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NOTE

from:	Presidency
to:	Coreper/Council
Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - <i>State of Play/Orientation debate</i>

A. Background

The Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office (EPPO) was adopted on 17 July 2013, and has since then been discussed in the competent Council Working Party (COPEN), as well as in CATS and several JHA Councils.

In March 2014, the Presidency initiated discussions on a first revision of some key parts of the Commission proposal. The objective was to translate the outcome of the discussions in Council into legal text, whilst taking account of the views expressed by national parliaments in the reasoned opinions emitted in 2013. The new draft in particular integrated the concepts of

- a Collegial structure of the Office, and
- a concurrent competence of the Office and national prosecution services to investigate offences against the financial interests of the Union.

These concepts were endorsed by the JHA Council on 3 March 2014, which thereby also underlined the necessity to ensure that the Office will be independent and efficient in its functioning.

B. State of Play

CATS has endorsed the principles expressed in the drafts in its meeting on 24th April 2014. New drafts have been discussed in detail and reviewed at two meetings of Friends of Presidency (25 March and 14 April 2014) and three meetings in COPEN (29-30 April, 12 May and 19-20 May 2014).

The discussions have been constructive and have made it possible to formulate compromises between different views on a number of technical issues. Delegations thus now appear to be in broad agreement on the text, although a few issues highlighted in footnotes to the text as set out in annex will need to be revisited in the light of the results of future negotiations on other chapters of the Regulation.

Two main issues remain open in the text, namely:

1. The supervision of the operational work of the Office in the Member States.

The text set out in annex builds on the agreed view that the main part of the operational work of the Office will be carried out by European Delegated Prosecutors based in the Member States. Exactly how this work will be directed and supervised from the Central Office has been the subject of numerous discussions at expert level, where most delegations have defended the view that the individual European Prosecutors shall supervise the case work in their state of origin, under the direction of a Permanent Chamber. This view has been criticised by some others for falling short of ensuring the independence of the Office. The Commission and some Member States have defended the view that the European Prosecutor reporting on a case, including supervision of the investigation and prosecution of it, should not be a national of the Member State mainly concerned by the case.

The Presidency proposes a system whereby:

- a) The European Prosecutors will supervise investigations and prosecutions in their Member States of origin.

- b) A Permanent Chamber of at least three European Prosecutors will direct and monitor investigations and prosecutions, and may - where necessary and through the competent European Prosecutors - give direct instructions in the said investigations and prosecutions;
- c) In order to ensure the independence of the decision-making, certain key decisions - such as the closing of a case - will always be taken by a Permanent Chamber.

2. The meaning of the concept of concurrent competence

The principle of concurrent competence, outlined in Articles 5 and 19 in the text set out in annex, has been the object of various interpretations by delegations. Some Member States wish to underline the primacy of the Office as regards the exercise of its competence, i.e. that the EPPO will have the right to evoke any case falling under its competence, whereas others have argued that national prosecution authorities should retain a certain discretion to decide to exercise their national competence for the same offence.

The Presidency proposes a model whereby:

- a) The European Public Prosecutor's Office and national prosecution authorities will both be competent to investigate and prosecute offences affecting the financial interests of the Union.
- b) The European Public Prosecutor's Office will have a priority right to investigate and prosecute the offences in question, and also have a right of evocation of investigations already started by national prosecution authorities.
- c) Minor cases, as defined in the Regulation, will in principle be handled by national prosecution authorities.

It is the conviction of the Presidency that the text set out in annex constitutes a balanced compromise between the views expressed by delegations.

C. Questions

1) *The Presidency invites the Council to express its support for the approach as set out in the text in annex, which reflects the progress of the discussions to date and confirm it as the basis for future discussions of the COPEN working party, on the understanding that details of the text may need further consideration by the Working Party.*

2) *In particular, ministers are asked to confirm*

- *the approach in the text as set out in annex conforms with the principles of independence and efficiency of the EPPO;*
- *the model for supervision of operational work in Member States described in point B.1 above as the basis for further discussions, and in particular that:*
 - *the European Prosecutors will supervise investigations and prosecutions in their Member States of origin,*
 - *the Permanent Chambers will direct and monitor investigations and prosecutions and may*
 - *where necessary and through the competent European Prosecutors - give direct instructions in these investigations and prosecutions,*
 - *certain key decisions, such as the closing of a case, will always be taken by a Permanent Chamber.*
- *the principle that the EPPO has a priority competence to investigate and prosecute offences affecting the Union's financial interests, using the model for concurrent competence between the EPPO and the national prosecution authorities as set out in point B.2 above.*

Draft

COUNCIL REGULATION

on the establishment of the European Public Prosecutor's Office

CHAPTER I
SUBJECT MATTER AND DEFINITIONS

Article 1
Subject matter

This Regulation establishes the European Public Prosecutor's Office and sets out rules concerning its functioning.

