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From : Eurojust

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Subject : Meeting of the Consultative Forum
of Prosecutors General and Directors of Public Prosecutions
of the Member States of the European Union
Eurojust, The Hague, 14 December 2012, as well as a summary of the replies to a
questionnaire regarding PIF offences.
Conclusions

Delegations will find in the Annex the Conclusions of the meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the EU Member States held at Eurojust on 14 December 2012, as well as a summary of the replies to a questionnaire regarding PIF offences.

MEETING OF THE CONSULTATIVE FORUM
OF PROSECUTORS GENERAL AND DIRECTORS OF PUBLIC PROSECUTIONS
OF THE MEMBER STATES OF THE EUROPEAN UNION
EUROJUST, THE HAGUE, 14 DECEMBER 2012
CONCLUSIONS

1. Introduction

A meeting of the *Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union* (“the Forum”) took place at Eurojust’s premises in The Hague on 14 December 2012. The meeting was convened by the Attorney General of the Republic of Cyprus and was organised with the support of Eurojust.

The conclusions reached by the Forum on “Fight against crimes affecting the Union’s financial interests” (Session I), with special focus on the draft Directive on the fight against fraud to the Union’s financial interests by means of criminal law¹, and on “Freezing and confiscating criminal assets” (Session II) are summarised here under.

2. Conclusions on fight against crimes affecting the EU’s financial interests

Draft Directive on the fight against fraud to the Union’s financial interests by means of criminal law:

Forum members welcomed the draft Directive which in general terms reflects the concerns that were expressed by the Consultative Forum at previous meetings.

Some Member States already have legislation in place to combat crimes affecting the EU’s financial interests. Nevertheless, it was recognised that clarification is needed at EU level in relation to the definition of such crimes among all Member States, particularly in view of the future proposal on the EPPO. A clearer definition will facilitate the fight against these crimes. The aim should be to overcome the current differences in the legislation and start a real EU common criminal policy in this field.

The need for a clear understanding of each other systems from a legal and practical point of view was underlined. In this regard, the questionnaire submitted by the German Forum member on “Criminal offences to the detriment of the financial interests of the EU” was broadly welcomed. *A summary of Forum members’ replies to such questionnaire is attached to these Conclusions (see Annex I).*

From a practitioner’s point of view, some issues raise concerns and require further discussion as further explained below.

As for the scope of the draft Directive, the definitions of the crimes seem not to be too controversial, although the wording of some provisions should be clarified, such as the meaning of “all revenues”, which is not sufficiently clear and the definition of “public official”, which might differ from the definitions of national criminal codes. Moreover, clarification is deemed necessary for the definition of the two new offences (misappropriation and abuse of public tender procedures). To this end, explanatory notes accompanying the legislative text would be helpful for practitioners. Different views were expressed by Forum members as to the inclusion or not of VAT fraud in the scope of the draft Directive. It was underlined that this point is particularly sensitive as VAT fraud is a concern not only for the EU, but also for Member States and other stakeholders.

The inclusion of prescription periods in the Directive was not considered appropriate by some Forum members, while other Forum members welcomed it. Improvement in both coordination and cooperation, especially with Eurojust, rather than longer prescription periods, could help accelerate proceedings in cross-border investigations. Forum members highlighted that prescription periods should be proportionate to the seriousness of the offences committed. For example, a period of five years from the time when the offence was committed, as proposed in the draft Directive, could be too short in practice for serious fraud cases. Finally, Forum members suggested that the draft Directive provides a clearer regulation of both the interruption and the suspension of the prescription period.

Some Forum members underlined the importance of the approximation of penalties, particularly if penalties are used as a criterion for setting the prescription periods. However, some serious concerns have also been expressed as to the establishment of a minimum level of penalties, which might entail significant changes to the national criminal systems (also at constitutional level) and even pose an obstacle to prosecution.

¹ COM(2012) 363 final of 11.07.2012.

Other issues mentioned by Forum members concerned the lack of an explicit reference to cooperation with Eurojust, for example in Article 15 of the draft Directive, which refers only to cooperation between the Member States and the Commission (OLAF); the issue of jurisdiction, in particular with regard to VAT fraud cases for which the possibility to apply the universal jurisdiction principle was mentioned; and the issue of the legal basis of the proposal, in particular whether Article 325(4) or Article 83(2) TFEU would be the appropriate legal basis, and the respective impact of either of these provisions on the scope of the draft Directive and on the participating Member States.

Forum members highlighted the importance of the link between the draft Directive and the future establishment of the EPPO, as the Directive will contribute substantially to the definition of the sphere of competence of the EPPO. According to some Forum members, the approximation of penalties might facilitate the establishment of a uniform system of prosecution in this area of law. However, it was considered that the draft Directive provides only for minimum standards that might not be a sufficient basis for the EPPO which would need a clear-cut delimitation of its competences.

