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From: Presidency
To: Permanent Representatives Committee/Council

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Subject: Proposal for a Directive of the European Council and of the Council on the fight against fraud to the Union's financial interests by means of criminal law
- Progress report/Policy debate

1. Summary

This document contains the results of the discussions on expert level on fraud with Value Added Tax (VAT) and its inclusion in the draft Directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF-Directive), with a view to resuming the negotiations with the European Parliament on the draft Directive.

Council is requested to take note of the results and to endorse the continuation of efforts to find a compromise solution, as set out in chapter 4.

2. Background

The latest trilogue on the PIF-Directive was held on 2 June 2015¹, where the Parliament and the Council were close to draft an agreement. However, the legislators concluded that they were in disagreement on one key issue, namely the inclusion or not of VAT related fraud in the scope of the draft Directive. While the European Parliament insisted on including the fraud with VAT, the Council upheld the position of the General approach², that '*Revenues arising from VAT shall be excluded from the scope*'. The negotiations were therefore postponed.

¹ See doc 8604/15.

² See doc 10232/13.

On 8 September 2015 the Court of Justice issued its judgement in Case C-105/14 Taricco (the Taricco case) which revived the discussion on the inclusion of fraud with VAT in the draft PIF-Directive. With reference to this judgment, the Luxembourg Presidency of the Council organised a series of discussions, in particular in Council (JHA) in October 2015. In their contributions to the debate, Ministers expressed divergent views on the consequences to give following the Taricco case. Some Ministers expressed that the judgement did not change their opinion that VAT should be excluded from the PIF directive, whereas a large number of Ministers showed a willingness to include to some extent VAT in the scope of the draft PIF directive.

Following these debates, the Luxembourg Presidency concluded³ that the Council must at some point take a step towards the Parliament if a PIF-Directive is ever to be adopted. The VAT issue should thus be explored further. In particular and before negotiations with the European Parliament can resume, there appeared to be a need to:

- clarify the exact scope and impact of VAT fraud in general, in particular in close liaison with tax experts (e.g. nature of VAT, VAT calculation methods, interaction between administrative and criminal proceedings and sanctions);
- define the scope that could be covered in the Directive, and find a corresponding draft (e.g. by which criteria – the cross-border nature of the offence or a threshold ; in case of a threshold, on which basis should the threshold be calculated on – the damage done to the budget/the advantage gained or the amount of the transaction in question including or excluding VAT); and
- explore the link between the possible VAT provision in the draft Directive with the draft Regulation on the establishment of a European Public Prosecutor's Office (e.g. the cross-border nature of the offence).

³ Doc 14281/15.

3. Developments under the Netherlands' Presidency

The Netherlands' Presidency has followed up on the discussions of Ministers and in particular the conclusions of the Luxembourg Presidency, with the aim of exploring the possibility to address the VAT-related issues in the Directive. The Presidency would summarise the three meetings held at Working Party level as follows:

- On 10 February 2016, a meeting of the competent Working Group (DROIPEN) with the participation of VAT fraud experts was organised. The aim of the meeting was to reach a common understanding not only on how VAT works in the Member States, but also how fraud with VAT occurs, how it is fought (e.g. through administrative and criminal proceedings) and the effects of such fraud for the Union but also on the content of the PIF-Directive. Although delegations from several Member States expressed in clear terms that there was no change in their position that VAT should not be included in the PIF-Directive most of them were willing to exchange views on the issues the Presidency would like the meeting to address. The combination of criminal law and fiscal experts led through an in depth discussion to a better understanding by all experts of all aspects of the matter at hand. The fiscal experts heard explanations of how the draft PIF Directive aims at harmonisation of criminal offences and sanctions and does not change anything in the existing administrative rules on VAT. The criminal law experts gained a better understanding of the true meaning of “VAT fraud” and the ways and manners of combatting it in the different Member States.

The following main findings were made at the meeting:

- ✓ The term “VAT fraud” is commonly used for acts or omissions related to VAT which have in common that they are not in conformity with the existing obligations in relation to VAT. Although the aim is mostly fraud with VAT such conduct can be considered as an administrative or a criminal offence, depending on the context. The scope of what is considered a criminal offence varies amongst the Member States.