Article 2
Definitions¹

For the purposes of this Regulation, the following definitions apply:

- a) 'person' means any natural or legal person;
- b) 'criminal offences affecting the financial interests of the Union' means the offences provided for by Directive 2014/xx/EU, as implemented by national law²;
- c) 'financial interests of the Union' means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them;

¹ The definitions will need to be adapted to be consistent with the definitions that will finally be included in the PIF-Directive.

² This provision will be reformulated in order to be consistent with the final wording of Article 17.

- d) ‘administrative personal data’ means all personal data processed by the European Public Prosecutor’s Office except for operational personal data;
- e) ‘operational personal data’ means all case-related personal data processed by the European Public Prosecutor’s Office to meet the purposes laid down in Article [37].

CHAPTER II

Establishment, tasks and basic principles of the European Public Prosecutor’s Office

Article 3

Establishment

1. The European Public Prosecutor's Office is established as a body of the Union.
2. The European Public Prosecutor’s Office shall have legal personality.
3. The European Public Prosecutor’s Office shall cooperate with Eurojust and rely on its support in accordance with Article [57].

Article 4

Tasks

1. The task of the European Public Prosecutor’s Office shall be to combat criminal offences affecting the financial interests of the Union.
2. The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in the criminal offences referred to in paragraph 1. In that respect the European Public Prosecutor's Office shall direct and supervise³ investigations, and carry out acts of prosecution⁴ and exercise the functions of prosecutor in the competent courts of the Member States in respect of the offences referred to in paragraph 1 until the case has been finally disposed of⁵.

³ The Commission and some delegations would prefer another wording, which would state that the EPPO shall direct, conduct and supervise investigations.

⁴ A recital highlighting the necessity for each Member State to foresee the function of a prosecutor with the tasks described in this Regulation shall be elaborated.

⁵ One delegations has suggested that the final word of this provision should be deleted.

Article 5

Basic principles of the activities

1. The European Public Prosecutor's Office shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union.
2. The European Public Prosecutor's office shall be guided by the principle of proportionality in all its activities⁶.
3. The investigations and prosecutions on behalf of the European Public Prosecutor's Office shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State where the European Delegated Prosecutor in charge of an investigation is located⁷⁸. Where a matter is governed by national law and this Regulation, the latter shall prevail.
4. The European Public Prosecutor's Office shall have competence to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in the criminal offences against the Union's financial interests as determined in Articles 17 and 18 and exercise this competence in accordance with Article 19 in this Regulation.⁹
5. The European Public Prosecutor's Office shall conduct its investigations in an impartial manner and seek all relevant evidence, whether inculpatory or exculpatory.
6. The European Public Prosecutor's Office shall open investigations without undue delay and ensure that investigations and prosecutions are conducted speedily¹⁰.

⁶ A number of delegations have suggested that references to at least the principles of legality and of rule of law must be added here.

⁷ The issue of the applicable law on investigation measures is addressed in Article 26 in the original Commission proposal and will be revisited at a later stage of negotiations.

⁸ An investigation may be assigned to several European Delegated Prosecutors. A recital to clarify that such assignment may arise *de facto* as a result of the investigation being initiated by the European Delegated Prosecutor will be considered.

⁹ The Commission and some delegations would like to underline here that the EPPO will have a priority to prosecute and investigate the relevant offences. Others have noted that the priority of the EPPO is already clearly following from Article 19 in this text.

¹⁰ Some delegations would prefer to replace the word "speedily" with another term.

7. The competent national authorities shall actively assist and support the investigations and prosecutions of the European Public Prosecutor's Office at its request and shall refrain from any action, policy or procedure which may delay or hamper their progress.¹¹

Article 6

Independence and accountability

1. The European Public Prosecutor's Office and all its staff shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors as well as the staff of the European Public Prosecutor's Office shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the office, any Member State or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States and the Union institutions, bodies, offices or agencies shall respect the independence of the European Public Prosecutor's Office and shall not seek to influence it in the exercise of its tasks.
2. The European Public Prosecutor's Office shall be accountable to the European Parliament, the Council and the European Commission for the general activities of the Office, in particular by giving an annual report in accordance with Article [70]¹².

