of the countermeasures to fraudulent activities related to access to public EU tenders, including those annulling or distorting the natural competitions among bidders;
- Provisions which consider "any" offence involving damages to the Union's budget an offence "as such", without differentiating among minor and serious offences depending on the level of amounts affected. On this point, taking into account at EU level the existing national provisions, the rapporteurs also decrease the offences' threshold from 10.000 to 5.000 Euros in order to allow the Member States, if they wish to do so, to provide for other than criminal sanctions for fraud below this level. The rapporteurs thereby wish to send a strong signal to the fraudsters that above this threshold, their activities are to be considered criminal offences everywhere across Europe.
- Lower benchmarks for imprisonment when it comes to fraud against the Union's budget and other illegal activities, in order to promote the approximation of national laws towards a well-determined level. The rapporteurs grounded their approach on a comparative analysis of the existing legal provisions in the Member States. The European Parliament believes that it is important to communicate the message that committing fraud against the Union's budget is no longer tolerable.

- A provision which takes into account the role of Eurojust in the cooperation between the Member States and the Commission to protect the Union's financial interests.

The rapporteurs believe that the Commission's proposal for a directive on the fight against fraud to the Union's financial interest is an important step in the field of EU Criminal Law. This area has been significantly enhanced since the entry into force of the Lisbon Treaty, with the abolition of the three-pillar structure and the consolidation of the European Parliament as a fully-fledged co-legislator in the European Area of Freedom, Security and Justice.

The general objective of the proposal is to ensure effective, proportionate and dissuasive protection of the Union's financial interests. For that purpose, it seeks to lay down minimal rules, including definitions of offences and minimum as well as maximum sanctions, in the field of fight against fraud and other illegal activities affecting the Union's financial interests.

The rapporteurs highlight that this directive is intended to provide a framework within which a future European Public Prosecutor's Office would operate. It represents a significant development in the creation of a European area of criminal justice.

The rapporteurs believe that, for the purposes of legal certainty, it is better to avoid categorisation of offences as 'minor' and/or 'serious'. In that respect, the rapporteurs share the view that all fraud against the EU's financial interests should be taken seriously.

The rapporteurs also share the Commission's view that a distinction should be drawn between fraud, on the one hand, and corruption and money-laundering, on the other. However, unlike the Commission, the rapporteurs think that the minimum sanctions proposed should reflect the differences between those offences (and not simply the amounts involved).

The rapporteurs further believe that, where the European Union's financial interests are at stake, it is appropriate to establish a level of minimum criminal sanctions to ensure a degree of consistency across the EU on sanctions imposed on those who defraud the EU's financial interests. Such a step must also be seen as a means of discouraging forum shopping on the part of money-launderers and fraudsters, and as part of a further development of a European area of criminal justice. However, such sanctions should not interfere with the prerogatives retained by the individual courts and judges of the Member States.

The rapporteurs want to ensure close cooperation between the Member States and the relevant Union institutions and agencies on investigating and prosecuting fraud. In particular, in that regard, it is important to acknowledge the increased role which Eurojust could play in future developments of EU criminal justice.

While establishing an effective and dissuasive deterrent to fraud against the EU's budget, the rapporteurs are also conscious of the need to maintain high standards of procedural safeguards in criminal proceedings throughout the EU, in particular with the reference to the principle of *ne bis in idem*.

With this report, the rapporteurs answer the citizens' and taxpayers' concerns, and offer a stronger basis to ensure an effective and equivalent protection of the Union's financial interests across the entire territory of the Union.