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NOTE

From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law - <i>State of Play</i>

Background

The latest trilogue on the Directive on the fight against fraud to the Union's financial interests (PIF-Directive) was held on 2 June 2015. The Parliament and the Council were thereby very close to an agreement on almost all questions that had previously been discussed. However, the legislators also concluded that they were in disagreement on one key issue, namely the inclusion or not of VAT fraud in the scope of the PIF Directive.

Developments under Luxembourg Presidency

During the informal Ministers meeting in Luxembourg in July, Ministers agreed that discussions should resume once the decision of the Court of Justice in Case C-105/14 (*Taricco*) would be published. Following the publication of the *Taricco* decision on 8 September 2015, the Presidency organised a discussion amongst Justice Ministers during the October Council as well as in CATS.

In their contributions to the debate, Ministers expressed different views on the consequences of the *Taricco* case for the PIF-Directive. Some Ministers expressed that the judgement would not change their opinion that VAT should be excluded from the PIF directive. However, a large number of Ministers stressed that the decision of the Court clearly shows that VAT should, at least for major offences, be included in the scope of the PIF directive. Some Ministers also suggested to foresee some competence for the European Public Prosecutor's Office for VAT offences without necessarily including VAT in the PIF directive.

Follow-up to the October Council - DROIPEN of 28 October 2015 and CATS of 1 November 2015

Following the debate of Ministers, the Presidency concluded that experts should examine the possible inclusion of major VAT fraud in the Directive with a view to re-opening the negotiations with the European Parliament on this file. In line with this, the Presidency organised a working party (DROIPEN) on 28 October 2015 and raised a number questions¹:

The positions of delegations in DROIPEN and CATS can be summarized as follows:

- Although admitting that the *Taricco* case would have consequences regarding the PIF directive, a number of delegations expressed a preference to stick to the general approach² of 2013.
- However, most of the delegations that oppose the inclusion of VAT fraud expressed openness to discuss, if necessary, possible compromise solutions. One such solution could be the inclusion of particularly serious offences and/or offences with a cross-border or organised-crime dimension in the Directive. Possible thresholds of 100 000 euros or more to decide on the seriousness of a VAT fraud offence were thereby mentioned by delegations. Delegations underlined that further discussions are needed on whether to use as parameter the 'value of transaction' or the 'damage/'advantage', i.e. the lost amount of VAT.
- The future competence of the EPPO for VAT issues as an important factor in the search for a global compromise with the Parliament was mentioned by many.

¹ Doc 13219/15 DROIPEN 123 JAI 774 GAF 42 FIN 703 CADREFIN 64 CODEC 1373.

² Doc /13

- Many delegations noted that the current Council negotiation position on the PIF Directive, as discussed with Parliament at the latest trilogue in June 2015, had been formulated on the assumption that VAT fraud would remain outside the scope of the Directive, and that many concessions to Parliament had been made under this assumption. There might thus be a need to make certain limited readjustments to the text.
- The potential effects on national legal systems and on existing systems of administrative sanctions were highlighted. Delegations underlined that any inclusion of VAT fraud in the Directive must be carefully prepared at expert level, in close cooperation also with experts on VAT and general fiscal issues.

Way forward

The Luxembourg Presidency concludes 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 appears 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)
- Explore the link between the possible VAT provision in the Directive with the Regulation on the establishment of a European Public Prosecutor's Office (e.g. the cross-border nature of the offence)

The Presidency invites Ministers to take note of this State of Play.