¹¹ A number of delegations would suggest to reformulate this provision in view of clarifying that national authorities may not always be in a position to give priority to PIF-cases. The Presidency would suggest that these concerns should be addressed in a recital.

¹² A few delegations have suggested that a reference to the accountability of the Office to national parliaments should be added here.

CHAPTER III

STATUS, STRUCTURE AND ORGANISATION OF EPPO

SECTION 1

STATUS AND STRUCTURE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 7

Structure of the European Public Prosecutor's Office

1. The European Public Prosecutor's Office shall be an indivisible Union body with a decentralised structure.
2. The European Public Prosecutor's Office shall be organised at a central level and at a decentralised level.
3. The central level shall consist of a Central Office at the seat. The Central Office shall consist of a College, its Permanent Chambers and the Members of the College, as well as the staff of the Office¹³. The Members of the College shall be referred to as European Prosecutors.
4. The decentralised level shall consist of European Delegated Prosecutors located in the Member States.

Article 8

The College

1. The College of the European Public Prosecutor's Office shall consist of one Member per Member State as well as the European Chief Prosecutor [and his/her Deputies]. The European Chief Prosecutor shall chair the meetings of the College and have responsibility for their preparation.

¹³ The inclusion of "staff" in this provision has been questioned.

2. The College shall meet regularly. It shall be responsible for monitoring¹⁴ activities of the Office and for taking decisions on strategic matters, in particular in view of ensuring coherence and consistency in the prosecution policy of the Office throughout the Union, as well on other matters as specified in this Regulation. The College shall not be involved in operational decisions in individual cases. However, it may decide on strategic matters or issues of general application arising from individual cases¹⁵.
3. On a proposal by the European Chief Prosecutor, the College shall set up Permanent Chambers to direct and monitor the casework of the European Public Prosecutor's Office¹⁶.
4. The College shall propose internal Rules of Procedure of the European Public Prosecutor's Office for adoption by the Council in accordance with Article 16 and adopt the organigram and the establishment plan of the Central Office¹⁷.

¹⁴ In this document, the terms "monitoring", "directing and monitoring" and "supervision" are used to describe different control activities. These terms will need more detailed definitions in the text and recitals. In general terms, the preliminary understanding of the Presidency is that

- ✓ "Monitoring" refers to a general oversight of the activities of the Office, in which instructions are in principle only given on issues which will have a horizontal importance for the Office;
- ✓ "Directing and monitoring" refers both to the general oversight just described and to certain clear powers to direct individual investigations and prosecutions when such directions appear to be necessary.
- ✓ "Supervision" refers to a closer and rather continuous oversight of investigations and prosecutions, including full powers to at any time intervene and give instruction on investigations and prosecution matters.

¹⁵ Some delegations believe that the powers of the College may be too limited by this provision, and some have questioned the two last phrases of the provision. Others wish to exclude that the College can have any operational powers.

¹⁶ A number of delegations have requested that detailed criteria for the composition and set up of the Chambers shall be set out in the Regulation. Some have argued in favour of specialised chambers, whereas others appear to advocate a system where there is always one Chamber on duty. It has also been suggested that the European Prosecutors could be distributed between different Permanent Chambers with account taken to the size of the Member States and the expected number of cases. A few delegations have also suggested that this provision should be moved to Article 9.

¹⁷ The Commission and a number of delegations strongly advocate that the College should adopt its own internal Rules of Procedure. Others have suggested that explanations of the terms organigram and establishment plan are needed.

5. Unless stated otherwise in this Regulation, the College shall take decisions by simple majority. The College shall vote at the request of any European Prosecutor or the European Chief Prosecutor. Each Member of the College shall have one vote. The European Chief Prosecutor shall have a casting vote in the event of a tie vote on any matter to be decided by the College¹⁸.

Article 9

The Permanent Chambers

1. The European Chief Prosecutor, the Deputies and all the other European Prosecutors shall be part of [at least one] Permanent Chamber. Each Permanent Chamber shall be chaired by the European Chief Prosecutor or one of the Deputies, and have two¹⁹ additional permanent Members.
2. The Permanent Chambers shall direct and monitor the investigations and prosecutions conducted in the Member States²⁰²¹. They shall also ensure the coordination of investigations and prosecutions in cross-border cases and the implementation of decisions taken by the College on strategic or prosecution policy matters in accordance with Article 8(2).
3. The Permanent Chambers shall take certain decisions as specified in Articles XX ... of this Regulation²².

¹⁸ The casting vote of the Chief Prosecutor as well as other voting arrangements foreseen have been criticized by some.

¹⁹ Some delegations would prefer to leave the number of members in the Chambers, as well as the number of Chambers, open for the time being.

