

Informal Justice and Home Affairs Ministers' meeting

9-10 July 2015, Luxembourg

Discussion Paper

*Directive of the European Parliament and of
the Council on the fight against fraud to the
Union's financial interests by means of
criminal law*



On 11th July 2012 the European Commission presented a proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (hereafter "the PIF Directive").

The explanatory memorandum states that "*fraud and related illegal activities affecting the Union's financial interests pose a serious problem to the detriment of the Union budget and thereby of taxpayers*". And, "*according to the 2010 Commission report on the protection of the Union's financial interests¹ suspected fraud amounts to approximately 600 million euro annually on the revenue and expenditure side despite the legal framework in place. It can be assumed that the actual amount is even higher as not all cases are detected and reported*". The purpose of the proposal is therefore to strengthen the existing legal framework in place.

The Commission addresses the VAT issue in relation with fraud to the Union's financial interests in the recitals of the proposal stating that "*as confirmed by the Court of Justice jurisprudence², there is a direct link between the collection of VAT revenue in compliance with the Union law applicable and the availability to the Union budget of the corresponding resources, since any lacuna in the collection of the first potentially causes a reduction in the second*"³. The Commission concludes that "*the Directive therefore covers revenue resulting from VAT receipts in the Member States*"⁴.

The European Parliament entirely shares the Commission's analysis. Since the PIF Directive would *a priori* determine the competence *ratione materiae* of the future European Public Prosecutor's Office, VAT should be included in it. According to the European Parliament and the Commission a total exclusion of VAT from the scope of the Directive would be a backward step from the existing PIF framework and an undesirable limitation of the range of action of the future European Public Prosecutor's Office, including the fight against major VAT fraud offences.

The European Parliament and the Commission identified VAT carousel fraud as one of the major offences affecting the Union's financial interests. They consider that the future European Public Prosecutor's Office (EPPO) could more effectively deal with these offences affecting multiple Member States than national authorities on their own.

During the negotiations in Council almost all the Member States were in favour of an exclusion of VAT from the scope of the PIF Directive. While acknowledging the link between the collection of VAT revenue and the Union's financial interests, Member States notably argued that VAT revenue remains a predominantly national interest. The exclusion

¹ COM(2011) 595 final, accompanied by the working documents of the Commission SEC(2011) 1107 final, SEC(2011) 1108 final and SEC(2011) 1109 final.

² Decision C-539/09 (JO C 25 dating 28.1.2012).

³ Recital 4 of the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.

⁴ Ibid.

materialized in the addition of a third paragraph in article 2 defining the Union's financial interests and stating that "*revenues arising from VAT shall be excluded from the scope of this Directive*"⁵. At the same time, Council agreed to include a recital which states that the exclusion of VAT from the Directive does not prevent the future EPPO to be competent for serious cross-border VAT-fraud⁶.

These diverging positions concerning VAT have an immediate effect on the proposal for a regulation on the establishment of the European Public Prosecutor's Office⁷. Solving the VAT issue is crucial for a substantial progress on the proposal on the establishment of the European Public Prosecutor's Office and for securing the necessary consent of the European Parliament under article 86, paragraph 1, TFEU.

The Presidency considers an acceptable and efficient compromise to be key in order to take substantial steps forward in the negotiations of the PIF Directive and the Regulation on the establishment of the European Public prosecutor's Office.

Questions

In light of the above, and with account taken to the position of the Parliament on the VAT issue with regard to both proposals, the Presidency invites Ministers to consider the following questions:

- 1) In view of ensuring an efficient action against fraud to the financial interests of the Union and in order to find an agreement with the European Parliament on the PIF Directive, could Ministers accept a limited inclusion of VAT (carousel fraud) in the scope of the PIF Directive?**
- 2) If the answer to the first question would be in the negative, could a possible solution consist in an inclusion of the VAT fraud, if necessary limited to carousel fraud, in the text of the proposal for a Regulation on the establishment of the European Public Prosecutor's Office?**
- 3) What other alternatives in view of finding an agreement with the Parliament could there be?**

⁵ Article 2 in the General Approach of the Council of 6-7 June 2013.

⁶ Coreper 13 May 2015.

⁷ COM(2013)0534 – 2013/0255(APP)