Forum members underlined that several issues still need to be tackled on the substantive and procedural rules that will apply to the EPPO before its establishment. Some Forum members considered that the harmonisation of substantive criminal law is a first step, but not a sufficient condition for the effectiveness of the future EPPO's investigations: the harmonisation of criminal procedures will be even more important but, at the same time, much more difficult to achieve.

In general, the preference for a step-by-step approach before the adoption of the proposal on the EPPO was mentioned by several Forum members. Some Forum members have concerns on the need for setting up an EPPO as a solution to fight more efficiently against PIF crimes. It was also argued that if only a few Member States agree on setting up an EPPO, it will face the same obstacles in investigating cases of transnational crime, e.g. VAT carousel fraud, as national law enforcement authorities. If such an Office is finally created, the question of including VAT fraud crimes will be of crucial importance because, in case of inclusion, it would considerably reduce national sovereignty.

In conclusion, the Consultative Forum wishes to continue discussions on these important topics and, in particular, to analyse the practical problems associated with the creation of the EPPO under the forthcoming Consultative Forum's presidencies.

3. Conclusions on freezing and confiscating criminal assets

Challenges in judicial cooperation in the area of asset recovery: Forum members stressed that judicial cooperation in this area is still hampered by major differences between national legal systems and lack of harmonised rules. Judicial cooperation is particularly difficult with regard to non-conviction-based confiscation and extended confiscation, but problems also arise in relation to the rights of *bona fide* third parties and confiscation orders issued after *in absentia* convictions. In addition, tracing of assets has become more and more challenging due to the nature of instant electronic transactions. The efficiency of asset recovery is also undermined by the problem of decreasing values in the property and securities and by the fact that asset recovery offices are not equally effective in all Member States.

In the light of their experience, Forum members emphasized an increased use of Financial Intelligence Units and the establishment of central registers of financial accounts both at national and EU levels, could greatly facilitate financial investigations. On the other hand, the management of seized assets can be facilitated by the appointment of devoted receivers or the establishment of asset management offices in every Member State. Furthermore, prosecutorial authorities would benefit greatly from specialised training in recovery of assets and confiscation.

Existing EU legal instruments: the main difficulties encountered in the use of existing EU legal instruments are: lack of clarity in the applicable provisions, or provisions allowing for alternative implementing options (e.g. with Framework Decision 2005/212/JHA in the case of extended confiscation); resulting patchy and diverging transposition into national law; cumbersomeness of the procedures and complexity of format applications causing delays; the fragmentation of the current legal framework. Some Forum members highlighted that, as a result of the above difficulties, national competent authorities are often more inclined to use traditional MLA tools than the existing EU instruments. On the other hand, traditional MLA requests still need to be used in cases involving Member States that have not yet implemented the above mutual recognition instruments.

*Draft Directive on the freezing and confiscation of proceeds of crime in the European Union*¹: in general, Forum members welcomed the EU proposal to lay down common minimum rules applicable in all Member States in a number of key areas, such as extended confiscation, third party confiscation, precautionary freezing and non-conviction based confiscation. It was generally agreed that further harmonisation of freezing and confiscation regimes can enhance common understanding of problems and mutual trust, thereby facilitating judicial cooperation and better use of the existing EU instruments. However, it was generally felt that it is not yet possible to assess the impact of this draft Directive on judicial cooperation and that more reflections and discussions are needed on this proposal. Furthermore, depending on the legal system, current national provisions are either broader than the corresponding provisions of the draft Directive or stricter, for example due to constitutional limitations. It was generally agreed that this situation can create serious difficulties in the execution of domestic orders: Forum members recommended that such problems should be taken into account both by the EU legislator and national authorities when reflecting upon the new legal instrument and its implementation.

Forum members also raised the following specific concerns: the scope of the draft Directive is too limited and could result in an additional regime to be complied with, and could pose further difficulties for practitioners; the draft Directive enacts only a limited type of non-conviction-based confiscation and does not enable civil recovery; the compensation of victims appears to be excluded from the draft Directive. Furthermore, the current draft only considers aspects related to the management of frozen property, but fails to tackle aspects related to the actual destination of frozen and confiscated criminal assets. Finally, the current wording of the draft Directive appears to be unclear regarding how the value of the proceeds of crime (to be frozen/confiscated) is to be calculated.

¹ COM(2012) 85 final of 12.3.2012.

Eurojust's role: all Forum members agreed that Eurojust has the potential to actively assist judicial authorities in this area and that judicial authorities should therefore make greater use of Eurojust. Eurojust's involvement had been decisive in concrete cases, for example by facilitating coordination of investigations, by accelerating the execution of the requested measures or by solving practical problems caused by different legal systems. Some Forum members suggested that Eurojust could endeavour to ensure that appropriate freezing and confiscation orders are sought in the course of investigations, for example following the establishment of a Joint Investigation Team. Furthermore, the Liaison Magistrates at Eurojust could be a positive tool in enhancing judicial cooperation in freezing and confiscation beyond the EU's borders.