²⁰ The Commission, with the support of some Member States, advocates that the Permanent Chambers should be in charge of supervision in order to create a European system of supervision. The Commission also advocates a solution where one of the Members of a Permanent Chamber - regardless of his or her nationality - will be selected to be Rapporteur of the case in order to ensure the neutrality of the Rapporteur.

²¹ This will apply to all cases, including those concerning only one Member State. Some delegations have suggested that a simplified system should be considered for cases involving only one State. The Commission has strongly argued that the Permanent Chamber must be the main supervisory body, and that this must be made clear in the text.

²² A number of delegations have questioned whether all (or any) important operational decisions always need to be taken by a Permanent Chamber and if such a system would ensure efficient and speedy proceedings. Many have argued that the decentralised level should also be competent to take many of the key decisions, and that a detailed list of all decisions that can be taken by EDP's should be included in the text. The introduction of a rule enabling European Delegated Prosecutors to take certain decisions and then refer the

4. Where necessary, and following a report from the European Delegated Prosecutor who has been assigned the case, the Permanent Chamber may give instructions in a specific investigation or prosecution to the said European Delegated Prosecutor, through the competent European Prosecutor who is supervising the prosecution or investigation according to Article 11(1).²³
5. The Permanent Chamber shall take decisions by simple majority. The Chamber shall vote at the request of any of its Members. Each Member participating in person in a deliberation shall have one vote. The Chair shall have a casting vote in the event of a tie vote.

matter to a Permanent Chamber for confirmation has also been suggested. The Commission has argued that important decisions, with the exception of initiating an investigation, should be taken at Chamber level, in view of ensuring full independence of the decision-making. However, it also agrees that a certain flexibility which would allow EDP's to take certain decisions directly is needed, for example to dismiss a case in the event of the death of a suspected person. The following types of decisions could be covered by decision-making at central level (the list has been criticised for being too extensive by a number of delegations; some of them would limit the list to only point c)):

- a) Decisions on the initiation of an investigation where the European Delegated Prosecutor has not yet done so;
- b) Decisions on the Member State in which an indictment shall be submitted;
- c) Decisions to prosecute or to dismiss a case;
- [d) Decisions on transactions];
- e) Decisions to reallocate a case in accordance with Article 12(4);
- f) Decisions to refer a matter of strategic or general importance arising from an individual case to the College.

A few delegations would like to include a right for the Permanent Chambers to delegate the powers under this provision to individual European Prosecutors.

²³ One delegations noted that it should be clarified that a European Delegated Prosecutor can only taken instructions as long as they are consistent with the applicable national law.

6. In addition to the permanent Members, the European Prosecutor or European Prosecutors who are supervising a prosecution or an investigation²⁴ in accordance with Article 11(1) shall participate in the decisions of the Permanent Chamber as regards that case. A Permanent Chamber may also invite European Delegated Prosecutors to attend their meetings without a right to vote.
7. The Permanent Chambers shall keep the College informed of the decisions taken pursuant to this Article²⁵.

Article 10

The European Chief Prosecutor and the Deputies

1. The European Chief Prosecutor shall be the head of the European Public Prosecutor's Office. The European Chief Prosecutor shall organise the work of the Office, direct its activities and take decisions in accordance with this Regulation and the internal Rules of Procedure.²⁶
2. [Five]²⁷ Deputies shall be appointed to assist the European Chief Prosecutor in the discharge of his/her duties and act as replacement when he/she is absent or is prevented from attending to his/her duties.

²⁴ Some delegations have suggested that the participation in the decision-making should be limited to one of the supervising European Prosecutors, possibly to the one coordinating the investigations (see footnote 30).

²⁵ A few delegations have asked for a clarification of this obligation.

²⁶ A few delegations have suggested that this provision gives too extensive powers to the Chief Prosecutor.

²⁷ A few delegations have suggested that a lower number of Deputies may suffice.

3. When the European Chief Prosecutor - on the basis of information received from a European Delegated Prosecutor or otherwise - has reasonable grounds to believe that an offence within the competence of the Office is being or has been committed, it shall²⁸, in accordance with Article [X] and the internal Rules of Procedure, decide which Permanent Chamber shall be in charge of a case²⁹. The Chair of the Permanent Chamber shall then assign the case to a European Prosecutor or European Prosecutors from Member States concerned by the case³⁰³¹.
4. The European Chief Prosecutor shall represent the European Public Prosecutor's Office towards the Union Institutions, the Member States³² and third parties. The European Chief Prosecutor may also delegate his/her tasks relating to representation to one of the Deputies.
5. The European Chief Prosecutor and his/her Deputies shall be assisted by the staff of the Central Office in their duties under this Regulation.

