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NOTE

from: Presidency

to: Working Party on Substantive Criminal Law (PIF)

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Subject: Protecting the Union's financial interests by means of criminal law

This document contains tentative compromise proposals from the Presidency as regards Articles 4, 8 and 12 in the relevant proposal. Reservations expressed by delegations at earlier meetings are not included in this document, but will be reintroduced in the consolidated version of the proposed Directive that will be established later. The intention of the Presidency is to base the discussions at the meeting on 13 March 2013 regarding the said Articles on this document, in view of clarifying whether there is sufficient support for the proposed approach.

DRAFTING SUGGESTIONS

Article 4

Fraud related criminal offences affecting the Union's financial interests

1. Member States shall take the necessary measures to ensure that the intentional use of information received or procured from a third person with the knowledge that the third person is not entitled to share this information, or of information which is otherwise obtained unlawfully, in a public procurement or grant procedure involving the Union's financial interests, is punishable as a criminal offence when the perpetrator has an aim
 - (a) of winning the tender or grant, or
 - (b) circumventing or affecting the eligibility, exclusion, selection or the award criteria of the procurement procedure.
2. Member States shall take the necessary measures to ensure that money laundering as defined in Article 1 (2) of Directive 2005/60/EC of the European Parliament and of the Council involving property derived from the offences covered by this Directive is punishable as a criminal offence.
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 an advantage 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 breach of his official duties*] 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 breach of his official*] duties in a way which damages or is likely to damage the Union's financial interests (active corruption).
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 which damages the Union's financial interests, is punishable as a criminal offence (misappropriation).

5. For the purpose of this Article, 'public official' means:
- (a) any person exercising a public service function for the Union or in Member States or third countries by holding a legislative, administrative or judicial office;
 - (b) any other person exercising a public service function for the Union or in Member States or third countries, not holding such an office, participating in the management of or decisions concerning the Union's financial interests.

Article 8

Penalties of imprisonment

Member States shall take the necessary measures to ensure that serious cases of criminal offences as referred to in Articles 3 and 4 shall be punishable by a maximum penalty of at least 5 years of imprisonment.

Offences as referred to in Article 4(3) shall always be deemed serious.

Offences as referred to in Article 3 and Article 4(4) shall be deemed serious, when involving a minimum amount to be set in each Member State. The minimum amount may not be set at a sum exceeding 100 000 euros.

[Offences as referred to in Articles 4(1), 4(2), and 5 may be deemed serious, when involving an advantage or a damage of at least 100 000 euros.]

Article 8a¹

Aggravating circumstance

Member States shall take the necessary measures to ensure that it shall be regarded as an aggravating circumstance, when a criminal offence referred to in Articles 3, 4 and 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841 of 24 October 2008 on the fight against organised crime.

¹ This provision may instead be placed in connection to Article 7.

Article 12

Prescription for offences affecting the Union's financial interests

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3, 4 and 5 can be effectively prosecuted for a sufficient period of time after their commission, with full regard to the complexity of the detection, investigation and prosecution of these offences.
2. Member States shall take the necessary measures to enable the prosecution of serious cases of criminal offences, as referred to in Article 8, for:
 - (a) at least six years after the commission of these offences, or
 - (b) at least three years after the commission of the offence, providing that the Member State ensures that the prescription period shall be interrupted or suspended and commence anew upon specified acts undertaken for the purpose of investigation or prosecution by a competent national authority, including at least:
 - the first official questioning of the suspect;
 - the bringing of an indictment for the criminal offence.

Where a prescription period is interrupted according to this provision, Member States shall ensure that a prosecution may be pursued during an overall period including interruptions or suspensions of at least six years since the commission of the offence. The interruption shall have effect only for the person in relation to whom the interrupting act is undertaken.

3. Member States shall take the necessary measures to enable the enforcement of an imposed penalty of more than one year imprisonment for a criminal offence referred to in Articles 3, 4 and 5, for a sufficient period of time. In serious cases of criminal offences as referred to in Article 8, this period may not be shorter than 5 years from the date of the final conviction.