

Implementation of the PIF-Directive into Austrian criminal tax law

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On 22 July 2019, the *EU-Finanz-Anpassungsgesetz 2019* (EU-FinAnpG 2019) was published in the Austrian Federal Law Gazette. Aside from the implementation of the EU Tax Dispute Resolution Directive, the EU-FinAnpG 2019 also introduces several amendments in the field of Austrian criminal tax law and entered into force on 23 July 2019, the day after its promulgation.

Principles of European Union law

Since the Treaty of Lisbon of 2009, primary law of the European Union contains explicit provisions on criminal offences which affect the financial interests of the EU. For instance, Article 325 of the Treaty on the Functioning of the European Union (TFEU) explicitly proclaims the fight against fraud to be part of the EU's policy. Accordingly, the EU and its Member States shall counter fraud and any other illegal activities affecting the financial interests of the EU by means of measures 'which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.' (Article 325, paragraph 1 of TFEU). Pursuant to Article 325, paragraph 4 of TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedures and after consulting the Court of Auditors, shall adopt the necessary measures to prevent and combat fraud affecting the financial interests of the EU.

On the basis of this legislative authority, the European Commission presented a proposal for a directive on combatting fraud affecting the financial interests of the EU as early as July 2012.^[1]

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Subsequently, in July 2017 – based on Article 83, paragraph 2 of TFEU (not Article 325 of TFEU) – the Directive 2017/1371/EU^[2]

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(the so-called 'PIF'^[3]

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Directive) was adopted. This was to be transposed into national law by Member States by the end of July 2019. The Austrian legislator complied with said obligation by adopting the EU-FinAnpG 2019 – Federal Law Gazette no 62/2019.

The new offence: cross-border VAT fraud

General

Provisions in the PIF Directive dealing explicitly with value added tax (VAT) are rare. In respect of 'revenue arising from VAT own resources' – Article 2, paragraph 2 of the aforementioned Directive – merely states that the PIF Directive only applies to serious offences 'against the common VAT system', whereas Article 3, paragraph 2 of the PIF Directive contains a list of what is to be considered as 'fraud affecting the Union's financial interests', insofar as the act or omission is committed in a cross-border fraudulent scheme.

The newly adopted offence of cross-border VAT fraud as set out in Article 40 of the Austrian Financial Crime Act (FCA; *Finanzstrafgesetz-FinStrG*) is, in large parts, a word-for-word conversion of the provisions contained in the PIF Directive. According to this provision, one is to be held guilty of intentionally creating or participating in a cross-border fraudulent scheme, in which the supply of goods or services are performed or simulated, if it:

- uses or presents false, incorrect or incomplete VAT returns or related documents;
- does not disclose VAT-related information in violation of a specific obligation; or
- fraudulently causes the loss of revenue for VAT purposes by submitting correct VAT returns for which the VAT is not paid on the due date at the latest, or in which unlawful sales tax credits are claimed.

In addition, the total damage must amount to at least €10 million in the territory of the EU with regard to VAT.

Submission of a correct VAT return

As set out in section 40, paragraph 1 of FCA, the offence of cross-border VAT fraud can also be committed in spite of a correct VAT return. Hence, the mere non-payment of VAT is sanctioned.^[4]

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Except for the offences falling under the scope of section 40 of FCA, Austrian law excludes consequences for criminal tax law purposes for timely submitted VAT returns. In such cases, namely in the absence of a violation of a duty to report or disclose, punishment is ruled out.

The issue of the value threshold

The threshold of €10m is to be calculated on a collective basis (Austrian VAT as well as VAT incurred in connection to cross-border VAT fraud in another Member State of the European Union). The amount of the total loss in VAT, which needs to be assessed for the applicability of section 40 of FCA, must be assessed as if the tax liability would have arisen in Austria.

To put it simply, a foreign loss of revenue from VAT must be calculated in accordance with Austrian laws. However, the accused has the possibility to submit a ruling from the authority responsible for levying taxes in the other EU Member State, which must be unappealable, to prove an actual lower loss of revenue abroad.