²⁸ This will also trigger the initiation of a case, which is not regulated explicitly in the current document (see Article 16(1)) in the Commission proposal). See also Article 12(2) in the current document.

²⁹ A few delegations have questioned whether the first phrase in paragraph 3 is necessary in this context. A number delegations have suggested that the Regulation should foresee an obligation to ensure an evenly distributed workload between the Chambers and its members.

³⁰ Some delegations are of the opinion that the Chambers shall decide on all matters concerning allocation of cases. It is the understanding of the Presidency that those decisions will in practice rather be a formality, as the exact criteria for allocation of cases will be laid down in the Regulation and/or the Internal rules of procedure.

³¹ The inclusion of a clear and limitative definition of the notion "concerned by the case" or "involving their respective Member State" will be necessary for the purposes of the Regulation. The Presidency would a priori suggest that this definition should be elaborated on the basis of which Member States would have jurisdiction in a case.

³² Some delegations would like to introduce a reference to national parliaments here.

Article 11

The European Prosecutors

1. The European Prosecutors shall, on behalf of the Permanent Chamber in charge of the case and in accordance with its instructions, supervise investigations and prosecutions assigned to them³³³⁴. They shall function as liaisons and channels of information between the Permanent Chambers and the European Delegated Prosecutors.
2. The European Prosecutors shall monitor the implementation³⁵ of the tasks of the Office in their respective Member States in close consultation with the European Delegated Prosecutors, and shall ensure in accordance with this Regulation and the internal Rules of Procedure that all relevant information from the Central Office is provided to European Delegated Prosecutors and vice versa.
3. The European Prosecutors may temporarily be authorised to discharge their duties on a part-time basis provided that this does not conflict with the interest of the European Public Prosecutor's Office. Such an authorisation may be granted, upon the written request of the national prosecution authorities, by the European Chief Prosecutor for a maximum period of up to 6 months. [This period may upon request be extended by a new decision of the European Chief Prosecutor.] The authorisation may be revoked at any time after consultation with the appropriate authorities.³⁶

³³ A number of delegations have suggested, as regards cases assigned to several European Prosecutors, that one of these European Prosecutors shall be selected to be coordinator/rapporteur of the case in question.

³⁴ See footnote 20: The Commission advocates that the Permanent Chambers should be in charge of the supervision.

³⁵ Some delegations have suggested that a specific definition on the notion of "monitoring the implementation of the tasks" should be introduced to the text.

³⁶ A number of delegations wish to delete this provision. Various opinions as regards the need and appropriateness of various parts of this provision have been expressed.

Article 12

The European Delegated Prosecutors

1. The designated European Delegated Prosecutor shall be responsible for the investigations and prosecutions on behalf of and under instructions of the European Public Prosecutor's Office, acting through the competent European Prosecutors.
2. When a European Delegated Prosecutor has reasonable grounds to believe that an offence within the competence of the Office is being or has been committed, he or she shall immediately open an investigation and inform the Central Office³⁷.
3. The European Delegated Prosecutors shall report on the cases to the competent European Prosecutor and the Permanent Chamber in charge of the case, and formulate reasoned proposals concerning the decisions to be taken by the Permanent Chamber.
4. There shall be at least two European Delegated Prosecutors in each Member State, whereby one of them may function as a substitute³⁸.
5. The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation. They shall inform the competent European Prosecutor of such assignments. In the event that they are at any given moment unable to fulfil their tasks as European Delegated Prosecutors because of other commitments, the European Prosecutors may, after consultation with the competent national prosecution authorities, instruct the European Delegated Prosecutor concerned to give priority to their functions deriving from this Regulation and immediately inform the competent national prosecution authorities thereof. The European Chief Prosecutor may also propose to the Permanent Chamber to reallocate the case to another European Delegated Prosecutor in the same state.³⁹

³⁷ A few delegations are of the opinion that this provision should be placed in another Chapter of the Regulation.

³⁸ Some delegations have asked for more flexibility in this provision, to allow Member States to adapt it to national circumstances. A flexible provision in this sense already exists as regards the contact points in the European Judicial Network.

³⁹ Various opinions have been expressed as regards the wording and content of this provision. In particular, clear rules on conflict of interest have been called for. The Commission has suggested that the reallocation of a case could also be done to an EDP in another Member State. Some Member States would prefer to delete the last sentence of the Article.

