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COVER NOTE

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at first reading with a view to the adoption of 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

Delegations will find attached document COM(2017) 246 final.

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Brussels, 16.5.2017
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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

**position of the Council at first reading with a view to the adoption of 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**

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position of the Council at first reading with a view to the adoption of 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

1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council (document COM(2012) 363 final – 2012/193 COD): 11 July 2012

Date of the opinion of the European Economic and Social Committee: N/A

Date of the opinion of the European Committee of the Regions: 18 December 2012

Date of the position of the European Parliament, first reading: 16 April 2014

Date of adoption of the position of the Council, first reading: 25 April 2017

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The objective of the draft Directive is to establish minimum rules concerning the definition of criminal offences, sanctions and limitation periods in the field of the fight against fraud and other illegal activities affecting the Union's financial interests, with a view to contributing effectively to a stronger protection against crime affecting those financial interests, in line with the *acquis* of the Union in this field. The Directive will improve the level of protection currently existing on the basis of the 1995 Convention on the protection of the European Communities' financial interests ("Convention")¹, which the Directive will replace for the Member States bound by it.

3. COMMENTS ON THE POSITION OF THE COUNCIL

As regards the substantive provisions of the Directive, the Council Position at first reading reflects the compromise reached in negotiations between the Council and the European Parliament, facilitated by the Commission.

The Council Position at first reading fully maintains the objectives of the Commission proposal. Compared to the Convention, the Directive will provide clearer and more stringent rules on a number of important issues. As regards the definition of criminal offences, the Directive provides updated definitions of active and passive corruption, a new offence of

¹ OJ C 316, 27.11.1995, p. 48.

misappropriation, which covers conduct by public officials going beyond the mere fraudulent behaviour and an updated definition of public officials.

Moreover, against the initial Council view to exclude VAT fraud from the scope of the Directive, the Council Position at first reading now includes the offence of serious VAT fraud in the Directive, whereby Member States will need to criminalise at least fraud offences against the common VAT system when they are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million. The Commission was from the beginning of the view that VAT fraud should fall within the scope of the Directive, as is currently the case for the Convention². The inclusion of at least serious cross-border VAT fraud cases in the Directive is essential for the Commission in order not to step back from the level of protection of the Convention and to continue ensuring minimum standards for VAT fraud cases across the Union and thus ensure uniform and better protection of the financial interests of the Union. The Commission accepts that not all VAT fraud cases, but only serious VAT fraud cases, are covered in the Directive and notes that the 10 million threshold is subject to a revision clause.

With regard to sanctions, the Directive harmonises maximum criminal sanctions for natural persons, including a maximum penalty of at least four years of imprisonment, when the offences referred to in the Directive involve considerable damage or advantage, or when other serious circumstances defined in national law justify such sanction.

While the Convention was silent on the question of limitation periods, the Directive introduces a new, binding set of rules on limitation periods, including provisions on interruptions and suspensions, in respect of criminal offences affecting the Union budget. This set of rules will enable law enforcement and judicial authorities to effectively investigate, prosecute and adjudicate the offences in question, as well as ensure the enforcement of the sanctions imposed.

As far as it concerns the legal basis, the Commission proposal was based on Article 325(4) TFEU, while the Council and the European Parliament agreed that Articles 83(1) and 83(2) TFEU should be the appropriate legal basis for establishing minimum rules with regard to the definition of criminal offences and sanctions, including offences in the field of the fight against fraud affecting the financial interests of the Union. Accordingly, the Council adopted in first reading the draft Directive on the basis of Article 83(2) TFEU.

In view of the aforesaid, the Commission made the following statement at the Council on 7 February 2017, when the Council reached a political agreement on the Directive and on 25 April 2017 when the Council adopted its position at first reading:

"Although it has no objection regarding the substantive provisions of the Directive, the Commission considers that it should have been based on Article 325 TFEU and reserves its right to initiate legal proceedings about the legal basis before the Court of Justice."

4. CONCLUSION

The Commission accordingly supports the position of the Council at first reading regarding the substantive provisions of the Directive. The Commission, however, considers that the Directive should have been based on Article 325 TFEU and reserves its right to initiate legal proceedings about the legal basis before the Court of Justice.

² This was confirmed by the Court of Justice in its judgment of 8 September 2015, Taricco, C-105/14