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NOTE

from: Presidency
to: CATS
Subject: Protecting the Union's financial interests by means of criminal law

The Commission's proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law was adopted on 12 July 2012¹.

In the context of budgetary austerity and financial crisis, the fight against misuse of EU public money (including both expenditure and revenues) is a priority for the Union. The Presidency therefore considers it appropriate and timely to have an initial orientation debate among delegations on the proposed Directive at this very early stage of discussions. (The Draft Directive will be discussed for the first time by the Working Party on Substantive Criminal Law (DROIPEN) on 21 September 2012).

¹ 12683/12 DROIPEN 107 JAI 535 GAF 15 FIN 547 CADREFIN 349 CODEC 1924 (COM(2012) 363/2).

The aim of the proposed Directive is manifold: to deter fraudsters, improve the prosecution and sanctioning of crimes against the EU budget, and facilitate the recovery of misused EU funds thereby increasing the protection of EU taxpayers' money.

The Lisbon Treaty considerably reinforced available tools to act for the protection of EU financial interests, including by means of criminal law. The proposal is based on Article 325(4) of the Treaty on the Functioning of the European Union (TFEU).²

The main legal act in the area of criminal law and protection of the EU budget currently in place, is the so-called "PIF (Protection des Intérêts Financiers/ Protection of Financial Interests) Convention" and its accompanying protocols.³ However, this Convention, it has been argued, has not been sufficiently well implemented in some Member States, divergences existing both in relation to definitions, rules and the level of penalties. In addition, since this Convention was signed in 1995, the number of EU Member States has increased as well as the level of integration, sometimes with new policy fields and types of expenditure having developed in multiple sectors, such as agriculture, customs, cohesion, pre-accession financial instruments, external aid etc.

² Article 325(4) TFEU: "*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*".

³ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests of 26 July 1995 (OJ C 316, 27.11.1995, p. 49).

A number of other legal instruments are in place to protect the EU's financial interests when crimes such as fraud, corruption or money laundering are committed. To be mentioned here the newly proposed legislation on freezing and confiscation of proceeds of crime in the EU⁴ that is currently being discussed within DROIPEN (and recently also at the informal meeting of the JHA Ministers in July 2012). Other initiatives, such as the final report of the fifth round of mutual evaluations on "financial crime and financial investigations"⁵, completed during the Cyprus Presidency, equally draws conclusions relating to these issues. Moreover, discussions are ongoing in relation to the Directive on criminal sanctions for insider dealing and market manipulation.

To overcome certain loopholes and shortcomings of the legislation in place at national and at EU level, and bearing in mind that more than 90% of the EU budget is managed nationally, the need for common criminal law rules against fraud to ensure that acts of fraud and illegal activities at the expense of the Union's financial interests are prosecuted evenly across the Union could be advocated. The proposed Directive thus provides **common definitions of a number of offences** against the EU budget and **common prescription periods**, within which the case must be investigated and prosecuted, as well as **minimum sanctions**, including imprisonment for the most serious cases to strengthen the deterrent effect. These **common rules** should, according to the Commission's proposal, help to ensure a level playing field and improved investigation and prosecution across the EU. A separate initiative on procedural measures for the protection of the Union's financial measures is foreseen for 2013⁶.

⁴ 7641/12 DROIPEN 29 COPEN 57 CODEC 656 (COM(2012) 363 final).

⁵ 12657/12 GENVAL 51 + ADD 1.

⁶ This proposal will aim, firstly, at aligning rules for the collection and use of evidence in criminal procedures and, secondly, at better communication and cooperation between national authorities and OLAF.

The proposal aims to define offences such as fraud, and other fraud related crimes such as active and passive corruption, the misappropriation of funds, money laundering and obstruction of public procurement procedures to the detriment of the EU budget. It suggests Member States to impose a minimum sanction of six months' imprisonment for serious cases (Article 8), and a maximum penalty of at least 10 years of imprisonment where the offence was committed within a criminal organisation. In order to help the recovery of funds, it provides for confiscation of the proceeds of these crimes (Article 10). Furthermore, it suggests longer prescription periods/"deadlines" for the offences defined (Article 12), due to the fact that adequate time to investigate is of utmost importance in complex cross-border cases. Questions such as the interaction between administrative and criminal sanctioning regimes, definition of a public official would also need to be examined further.

In the light of the above, the Presidency invites CATS to hold a first exchange of views on the following questions:

1. *In the opinion of CATS, is there a need to define offences at EU level for the purposes of the protection of EU financial interests, such as those in the proposal?*

2. *Do CATS believe that there is a necessity to define types and levels of penalties for the protection of EU financial interests, such as those contained in the proposal?.*