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NOTE

From:	Presidency
To:	Working Party on Substantive Criminal Law (DROIPEN) - Proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment
No. prev. doc.:	15777/17
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA - Presidency document

On 21 December 2017, the Estonian Presidency of the Council issued a document¹ with a consolidated version of the text of the draft Directive on combating fraud and counterfeiting of non-cash means of payment. The consolidated text was the result of a thorough examination of the text at expert level throughout the Estonian Presidency and expresses the state of play at the end of the mandate of the Estonian Presidency.

The Bulgarian Presidency considers that the said consolidated text constitutes a significant step towards achieving a text that could be broadly agreed upon as a general approach in Council. However, a few key issues still need detailed examination at expert level. The Presidency proposes to focus on these at its first working party (DROIPEN) meeting on 15 January 2018.

¹ Doc 15777/17.

The Presidency therefore invites delegations to reflect on the issues outlined below in preparation of the upcoming DROIPEN meeting. The objective of the Presidency is to get a clear picture of the majority situation with regard to the individual provisions, while at the same time seeking to take the interest of reaching a balanced compromise encompassing all the provisions of the Directive fully into account.

The Presidency will also open the floor for general comments regarding the consolidated text set out in document 15777/17.

1. General definitions

In particular two general definitions in the draft Directive continue to raise questions:

- The definition in Article 2(a), whereby the main question is whether the words 'by its specific nature' should be retained.
- The wording of the definition of 'virtual currencies' has been questioned by some delegations. The current assessment of the Presidency nevertheless is that the present wording is supported by a majority of delegations.

The Presidency invites all delegations to express their position on the issues highlighted above.

2. The scope of Articles 3 to 7

The discussions in 2017 showed that there is a broad common understanding of what should be the main content of the crime definitions in the text. However, there are some delegations who wish to limit the scope of some of the obligations following from the provisions, essentially in order to give the Member States the possibility to exclude less serious or less exceptionable behaviour from the compulsory scope of the criminalisation and/or of the penalties provided for in this Directive. In this vein, it has been suggested by delegations

- to give Member States the possibility to condition the offence of *unlawful obtention of a non-corporeal means of payment* (Article 4(b)) with the infringement of a security measure;
- to include special intent criteria in some provisions, namely a particular criterion of *'in order for it to be used fraudulently'* in Article 4(c), and/or the special criteria outlined in Articles 4a(2) and 6(2);

- to limit the scope of Article 4a(1), by deleting certain of the terms - in particular *possession* - set out in the provision;
- to limit the scope of Article 6 by reducing the reference to offences for which tools would be used to only certain of the offences originally provided for;
- to limit the scope of the attempt offence set out in Article 7(2), so that it would relate to only certain delimited offences.

A substantial group of Member States opposes the possibility to introduce such limitations of the scope of these provisions and argue, in substance, that it is important to harmonise national law as far as possible in respect of these provisions.

Delegations are requested to anew consider the wording of Articles 3 to 7 in the light of previous discussions in DROIPEN. In particular, delegations are invited to attempt to examine the relevant provisions in one single context, with a view to finding a globally acceptable solution encompassing all the said Articles. For example, delegations may reflect on the possibility to reintroduce the notion of *'in order for it to be used fraudulently'* in Articles 4, 4a and 6, and to delete at the same time the provisions in Articles 4a(2) and 6(2). Other 'package compromises' could and should obviously also be considered.

3. Penalties for natural persons

The discussions on the Article on penalties have had certain similarities with the discussions on Articles 3 to 7, in that some delegations have called for a limitation of the scope of some of the provisions, either by excluding minor offences from the compulsory 'minimum maximum' penalty or by reducing the terms of the said minimum maximum penalties, whereas other delegations have argued that a more far-reaching harmonisation of the penalties should be an objective of this Directive. The current text has reduced the scope of the minimum maximum penalties provided for in Article 8(2) and (3) by the introduction of the notion of *'at least in cases which are not minor'*, a solution which has been criticised by some delegations, not the least on the ground that it appears to be vague. An alternative to this solution could be to reduce the minimum maximum penalties set out in Article 8, while deleting the words *'at least in cases which are not minor'*.

Delegations are invited to consider their positions with regard to the rules in Article 8 in the light of previous discussions in the working group and the alternative solutions outlined above. Delegations are thereby asked to give particular consideration to the interest to find a global compromise regarding how to address 'minor offences' throughout the draft Directive.

4. Jurisdiction

The rules on jurisdiction have been discussed in detail during the last few months. The Presidency considers that the text suggested by the former Estonian Presidency comes close to express a broadly acceptable compromise text for the purposes of an upcoming general approach, in that the original Article 11(1)(c) has been deleted, while Article 11(2)(b) maintained. However, there have also been strong calls to analyse the merit and the functionality of the said Article 11(1)(c) further, whereby the elaboration of a new explanatory recital could add value.

Delegations are requested to indicate if they can accept the wording of Article 11 set out in the consolidated text. If the reply is negative, delegations are asked to consider how the main idea behind the Article 11(1)(c) of the original Commission proposal (jurisdiction based on where the damage occurs) could be included in the Directive².

5. Effective investigations (investigative tools)

The discussions in DROIPEN in 2017 showed that delegations in principle share the same view on the content of the provision in Article 12(1) on investigative tools. All agree on the need to ensure that law enforcement disposes of effective tools to investigate the relevant criminal offences, but at the same time also that the most intrusive investigation tools, such as those used in particular in countering organised crime, should not be available or in any case applied used in all cases, in particular when it comes to less serious offences. The discussions in the group have focused on the issue of what would be the most appropriate manner to combine the need for an effective provision on investigation tools with the necessary limitation of its scope in practice in the Directive. The wording included in the latest Presidency text has generally been accepted as a good basis, but some delegations have expressed doubts as regards the exact wording of it.

Delegations are invited to indicate if they can agree on the current wording of Article 12(1), or if they wish to develop the text further. In the latter case, delegations are requested to indicate in what way, in as exact terms as possible, they would like to modify the text.

Delegations are informed that the next meeting at working group level regarding this file is foreseen for 31 January 2018.

² If such an idea would meet approval, the Presidency will consider a recital to explain the detailed criteria of such a jurisdiction rule.