- ✓ Fraud with VAT is seldom an isolated matter; it mostly appears in combination with fraud related to other types of taxes.
 - ✓ In most Member States, investigations into cases of tax fraud and thus also fraud with VAT are primarily investigated by tax authorities and are administrative in nature. Criminal investigations and prosecutions are reserved for more serious cases. The relation between administrative and criminal proceedings for fraud with VAT varies between Member States and comparison is therefore a complex matter. Existing national systems in place often give room to flexibility to choose between administrative and criminal sanctions. Often a threshold expressed in an estimate amount of damage to the national budget is used to differentiate between the final approach. Delegations of those Member States expressed that it is of key importance to ensure that the existing administrative proceedings are not to be affected by the PIF Directive.
 - ✓ A large number of delegations showed willingness in principle to explore the room for inclusion of serious cases of fraud with VAT in the scope of the draft Directive. However, the views on which cases should be considered serious vary considerably. Many defended the introduction of a threshold expressing (indirectly) the damage to the Union budget, whereby there were various views on the amount of such a threshold. Others opposed the use of a threshold as sole ground to define serious cases, and noted that many factors will have to be considered in order to decide if a fraud case is serious. Some argued that the seriousness could only be decided on the basis of national law.
- The Presidency followed up on the discussions from the combined meeting in the Friends of Presidency meeting of the criminal law experts on 24 February 2016, in view of discussing possible ways of changing the scope of the draft PIF Directive. Concretely, possible modifications in order to include at least certain cases of serious fraud with VAT in the scope of the draft Directive were analysed. Although several delegations recalled their principle opposition to any inclusion of VAT-related offences, most delegations in general expressed openness to discuss different options, while indicating that it may take some time still to reach an acceptable compromise.

The following main findings were made at the meeting:

- ✓ The need to ensure that Member States can maintain their current systems of administrative sanctions on VAT related fraud, which could be clarified in a recital;
 - ✓ The need to clarify that administrative recovery at the national level in cases of fraud with VAT will not be affected by any obligation in the PIF Directive;
 - ✓ The desire to clarify in the corpus of the PIF Directive that the structure, organisation and functioning of the tax administration of the Member States are not affected by this Directive and that VAT remains a competence of the Member States;
 - ✓ On the assumption that serious forms of 'VAT fraud' would be covered by the PIF Directive, the need for a separate description of such fraud, which focuses on all aspects of “carousel fraud”, including Missing Trader Intra-Community (MTIC) fraud;
 - ✓ The need for a threshold which encompasses the total damage (the damage to the national budget(s) and to the Union’s financial interests) of the fraud case;
 - ✓ Compromises reached in the trilogue may need to be reconsidered in the light of the inclusion of serious fraud with VAT in the PIF Directive;
 - ✓ Finally, the question was raised whether Article 113 TFEU, in particular the requirement of the extraordinary legislative procedure, has relevance when serious cases of fraud with VAT would be included in the PIF Directive.
- On 6 April 2016, the third meeting on the VAT issue was organised, again for the criminal law experts. The Presidency suggested a number of provisions that could be included in the draft PIF Directive in view of a future compromise with the European Parliament on these issues. The Working Party discussed the details of these drafts , while some delegations repeatedly underlined that they still do not agree to the inclusion of any VAT-related provision in the PIF Directive. Furthermore the competence of the European Public Prosecutor's Office in relation to offences of fraud with VAT was addressed.

The following main findings were made at the meeting:

- ✓ With the help of the legal service of the Council the issue of the legal basis was clarified which resulted in an agreement that Article 83(1) should not be replaced by Article 113 TFEU as the legal basis for possible provisions related to fraud with VAT;
- ✓ The Working Party is approaching an agreement on recitals 25b and 25c that will ensure an appropriate relation between administrative and criminal sanctions and their application, in particular important in the area of VAT-related offences, which may be applied in parallel as long as this does not lead to a breach of the Charter of Fundamental Rights;
- ✓ The competence of Member States in the area of tax administration will be respected by the PIF Directive;
- ✓ When provisions specific for offences of fraud with VAT will be included in the PIF-Directive the appropriate places will be in amending Articles 3 (definition) and 7(4) (sanctions), while the last sentence of Article 2 should be deleted.
- ✓ The focus should be on the most serious forms of VAT fraud, such as carousel, Missing Trader Intra-Community Fraud (MTIC) fraud with a total damage of at least EUR 1 000 000, regardless whether the damage occurs in one or more Member State, and the offence should enable to prosecute all participants in the scheme even where their individual acts do seem less serious.