Nonetheless, in our opinion, this creates a 'fictitious' element of offence, which could be irreconcilable with the system of criminal investigation. A fictitious criterion, assumed to have been fulfilled merely due to lack of evidence, cannot be relevant under criminal law. Thus, the act in fact contains a constitutionally questionable reversal of the burden of proof with regard to the material scope of application of a criminal provision.

Sanctions

In accordance with section 7, paragraph 1 of the PIF Directive, 'fraud affecting the Union's financial interests' is to be punished by effective, proportionate and dissuasive sanctions. Here, the Austrian legislator has chosen to align the punishment in section 40 of FCA, with sanctions for serious fraud (section 147 of the Austrian Criminal Code; *Strafgesetzbuch*).

Cross-border VAT fraud is an offence punishable by imprisonment for a term of between one to ten years. In addition to a prison sentence which does not exceed eight years, a fine can also be imposed of up to €2.5m. Legal entities are to be punished with a fine of up to €8m.

Intentional crimes – increase of penalties

Under the EU-FinAnpG 2019 the prison sentence for tax evasion (*Abgabenhinterziehung*) (s. 33 of FCA) was increased from two up to four years, which can be combined with a fine. The same goes for the crimes listed in section 35 of FCA (smuggling, evasion of import and export duties) as well as for the handling of stolen goods in tax matters (*Abgabenhehlerei*; section 37 of FCA), when the penalty-determining sum is more than €100,000.

The changes with regard to tax fraud (section 39 of FCA) are more substantial. In its basic form, this is tax evasion with a high level of criminal energy (falsification of documents, fictitious transactions, etc.), when the penalty-determining sum is more than €100,000. In this case, the current legislation provides for (primary) imprisonment as the punishment which should be given precedence. For this purpose, the prison sentence can be up to five years.

In addition, if the prison term does not exceed four years, a fine can be imposed of up to € 1.5m. Legal entities are to be punished with a fine of up to €5m. If the penalty-determining sum exceeds €500,000, punishment by imprisonment for a term of between one to ten years is provided. In addition, if the prison term does not exceed eight years, a fine can be imposed of up to €2.5m. Legal entities are now to be punished with a fine of between € 500,000 up to € 8m.

Conclusion

Taking into account the Austrian tax revenue, where VAT (including import duties) with an amount of €29.35bn takes the leading position, any measure to combat VAT fraud is *de facto* not only a measure to protect the financial interests of the European Union, but also, and in particular, a measure to protect the national budget.^[5]

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It should also be noted that in this context only around two per cent of the VAT revenue flows to the EU. In that regard, the introduction of a cross-border VAT fraud offence will undoubtedly be welcomed by every Austrian taxpayer. It is doubtful, however, whether the value threshold problem described above allows for the most effective calculation of the sum determining the penalty, namely in the sense of adequate reliability for a judicial criminal tax proceeding.

The value threshold of €10m is also set so that in practice only exceptional cases, not 'everyday' VAT fraud, can fall under its scope.

[1] (file:///R:/Publications/Committee%20output/LPD/Taxation%20Section/Taxes/2019/Standard%20Articles/October%202019/Edited/Nov/201910_PIFdirective 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) 363, 11 July 2012.

[2] (file:///R:/Publications/Committee%20output/LPD/Taxation%20Section/Taxes/2019/Standard%20Articles/October%202019/Edited/Nov/201910_PIFdirective 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 2017/198, 29.

[3] (file:///R:/Publications/Committee%20output/LPD/Taxation%20Section/Taxes/2019/Standard%20Articles/October%202019/Edited/Nov/201910_PIFdirective *intérêts financiers*).

[4] (file:///R:/Publications/Committee%20output/LPD/Taxation%20Section/Taxes/2019/Standard%20Articles/October%202019/Edited/Nov/201910_PIFdirective provision is included to cover those cases of fraud in which, within the framework of a cross-border VAT fraudulent scheme, tax returns are submitted in accordance with the law, but where the intention from the outset is not to pay VAT.

[5] (file:///R:/Publications/Committee%20output/LPD/Taxation%20Section/Taxes/2019/Standard%20Articles/October%202019/Edited/Nov/201910_PIFdirective and facts from the Austrian tax administration, https://www.bmf.gv.at/Abg_Aufkommen.html (https://www.bmf.gv.at/Abg_Aufkommen.html).

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