REPORT 11/2012 BY THE JOINT COMMITTEE FOR EU AFFAIRS DATED OCTOBER 8, 2012, ON THE COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY BY 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) 363 FINAL] [2012/0193 (COD)] {SWD (2012) 195 FINAL} {SWD (2012) 196 FINAL} AND BY THE PROPOSAL FOR A DIRECTIVE OF THE COUNCIL AMENDING DIRECTIVE 2006/112/EC ON THE COMMON SYSTEM OF VALUE ADDED TAX AS REGARDS A QUICK REACTION MECHANISM AGAINST VAT FRAUD [COM (2012) 428 FINAL] [2012/0205 (CNS)]

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

B. The Proposal for a Regulation of the European Parliament and of the Council on The Fight Against Fraud to the Union's Financial Interests by means of Criminal Law and the proposal for a Directive of the Council Amending Directive 2006/112/EC on the Common System of Value Added Tax as Regards a Quick Reaction Mechanism against VAT Fraud, have been adopted by the European Commission and conveyed to the national parliaments, which have a period of eight weeks to verify the subsidiarity check of the initiative, being the deadlines October 18 and 29, 2012, respectively.

C. The Bureau and the Spokespersons of the Joint Committee for EU Affairs agreed on September 11, 2012, to examine the said European legislative initiative, appointing to that end as Rapporteur Senator Mr. Ramón Ortiz Molina, and requesting the Government the report envisaged in section 3 j) of act 8/1994.

D. The Government has conveyed its reports on both initiatives according to which they comply with the subsidiarity principle.

The Government's 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, indicates that, in principle, Spain welcomes this proposal and shares the goal of the fight against illegal activities which deplete public money, whether it be national funds or pertaining to the EU, and shares the strategy to use criminal law to reinforce this protection, bearing in mind the greater deterrence effect that this framework entails. However, the report warns that we will have to pay attention to the proportionality aspects of the proposal, given the fact that the sanctions envisaged in the text in some cases are not coherent with the proposals enshrined in other provisions.

The Government's report concerning the Proposal for a Directive of the Council Amending Directive 2006/112/EC on the Common System of Value Added Tax as Regards a Quick Reaction Mechanism against VAT Fraud, stresses that it should be welcomed since it will allow for the swift adoption of measures requested by Member States to face exceptional cases of fraud.

E. The Joint Committee for EU Affairs, in its meeting held on October 8, 2012, adopted the following

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1.- Article 5 (1) of the Treaty on the European Union indicates that "*the use of Union competences is governed by the principles of subsidiarity and proportionality*", and adds in Article 5 (3) of the same Treaty that "*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".*

2.- According to the European Commission, the legal basis for 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 is to be found in Article 325 (4) of the Treaty on the Functioning of the European Union, which lays down the following:

"Article 325

(4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies."

We must bear in mind that this provision is part of Chapter VI of Title II of the Treaty on the Functioning of the European Union, devoted specifically to the fight against fraud.

3.- According to the European Commission, the legal basis for the Proposal for a Directive of the Council Amending Directive 2006/112/EC on the Common System of Value Added Tax as Regards a Quick Reaction Mechanism against VAT Fraud, is to be found in Article 113 of the Treaty on the Functioning of the European Union, which lays down the following:

"Article 113

"The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

4.- In the fight against fraud which so affects the financial interests of the European Union, and sharing the explanatory memorandum of the Directive examined in this report, we consider that Member States have adopted diverging rules and consequently often diverging levels of protection within their national legal systems. This state of affairs shows that there is no equivalent protection of the Union's financial interests, and that measures against fraud have not reached the necessary level of deterrence. For example, with respect to fraud the Member States have included definitions of this crime in many different forms of legislation, ranging from general criminal law, which may include specific or generic offences, to criminal tax codes. A similar divergence can be noted with respect to the levels of sanctions, which are applicable to these forms of crime in the different Member States. Such diversions have a negative impact on the effectiveness of the Union's policies to protect its financial interests, as demonstrated in the Impact Assessment accompanying this proposal.

The protection of the Union's financial interests calls for a common definition of fraud covering fraudulent conduct with respect to both expenditure and revenues at the expense of the EU budget. A common definition of offences in all Member States would reduce the risks of divergent practice, as it would ensure a uniform interpretation and a homogeneous way to meet all the necessary prosecution requirements. They would also strengthen the deterrent effect and enforcement potential of relevant provisions, and reduce the incentive for potential perpetrators to move to more lenient jurisdictions within the Union to exercise their intentional illegal activities.

Member States on their own have not been able to achieve these goals, and therefore an appropriate legal framework must be established at Union level, being this Directive the most adequate tool in this sense.

5.- Tax fraud in the field of value added tax (VAT) in the EU leads to considerable budget losses and affects the conditions of competition and thus the operation of the internal market. VAT fraud schemes evolve rapidly and Member States are sometimes confronted with situations whereby the EU VAT law in force does not provide a legal base for the counteractions they wish to take.

Directive 2006/112/EC of the Council, dated November 28, 2006, on the common system of value added tax, allows Member States to apply for a derogation from that Directive in order to prevent certain forms of tax evasion or avoidance. Authorisation of such derogation requires a proposal from the Commission and its adoption by the Council. Recent experience has demonstrated that the process for granting derogations is not always flexible enough to ensure a prompt and suitable reaction to requests by Member States.

Until now, such situations have been tackled either by an amendment of this last Directive 2006/112/EC, or individual derogations have been granted to Member States on the basis of Article 395 of the VAT Directive. In both cases, the process is, by nature, slow and cumbersome in comparison to quickly emerging fraud phenomena at international level.

Member States may therefore be tempted to take immediate measures without an appropriate legal basis in the EU legislation. However, this situation remains unsatisfactory as these measures, even where they are appropriate and proportionate in relation to the fraud situation, could be challenged before the Courts because of the lack of a legal basis.

In order to allow for a quicker adoption of the necessary derogations and to ensure uniform conditions for the implementation of Directive 2006/112/EC, implementing powers should be conferred on the Commission as regards the authorisation given to the requesting Member State to introduce derogation measures in the specific framework of the Quick Reaction Mechanism, as envisaged by the examined Directive. The purpose of this proposal is therefore to foresee a procedure in the VAT Directive which, in very specific situations, would provide a legal base for Member States to take immediate measures and which would be called the “Quick Reaction Mechanism”, something which can be done in the EU framework.

The only anti-fraud measure currently specified in this proposal is the so-called reverse charge mechanism, under which the taxable recipient becomes liable for the payment of the VAT instead of, as a general rule, the supplier of the goods or services. Insofar as the recipient disposes of a full right of deduction, he will account and deduct the VAT in the same VAT return and the result is that no effective payment or refund is taking place; thus reducing the possibilities of fraud. This measure has proven to be an effective tool in stopping fraud (and in particular carousel fraud) when targeted to certain specific sectors.

CONCLUSION

For the aforementioned reasons, the Joint Committee for EU Affairs considers that:

1º.- 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 complies with the principle of subsidiarity laid down in the Treaty on the European Union in force.

2º.- The Proposal for a Directive of the Council Amending Directive 2006/112/EC on the Common System of Value Added Tax as Regards a Quick Reaction Mechanism against VAT Fraud, complies with the subsidiarity principle as laid down in the Treaty on the European Union in force.