SECTION 2

APPOINTMENT AND DISMISSAL OF THE MEMBERS OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 13

Appointment and dismissal of the European Chief Prosecutor and of the Deputy European Chief Prosecutors

1. The College shall nominate three European Prosecutors⁴⁰ with sufficient managerial experience and qualifications to be candidates for the position as European Chief Prosecutor. The Council shall, after obtaining the consent of the European Parliament, appoint one of the said three candidates to be the European Chief Prosecutor for a non-renewable term of office of nine years⁴¹. The Council shall act by simple majority.⁴²
2. The College shall select [five] Deputy European Chief Prosecutors from among European Prosecutors in accordance with the Internal Rules of Procedure.
3. The Court of Justice of the European Union may, on application by the European Parliament, the Council or the Commission, dismiss the European Chief Prosecutor [or a Deputy European Chief Prosecutor] if it find that he or she no longer fulfils the conditions required for the performance of his or her duties or that he or she is guilty of serious misconduct.
4. If the European Chief Prosecutor resigns, if he/she is dismissed or leaves his/her position for any other reason, the College shall immediately nominate three candidates for the purpose of the appointment of a successor according to paragraph 1. [If a Deputy European Chief Prosecutor resigns, is dismissed or leaves his/her position for any other reason, the College shall immediately select a new Deputy].

⁴⁰ Some delegations believe that it would suffice to let the College nominate one of its members of the position.

⁴¹ A few delegations have questioned whether a mandate period of nine years is appropriate.

⁴² The Commission and some Member States have strongly criticised this provision and would prefer to go back to the principles of the original Commission proposal as regarded the appointment of the European Public Prosecutor.

Article 14

Appointment and dismissal of the European Prosecutors

1. The European Prosecutors shall be nominated by the respective Member State for a non renewable term of nine years⁴³. The nominated prosecutors shall be appointed by the Council, acting by simple majority and taking into account the opinion of a panel⁴⁴. If the panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council.
2. The European Prosecutors shall be active members of the public prosecution service or judiciary of the Member States. They shall be nominated among persons whose independence is beyond doubt, shall possess the qualifications required for appointment to high judicial office and have relevant practical experience of national legal systems and of international judicial cooperation in criminal matters⁴⁵.
3. Every three years there shall be a partial replacement of a third of the Members. The Council, acting by simple majority, shall adopt transitional rules for the appointment of European Prosecutors for and during their first mandate period.
4. The Court of Justice of the European Union may, on application by the European Parliament, the Council or the Commission, dismiss a European Prosecutor if it find that he or she no longer fulfils the conditions required for the performance of his or her duties or that he or she is guilty of serious misconduct.
5. If a European Prosecutor resigns, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the relevant Member State shall immediately nominate another person to be European Prosecutor in accordance with paragraph 1.

⁴³ Alternative mandate periods have been suggested.

⁴⁴ The composition of the panel has been discussed and remains open. The Commission has argued that it should be clarified that the panel should assess all the requirements on a candidate that is foreseen in paragraph 2.

⁴⁵ Some delegations suggest that more criteria should be added to this provision.

6. When a European Prosecutor is appointed as European Chief Prosecutor [or a Deputy] the Member State which nominated him or her shall promptly nominate a new European Prosecutor to replace her or him for the duration of the mandate⁴⁶. The provisions in paragraph 1 and 2 shall apply.

Article 15

Nomination and dismissal of the European Delegated Prosecutors

1. The Member States shall nominate at least two European Delegated Prosecutors. The College shall appoint the nominated persons on a proposal from the European Chief Prosecutor. The College may reject the nominated person if he/she does not fulfil the criteria referred to in paragraph 2. The European Delegated Prosecutors shall be appointed for a term of five years, which shall be renewable.
2. The European Delegated Prosecutors shall be active members of the public prosecution service or equivalent [judicial] authority of the Member States which nominated them. Their independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national legal system. Member States shall appoint a European Delegated Prosecutor as a Prosecutor under national law if at the time of his or her appointment as a European Delegated Prosecutor, he or she did not have this status already.
3. The appointment of European Delegated Prosecutors shall take effect upon the decision of the College.
4. The College shall dismiss a European Delegated Prosecutor if it finds that he or she no longer fulfils the requirements set out in paragraph 2 or the criteria applicable to the performance of their duties⁴⁷, or that he or she is guilty of serious misconduct.

⁴⁶ The need to replace the Chief Prosecutor as Member of the College has been questioned by some delegations.

⁴⁷ Some delegations have suggested that additional criteria should be added here.