There is overall agreement that the possible competence of the European Public Prosecutor's Office for offences on fraud with VAT can only follow from the PIF Directive, as is the case with the competence for the other offences covered by the PIF Directive. However, the exercise of such competence by the EPPO may be regulated further in the draft EPPO Regulation.

4. Questions to ministers

On the basis of these findings and comments received from delegations, the Presidency has further elaborated draft provisions in recitals 25b, 25c and Articles 2(2), 3(1)(d), 7(4)(a) and 13 of the draft PIF Directive.

These provisions have been drafted on the clear understanding that the inclusion of any VAT-related provisions in the Directive has not been agreed by the Council and that other provisions in the general approach may also need to be discussed anew in future negotiations with the European Parliament.

The new provisions should be read in conjunction with documents 10232/13 (general approach) and 8604/15 and are reproduced in Annex.

The Council is invited to

- 1. welcome the progress described in this Note,**
- 2. endorse the continuation efforts to find a compromise solution with the European Parliament on the issue, and**
- 3. agree that the recitals and provisions presented in Annex could serve as a basis for further work, with a view to restarting the negotiations with the European Parliament and to agreeing on the final text of the PIF-Directive.**

Recital 25b:

Administrative measures and penalties play an important role in the protection of the Union's financial interests. This Directive does not exempt Member States from the obligation to apply and implement administrative Union measures and penalties within the meaning of Article 4 and 5 of Regulation (EC, Euratom) No 2988/95.

Recital 25c:

This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the acts of Fraud and fraud related criminal offences affecting the Union's financial interests to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases. Member States may in principle continue to apply administrative measures and penalties in parallel in the area covered by the Directive. In the application of national law transposing this Directive, Member States should however ensure that the imposition of criminal sanctions of offences in accordance with this Directive and of administrative measures and penalties does not lead to a breach of the Charter of Fundamental rights.

Recital 25d:

The structure, organisation and functioning of the tax administration of the Member States are not affected by this Directive.

Recital X

The most serious forms of VAT fraud, in particular carousel fraud, fraud through missing traders constitute serious threats to the intra-community VAT system. This Directive aims to contribute to the efforts to fight these criminal phenomena.

Recital Y

In relation to fraud with VAT the notion of total damage is used to express that this is the total of the estimated damage both for the financial interests of the Member States concerned and for the Union.

Recital Z

The threshold of EUR 1 000 000 of total damages of the offence of fraud with VAT envisaged in Article 7(4) encompasses the serious diminution of the Union's budget referred to in Article 3(1)(d) (ii).

Article 3(1):

...

"(d) by derogation of point (c) in respect of revenue arising from VAT own resources, any act or omission committed through serious abuse of the intra-community VAT system, where the offences are connected with the territory of two or more Member States and relating to:

- (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the serious diminution⁴ of the resources of the Union budget;*
- (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect.*
- (iii) the presentation of correct VAT-related statements for the purposes of disguising non payment. "*

⁴ Recital Z

Article 7(4)(a):

In cases regarding offences referred to in Article 3(1)(d), Member States may provide instead for other than criminal penalties in cases of offences involving total⁵ damage of less than EUR 1 000 000.

Article 13 (Recovery)

This Directive shall be without prejudice to recovery:

(i) at EU level of sums unduly paid in the context of the commission of the criminal offences referred to in Article 3(1) a, b and c and Articles 4 and 5.

(ii) at national level of any VAT not paid in the context of the commission of the criminal offences referred in Articles 3 d and Articles 4 and 5.

⁵ Recital Y