**Summary of the replies provided by the Forum members
to the German questionnaire on
“Criminal offences to the detriment of the financial interests of the EU”¹**

1. *Does your Member State have specialised public prosecutor’s offices and/or specialised units at public prosecutor’s offices that are responsible for national or cross-border economic and tax offences?*

All Member States that replied to the questionnaire, except for one (FI), have specialised units, services or, at least, specialised prosecutors at public prosecutor’s offices that are responsible for economic and tax crimes, often including explicitly PIF offences.

2. *What general practical experiences have you had in prosecuting criminal offences to the detriment of the financial interests of the European Union? In your view, are there approaches for the development of Best Practices throughout Europe, for example based on proceedings that were concluded successfully?*

Some Forum members (LT, LV) considered that investigations of these offences are usually long and complex and specific economic-financial knowledge is required. Several Forum members (AT, DE, EE, FI, IE, SI) considered that there are no specific issues when dealing with PIF crimes and that it is difficult to identify best practices, also because in some Member States the experience with this particular field of crime is rather limited.

However, the idea of developing and sharing best practices was considered useful (AT, EE, IT, LT, LV, PL, SK). The following best practices and suggestions were already identified:

- Ensuring early contact and coordination between all authorities involved in the investigation (DE);

¹ The questionnaire was submitted by the German Forum Member and circulated to the Consultative Forum before and after the meeting. In total, 17 written contributions were received from the following Member States: AT, BE, CZ, DE, EE, EL, ES, FI, HU, IE, IT, LT, LV, PL, RO, SI and SK.

- Involving the European Commission (on behalf of the EU) in the criminal proceedings as a civil claimant (ES);
- Ensuring good interaction and communication between national competent authorities and OLAF (BE);
- Sharing the experience acquired and taking similarities of criminal activities undertaken by perpetrators in the EU into account (PL);
- Focussing on seizing the proceeds of crime and freezing property of offenders, and fostering police and judicial cooperation as assets are often located abroad (CZ);
- Ensuring that at national level the same crime type and the consequent set of rules, apply to the same criminal behaviour regardless of the (national or EU) budget affected by the offence (HU);
- Making use of the experience and best practices developed by EU bodies such as Eurojust and OLAF, e.g. by providing training for specialised prosecutors at Eurojust and OLAF and enhancing the role of the EJTJN in this field (IT).

3. *Are you aware of relevant investigative or criminal proceedings in your Member State?*

All respondents to the questionnaire are aware of relevant proceedings in their Member State, except for one (FI) that does not deal with significant cases concerning PIF offences.

4. *If you answered “yes” to question 3:*

a. *How many proceedings are there (approximately)?*

The number of proceedings varies among Member States (*please note that not all answers referred to the current situation; some data referred recent years, e.g. 2010 or 2011*): 1 in 2006 (IE, however PIF offences could possibly have been prosecuted under different offence categories), 5 (AT), 11 (LV), 17 (ES), 20 (BE), 21 (LT), 24 (EE), 35 (DE), 80 (CZ, SK), 700 (RO), 1150 (HU, referring to a comprehensive crime type division that was in force until 2012), 1718 (PL, relating to expenditure of the EU budget; in relation to revenue, 1610 concerning the so-called “cigarette crimes”). Some Forum members (IT, SI) highlighted difficulty in collecting reliable statistics.

b. *What results have the proceedings reached thus far (for example: were most proceedings dismissed or were indictments preferred; how long did the proceedings last)?*

Answers to this question differ and exact numbers often could not be provided, also because investigations or trials are not finalised yet. In general, in some Member States (DE in the field of agricultural subsidies, EE, PL - in the field of expenditure from the EU budget concerning grants and direct payments in agriculture, RO), the majority of proceedings were dismissed, while in others (DE in the field of customs offences, AT, ES, HU, LT, SI, SK) indictments were preferred.