5. If a Member State decides to dismiss or take disciplinary action against a national prosecutor who has been appointed as European Delegated Prosecutor, it shall consult the European Chief Prosecutor before taking action⁴⁸. A Member State may not dismiss or take disciplinary action against a European Delegated Prosecutor for reasons connected with his activities under this Regulation⁴⁹.
6. If a European Delegated Prosecutor resigns, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the relevant Member State shall immediately inform the Central Office and, where necessary, nominate another prosecutor to be appointed as the new European Delegated Prosecutor⁵⁰ in accordance with paragraph 1.

SECTION 3

INTERNAL RULES OF PROCEDURE

Article 16

Internal rules of Procedure of the European Public Prosecutor's Office

1. The internal Rules of Procedure shall govern the organisation of the work of the Office and shall include general rules on workflow and on the implementation of the rules in this Regulation on allocation of cases⁵¹.
2. A proposal for the internal Rules of Procedure of the European Public Prosecutor's Office shall be prepared by the European Chief Prosecutor and adopted by a two thirds majority of the European Prosecutors⁵².

⁴⁸ Some delegations have noted that a differentiation between the respective roles of an EDP and of a national prosecutor may need to be spelled out in this context. A number of delegations have also underlined their view that the European Delegated Prosecutors will remain in the national prosecution structure and that national rules on disciplinary actions and other matters should apply to them.

⁴⁹ One delegation has noted that it must be clarified what the notion "connected with his activities" actually means.

⁵⁰ Some Member States have questioned whether the words "where necessary" are sufficient in order to clarify that Member States do not always need to replace EDP's that leave their position.

⁵¹ It has been agreed that the Regulation will include very detailed rules on allocation of cases.

3. The Council, by means of implementing acts⁵³, shall adopt the internal Rules of Procedure by simple majority, on a proposal from the College.⁵⁴

SECTION 4

COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 17

Criminal offences within the competence of the European Public Prosecutor's Office

The European Public Prosecutor's Office shall have competence in respect of the criminal offences affecting the financial interests of the Union, which are provided for in Directive 2014/xx/EU and as implemented by national law⁵⁵.

Article 18⁵⁶

Ancillary competence

1. Where an offence constituting a criminal offence referred to in Article 17 is based on a set of facts which are identical or inextricably linked to a set of facts constituting, in whole or in part under the law of the Member State concerned, a criminal offence other than those referred to in Article 17, the European Public Prosecutor's Office shall also be competent for those other criminal offences, under the condition that the offence referred to in Article 17 is preponderant.
2. Where the offence referred to in Article 17 is not preponderant, the Member State that is competent for the other offence shall also be competent for the offence referred to in Article 17⁵⁷.

⁵² It has been suggested that it should be clearly spelled out that the Rules of Procedure must be adopted without delay once the Office has been set up. Some have questioned if it is necessary to foresee a specific role for the Chief Prosecutor here.

⁵³ A recital will be added to duly justify the conferral of implementing powers on the Council, in accordance with Article 291(2) TFEU.

⁵⁴ See footnote 17.

⁵⁵ The main open issue in this Article is whether a dynamic reference (the standard solution ensuring legal certainty) or a static reference to the substantive law should be chosen. Some delegations would prefer to see the offences defined in this Regulation directly.

⁵⁶ Many delegations continue to question whether the legal basis in Article 86 TFEU covers this Article.

⁵⁷ The need for this provision has been questioned by some. Others have noted that it must be seen in the light of the right of evocation as foreseen in Article 19.

3. When assessing whether two set of facts are inextricably linked within the meaning of paragraph 1, account shall be taken as to whether one of the relevant offences has been instrumental in committing the other offence or to whether one offence has been committed with a view to ensuring impunity⁵⁸.
4. An offence in accordance with Article 17 shall be considered to be preponderant:
 - a) if the damage caused or likely to be caused to the Union exceeds the damage caused or likely to be caused by the same act to the Member State or a third party, or⁵⁹,
 - b) in case the same act, under the law of the Member State, constitute a different type of offence: if the sanction that may be imposed in respect of the offence in accordance with Article 17 is⁶⁰ more severe than the sanction that may be imposed in respect of the other type of offence.
5. The European Public Prosecutor's Office and the national prosecution authorities shall consult each other in order to determine which authority should exercise its competence pursuant to paragraph 1. Where appropriate to facilitate this choice, Eurojust may be associated in accordance with Article [57].
6. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the exercise of competence pursuant to in paragraph 1, the competent national authorities⁶¹ shall decide who shall exercise the ancillary competence.

⁵⁸ A few delegations have suggested that this provision should rather be a recital. Others have suggested that the text should be given more detail.

