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NOTE

From: Presidency
To: CATS

Subject: Draft proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment

Introduction

The proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment was presented by the Commission in September 2017 and has been regularly examined by the competent Working Party (DROIPEN) and by Friends of the Presidency since then.

The proceedings in DROIPEN showed at an early stage that delegations largely agreed on the substance of the future Directive, which has made it possible to also agree on the text of the vast majority of its Articles. However, a few issues under Title II (*'Offences'*) have been more difficult to resolve. The Presidency has worked intensively in DROIPEN to find solutions to all issues, and has thereby tentatively proposed a number of different compromises to delegations, and will do so once more in a meeting of JHA Counsellors on 16 February¹.

¹ See the full draft text of the Directive as presented to that meeting in 6045/18.

Put simply, the main reason for the disagreement has been the fact that a number of delegations insist on an ambitious level of harmonisation of the crime definitions in the Directive, whereas others refer to the wording of Article 83(1) TFEU ('*minimum rules concerning the definition of criminal offences and sanctions*') and argue that the national legal systems must retain sufficient scope for adapting the provisions in the Directive to them.

Although considerable advances towards a text acceptable to all have been made in the last weeks and days, some issues still appear to be open.

The open issues in detail

There remain, in substance, two issues on which it is not certain whether a text agreeable to all delegations can be found:

1. The exact formulation of the intent criteria in a few provisions in Articles 4 and 4aA few delegations have objected to the current wording of the provisions in Article 4(b), 4(c), 4(d), 4a(b), 4a(c) and 4a(d), either because they consider that the reference to '*when committed intentionally*' in the chapeau of the two Articles sufficiently covers the subjective part of the crime description (the intent), or because they wish to add further criteria in this sense to the individual provisions.
2. The scope of the criminalisation of attempt offences in accordance with Article 7(2)A number of delegations wish to include a reference to Article 6 within the scope of Article 7(2), whereas some delegations wishes to extend the scope of exclusion.

The Presidency considers that every attempt to find acceptable compromises on the relevant provisions that can reasonably be expected at this stage has now been made. The time is therefore ripe to ask CATS delegations to agree to a 'package' solution consisting of a balanced compromise between the positions expressed by delegations as regards Articles 4 to 7 in the draft Directive. The text of such a compromise has been annexed to this note.

Questions

In the light of the above, CATS delegations are invited to

- **confirm that the annexed text of Articles 4 to 7 in the draft Directive constitutes a balanced compromise between delegations; and**
- **refer the said compromise text to JHA Counsellors for finalisation of the text with a view to reaching a general approach in the Council in March.**

Article 4

Offences related to the fraudulent use of corporeal non-cash payment instruments

Member States shall take the necessary measures to ensure that, when committed intentionally, the following conduct is punishable as a criminal offence:

- (a) theft or other unlawful appropriation of a corporeal non-cash payment instrument;
- (b) counterfeiting or falsification of a corporeal non-cash payment instrument;
- (c) possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified corporeal non-cash payment instrument for fraudulent use;
- (d) procurement for oneself or another, including receiving, appropriation, buying, transfer, import, export, sale, transport and distribution of a stolen, counterfeited or falsified corporeal non-cash payment instrument for fraudulent use.

Article 4a

Offences related to the fraudulent use of non-corporeal non-cash payment instruments

Member States shall take the necessary measures to ensure that, when committed intentionally, the following conduct is punishable as a criminal offence:

- (a) unlawful obtaining of a non-corporeal non-cash payment instrument [at least when this obtaining has involved the commission of one of the offences referred to in Articles 3 or 6 of Directive 2013/40]²;
- (b) counterfeiting or falsification of a non-corporeal non-cash payment instrument;
- (c) holding of an unlawfully obtained, falsified or counterfeited non-corporeal non-cash payment instrument for fraudulent use;
- (d) procurement for oneself or another, including sale, transfer and distribution, or making available, of an unlawfully obtained, falsified or counterfeited non-corporeal non-cash payment instrument for fraudulent use.

² For the case that the text in brackets is retained, the wording of Article 4a(a) should explicitly indicate that a prior or simultaneous conviction for the criminal activity from which the property was derived, is not a prerequisite for a conviction of the other offences referred to in this Directive.

Article 5

Fraud related to information systems

Member States shall take the necessary measures to ensure that performing or causing a transfer of money, monetary value or virtual currencies and thereby causing an unlawful loss of property for another person in order to make an unlawful gain for the perpetrator or a third party is punishable as a criminal offence, when committed intentionally by:

- (a) without right hindering or interfering with the functioning of an information system;
- (a) without right introducing, altering, deleting, transmitting or suppressing computer data.

Article 6

Tools used for committing offences

Member States shall take the necessary measures to ensure that the process of production, procurement for oneself or another, including import, export, sale, transport and distribution, or making available of a device or an instrument, computer data or any other means primarily designed or specifically adapted for the purpose of committing any of the offences referred to in Article 4(a), 4(b), 4a(a), 4a(b) or Article 5, at least when committed with the intention that these means be used to commit any of the said offences, is punishable as a criminal offence.

Article 7

Incitement, aiding and abetting and attempt

1. Member States shall take the necessary measures to ensure that inciting or aiding and abetting an offence referred to in Articles 3 to 6 is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that the attempt to commit an offence referred to in Articles 3, 4 (a), 4 (b), 4 (d), 4a (a), 4a (b), 4a (d) and 5 is punishable as a criminal offence.