The length of proceedings is dependent upon the nature of the specific crime and typically will last longer (some years) for more complex cases in which international assistance is needed (CZ, DE, EE, HU, IT, LT, LV, PL). To the contrary, standard proceedings may last only a few months (HU, SK).

c. *As far as you are aware, what legal or practical difficulties came up in the proceedings? Were there specific problems in terms of cross-border cooperation?*

The following legal and practical difficulties, including in terms of cross-border cooperation, were identified:

- Lengthy execution of MLA requests (BE, CZ, ES, HU, LT, LV, PL), or requirements for detailed additional information by the executing State (CZ). Prior contacts and agreements can be a solution (CZ), but not in all cases (DE) and coordination of cross-border cases could be improved (LT). Eurojust's helpful role in coordination was underlined (CZ, HU). However, when third States are involved, Eurojust has limited tools to help (HU);
- Difficulties are encountered in collecting evidence in different States with different rules of procedure (IT, PL, RO), in particular when crime is committed by organised crime groups. This might end in practice, in penalties which are not always effective and dissuasive (IT);
- Parallel investigations may lead to *ne bis in idem* problems (DE);
- Difficulties might depend on complicated scheme of crime (LV);

- It is necessary to ensure good cooperation and mutual understanding between administrative authorities (that mainly identify offences committed to the detriment of expenditure of the EU budget) and prosecution authorities. For the administrative staff it is usually difficult to distinguish between situations that constitute irregularities and those that may entail a suspicion of crime (PL);
- Very short time limitation statute does not allow effective prosecution in some cases (IT).

No specific problems were identified by some Forum members (EE, IE, SI, SK).

5. *Was OLAF involved in the investigative or criminal proceedings with which you are familiar?*
 In several Member States (AT, BE, CZ, DE, EE, IE, IT, LT, LV, PL, RO, SI), OLAF was involved, at least in some cases. Many cases (especially cigarette contraband) were solved bilaterally or with the help of Eurojust (DE).

In other cases (ES, FI, HU, SK), OLAF was not involved, but some OLAF reports on suspicion of possible criminal activities were received by the national authorities (ES, SK).

6. *If you answered “yes” to question 5:*

a. *Did OLAF approach the competent national authorities with indications of relevant criminal conduct?*

At least in a few cases, OLAF has approached the competent national authorities in several Member States (AT, BE, CZ, DE, EE, ES, IE, IT, LT, LV, PL, RO, SI, SK).

b. *How was OLAF involved from the side of the national authorities?*

OLAF supported investigations (AT, EE, SI), provided additional information and documents (AT, CZ, PL, RO, SK), organised meetings involving several experts (ES) or relevant authorities from several States (AT, LT, LV, PL), and helped identify EU officials to be interviewed as witnesses (PL). OLAF’s investigators also participated in hearings as witnesses (PL).

Contact with OLAF was also conducted via customs investigation offices (DE). Territorial prosecution offices are not always aware of the potential support that OLAF and Eurojust could provide in this field (IT).

c. *What legal or factual difficulties ensued from cooperation with OLAF?*

The following legal or factual difficulties were identified:

- Some actions by OLAF may jeopardise the results of the criminal investigation (BE);
- Difficulties in using OLAF notifications and documents obtained from OLAF as evidence before the trial courts (RO, SI);
- Delay by OLAF in communicating evidentiary information or documents that were important for the investigations conducted by the national authorities on the basis of OLAF notifications (RO);
- Evidence collected within administrative investigation must be transformed into admissible evidence according to criminal procedural law. This required gathering of evidence abroad and close cooperation with EU institutions (PL);
- Elapse of time prior to sending a complaint by OLAF to the national authorities with negative consequences for the entire proceedings since, by the time an investigation is completed, some years may have passed (BE, IE);
- OLAF's responses to requests, even simple requests for additional information or existing documents, take a long time and can lead to a requirement for extension of the investigation's time limits (CZ).

Several Forum members (DE, EE, ES, IT, LT, LV, SK) encountered no particular difficulties in cooperation with OLAF.

d. *Were potential problems able to be solved in specific cases? Do you consider it necessary to develop general (if applicable, legal) solutions for the problems you have described? If yes: What are they?*

The following remarks were made:

- Efficiency in international cooperation should be enhanced. Even better, it should be possible to gather evidence throughout the EU and use it accordingly, as an EPPO would be able to do (ES);
- Better communication among all entities involved in the investigation could solve potential problems (RO);

- Better flow of information at an early stage and long before the transfer of a final report by OLAF, should be ensured between OLAF and national prosecution authorities (PL);
- It is not necessary to develop general solutions for the problems identified (SI) or change national law which is well equipped (IE).
- Cooperation with OLAF was appreciated (PL, LT).

7. *If you answered “no” to question 5:*

a. *What were the reasons not to involve OLAF?*

OLAF was not involved in some cases because there was no practical need (SK) or the legal situation did not pose any difficulties (DE). In one Member State (HU), OLAF was not involved because it does not have any competence as an investigative authority in the criminal procedure. In another Member State (FI) there are no significant PIF cases.

b. *Did difficulties ensue in the investigations because OLAF was not involved?*

No difficulties ensued (DE FI, SK).

c. *Following conclusion of the proceedings, was OLAF informed by the national authorities of your Member State or another Member State?*

OLAF was informed in some Member States (HU, SK), while it was not in others (DE, FI).