⁵⁹ Many delegations have pointed out that it would be difficult to measure and compare the financial damage, or that it would at least be difficult to know what the damage is at an early stage of investigation. The assessment of the damage may also change during an investigation. It has been suggested that this rule should be seen as a hierarchical order of criteria. An explanatory recital could be considered to address these concerns.

⁶⁰ The Commission and some delegations would add the words "equal or" here.

⁶¹ Some delegations would prefer to refer to the College or to the Court of Justice for these decisions. Others have noted that the "competent national authorities" can not be those who are involved in the case themselves.

*Article 19*⁶²

Exercise of the competence of the European Public Prosecutor's Office

1. The European Public Prosecutor's Office may⁶³ exercise its competence to investigate and prosecute any criminal offence referred to in Articles 17 and, where applicable, Article 18, where such offence⁶⁴
 - a) was wholly or partly committed on the territory of one or several Member States, or
 - b) when committed outside of these territories, by a national of a Member State, or by a Union staff member or member of the institutions, provided that a Member State, according to its law, has jurisdiction for such offences when committed outside its territory⁶⁵.
2. If the European Public Prosecutor's Office decides to exercise its competence, the national authorities shall not exercise their own competence. If the national authorities have already started a criminal investigation, the Office may take over the investigation by exercising its right of evocation in accordance with paragraph 3.⁶⁶

⁶² The Presidency considers that the current text of the Article constitutes a balanced compromise between the diverging views expressed by delegations.

⁶³ A few delegations would prefer the word "shall" here. It has also been suggested to reformulate the first phrase, starting with "The European Public Prosecutor's Office has competence to investigate and prosecute..."

⁶⁴ Some delegations have noted that jurisdiction of PIF-offences will rather be regulated in the PIF-Directive.

⁶⁵ Some delegations would introduce a reference to "participating Member States" in this and other provisions.

⁶⁶ Some delegations would prefer to reword this provision to underline the priority competence of the EPPO.

3. If the European Public Prosecutor's Office is informed in accordance with Article X or becomes otherwise aware of the fact that an investigation in respect of the same case is already undertaken by the authorities of a Member State, the European Public Prosecutor's Office shall consult with these authorities and shall thereafter decide⁶⁷ whether to open its own investigation and request the respective Member State's authorities to transfer the proceedings to the European Public Prosecutor's Office in accordance with Article X (right of evocation)⁶⁸. Where the European Public Prosecutor's Office exercises its competence, the competent authorities of the Member States shall forthwith transfer the proceedings to the Office and refrain from carrying out further acts of investigation in respect of the same offence. The European Prosecutor's Office may exercise the right of evocation at any time during the investigation.

⁶⁷ Some Member States would indicate certain conditions under which such a decision could be taken. It has also been suggested that it should be indicated who within the European Public Prosecutor's Office should be entitled to take such decisions. Others have strongly opposed any condition to the right of evocation; some have suggested that the national competence should only be exercised when EPPO has taken a formal decision not to use its own competence.

⁶⁸ Tentatively, the Article X mentioned in this provision could have the following wording (whereby Article 19(4) in the text of this document would be replaced by paragraph 3 of Article X below):

"1. The authorities of the Member States shall inform without delay the European Public Prosecutor's Office of any investigation they initiate with regard to an offence affecting the Union's financial interests [unless the damage caused or potentially caused does not exceed EUR 500/1 000/5 000] and there are no reasons to assume that the case may have repercussions at Union level.

2. Upon receipt of the information in accordance with paragraph 1, the European Chief Prosecutor shall decide [within 5 working days] [following consultation with the relevant European Prosecutor / Permanent Chamber] whether to exercise the Office's competence with regard to the offence subject to the notification and inform the competent authorities of the Member State concerned of his/her decision.

3. Where a criminal offence would cause or is likely to cause damage to the Union's financial interests of less than EUR 500/1 000/10 000, the European Public Prosecutor's Office shall refrain from exercising its competence, unless the case has repercussions at Union level which require an investigation to be conducted by the Office."

4. Where a criminal offence would cause or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the European Public Prosecutor's Office shall refrain from exercising its competence, unless
- (a) a case has repercussions⁶⁹ at Union level which require an investigation to be conducted by the Office, or
 - (b) a case has been opened following suspicions that an offence has been committed by officials and other servants of the European Union, or members of the Institutions⁷⁰.
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⁶⁹ Many delegations would like to see a definition or explanation of such repercussions at Union level included in the text.

⁷⁰ A few delegations have questioned whether these cases always need to be handled by the Office.