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NOTE

From: Presidency
To: CATS

Subject: Preliminary exchange of views on the proposal for a PIF Directive

A. Background and state of play

The proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) was submitted by the Commission in 2012. At its meeting on 6 June 2013, the Council (Justice and Home affairs) reached a general approach on the compromise text of the Articles and the recitals. On 20 April 2014 the European Parliament adopted its Report on the Commission proposal.

The proposed Directive constitutes an essential instrument in strengthening the response of the Member States to fraud and other offences which damage the finances of the European Union. In this respect, it is immediately linked to the proposal for a Regulation establishing the European Public Prosecutor's Office (EPPO), currently under discussion in the Council. Indeed, the PIF Directive will concur to define the scope of action of the future EPPO.

Also in order to allow the discussion on EPPO to make progress on the definition of the Office's field of competence it is important that negotiations with the European Parliament begin swiftly and make rapid progress. In this respect, the Italian Presidency has already indicated, in the course of the hearing before the LIBE Committee of the newly instated European Parliament, that the beginning of negotiations on the PIF Directive with a view to reaching an agreement between the co-legislators is a matter of high priority.

The Parliament's position at first reading presents a number of similarities to the outcome of discussions in the Council as set out in the June 2013 general approach. Nonetheless, there are some significant differences between the two texts which will have to be addressed in the course of the negotiations.

In this respect, the Presidency would like to turn to **CATS** highlighting some of the major differences between the two texts, and requesting delegations to express their preliminary views on possible ways in which these differences may be reconciled. These indications will serve as guidance to the technical Working Party for the preparation of the trilogues, expected to kick off at the beginning of October 2014.

B. Issues for discussion

1. Definition of financial interests.

a. General definition

In its first reading position the European Parliament has amended the Commission's proposed text on the definition of "the Union's financial interests" by proposing the following:

"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:...*"

Delegations are invited to express their views on this addition.

b. Offences related to VAT

The Parliament, in its first reading position, has expressly confirmed the inclusion of VAT in the scope. It is the understanding of the Presidency that this will be a strong point for the EP in the upcoming trilogues.

During the discussions in the Council, a large majority of Member States advocated the addition to the draft Directive of a specific provision (in Article 2) excluding VAT revenues from the scope of the Directive. Delegations arguing in favour of this solution observed that only a small portion of VAT revenue collected is due to the European Union budget, with a clear preponderance of the portion reserved for the collecting State. Delegations in the minority, on the other hand, observed, supported by the Commission, that the small percentage of VAT due to the Union budget is an own resource of the EU and as such should be afforded protection also through approximated criminal law provisions.

Delegations are invited to express their opinion on possible manners to reconcile these positions. In particular, could a distinction between the scope of the Directive and the competence of the future EPPO be considered? For instance, it could be envisaged that the Directive:

- i. includes VAT (or some aspects of VAT), but limits the EPPO's competence to certain types of VAT offences of a serious nature (e g involving transnational organised crime), or some similar criterion;**
- ii. includes certain types of serious VAT-related offences, with the exclusion of minor offences, but excludes VAT-related offences from the EPPO's competence;**
- iii. includes VAT-related offences committed within the framework of organised and/or cross-border crime, but excludes such offences from the EPPO's competence.**

The Presidency does not ask delegations to give specific commitments at this stage on any of these, or other, alternatives, but rather wishes delegations to begin a reflection, which could be pursued at working party level, on whether there is room for discussion of this politically sensitive issue which no doubt will be crucial for the success of this legislative file.

2. Fraud related criminal offences and the definition of public officials

a. The scope of the definition of active and passive corruption

The first reading position of the European Parliament (Amendment 16) construes the definition of active and passive corruption in Article 4 of the draft Directive in a way that widens the scope of application with respect to the general approach adopted by the Council. In particular:

- the definition of passive corruption seeks to cover all cases of remuneration or promise to the public official,” whether or not [the act or omission is] in breach of his official obligations”; the EP's first reading position sticks to the Commission's proposal in so far;
- the definition of active corruption has been widened to include also subsequent corruption (i.e. remuneration or promise of remuneration after the performing of the conduct of the public official).

b. The definition of public official.

The Parliament's first reading position substantially amends the definition of public official as set out in the Commission proposal, to align it with the definition currently contained in Article 1 (1) of the Protocol to the PIF Convention. This brings the definition closer to that contained in the Council's general approach, but with a substantial difference. Indeed, in the Council's text Article 4 (3) (i), last sentence, reads:

“Members of institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be treated as Union officials, inasmuch as the Staff Regulations of the European Union or the Conditions of employment of other servants of the European Union do not apply to them”;

However, the definition now contained in the EP's first reading position is limited to “Members of bodies” and does not cover “institutions, offices and agencies”. This would mean that MEPs were excluded from the definition of public official.

Delegations are invited to express their view on the definitions of *active and passive corruption* and *public official*, as proposed by the Parliament.

3. Prescription

The European Parliament's first reading position does not amend Article 12 of the Commission's proposal concerning prescription terms for trials and for the execution of consequent penalties.

On the contrary, the Council's general approach has substantially amended that provision, among others:

- by introducing a distinction between "serious offences" and other offences;
- by defining the obligation for Member States to provide for a prescription period of no less than 5 years only in relation to serious offences;
- by reducing the period during which a final conviction must be enforceable after the final judgement from 10 to 5 years.

In particular for what concerns the first modification, it should be noted that the Explanatory statement attached to the Report of the LIBE and CONT Committees explains how a distinction between "serious" or "minor" offences and other offences should be avoided for reasons of legal certainty. This issue will be reflected also in the negotiations on other parts of the text, as the Council's general approach makes extensive use of this distinction (e.g. in Article 7 on levels of penalties for natural persons).

Delegations are invited to comment on the above difference between the Parliament's and the Council's text.