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NOTE

from: Presidency
to: Working Party on Cooperation in Criminal Matters

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Subject: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office
- REPORT ON THE STATE OF PLAY

1. Introduction

The Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office was adopted on 17 July 2013 and issued together with other documents being part of a package to enhance the protection of the Union's financial interests. Thus, the main objective of the European Public Prosecutor's Office (hereinafter referred to as EPPO) will be to protect the Union's financial interests by means of combating criminal offences affecting those interests. The proposal was first discussed by representatives of Member States, European institutions, practitioners and academics in the conference "European Public Prosecutor's Office: A Constructive Approach towards the Legal Framework", organised by the Lithuanian Presidency of the Council of the European Union in cooperation with the European Commission and the Academy of European Law, which was held in Vilnius, Lithuania, on 16-17 September 2013¹. An informal seminar with representatives of Member States was also organised at the College of Europe in

¹ Report from the conference can be found in doc. 13863/1/13 REV 1 EPPO 7 EUROJUST 75 COPEN 136 JAI 800 GAF 41 FIN 546.

Bruges on 15 November 2013.

2. Subsidiarity

In accordance with Protocol 2 to the Treaties, 14 reasoned opinions from national parliaments on non-compliance with the principle of subsidiarity were issued before the deadline of 28 October 2013. The threshold to trigger an obligation for the Commission to review the proposal (i.e. a quarter of the votes allocated to national parliaments) had thereby been attained. On 27 November 2013, the Commission published a Communication¹ in which it explained how the proposal had been reviewed following the reasoned opinions from national parliaments, and in which it noted its decision to maintain the proposal. The Commission also advised that it will take due account of the reasoned opinions of the national parliaments during the legislative process.

In light of these developments, the Presidency decided to continue work on the file in the competent Working Party, while at the same time ensuring that due account is given to views expressed by national parliaments in the reasoned opinions, which is also an obligation on the Council under Protocol 2 to the Treaties.

3. Negotiations in Council

The Commission proposal was presented to the JHA Council on 7 October 2013. In general, the Council welcomed the idea of setting up the EPPO, but noted that a number of issues needed clarification and further development to ensure the participation of as many Member States as possible. The Ministers also held a lunch discussion on the follow up to the reasoned opinions from national parliaments on 6 December 2013.

The Working Party on Cooperation in Criminal Matters (COPEN) discussed the proposal at its meetings of 1-2 October, 24-25 October, 5-6 November and 16-17 December 2013. After a preliminary "article-by-article" examination covering Articles 1-12 in the proposal, a detailed discussion on certain themes was carried out. Aspects of the proposal were discussed in CATS on 23 September and 12 November 2013. The preliminary conclusions of the Presidency of these discussions are outlined under section 4 below.

¹ Doc 17176/13 EPPO 33 EUROJUST 134 CATS 94 FIN 868 COPEN 225 GAF 53 PARLNAT 318.

The Commission has expressed its readiness to work constructively with Member States to find solutions that would allow the establishment of a European Public Prosecutor's Office with clear added value and would meet the criteria of efficiency, independence and accountability.

4. Presidency Conclusions from discussions in the Working Party and in CATS

(A) General issues (art. 1-5, 8-11 of the proposal)

The great majority of delegations have expressed support for the idea of establishing the EPPO, while some others questioned the added value of the proposal and noted that capacities of the existing instruments have not been exploited in full. There is general agreement on the need to ensure that the EPPO will be organised in a way that ensures its independence and efficiency, and that a sufficiently strong system of accountability and responsibility for its members is in place. The delegations have stressed the need to take into account the views expressed by national parliaments, as well as a desire to ensure the largest possible participation of Member States.

The impact of the establishment of the EPPO on national legal systems, and possible substantial changes in the national legal orders, for example as regards court proceedings and the status and role of prosecutors and investigative magistrates, were also discussed in the Working Party. Delegations thereby highlighted certain general challenges national legal orders will face when the EPPO is established, in particular in relation to:

- The independence and role of national prosecutors and investigative judges;
- The system for choosing the jurisdiction of trial;
- The role of Police and Customs in investigations.

(B) Structure of the EPPO (art. 6, 7)

Most delegations welcome the proposed decentralised organisation of the EPPO, which will to a large extent rely on European Delegated Prosecutors based in the Member States. However, different views have been expressed as to how such a model would be structured and how it would work in practice. In particular, the proposed organisation of the Central Office of the EPPO has given rise to many questions. A considerable number of delegations favour, as an alternative to the proposal made by the Commission, a collegial structure established at central (EU) level and composed of prosecutors from each participating Member State. This idea has been developed in a non-paper presented by six Member States¹, in which those States have explained how they believe it would be possible to reconcile the requirements of efficiency and independence in prosecution with a collegial organisation. The Commission and some Member States have questioned whether the collegial structure would ensure sufficient efficiency and independence and have challenged the assumption that such a solution would bring sufficient added value.

The majority of delegations have however expressed a degree of flexibility as regards the structure and organisation of the Office. In view of the Presidency, it may therefore reasonably be expected that the various models presented could form the basis of a compromise on these issues in the relatively near future. Such a compromise will need to have regard to the substantive competence of the Office finally agreed upon.

(C) Exclusive competence (art. 11)

Most Member States have raised questions regarding the proposed exclusive competence of the EPPO in the area of PIF-offences. There seems to be general agreement among delegations on the need to introduce at least an element of concurrent competence for Member States in the area covered by the EPPO's competence. At the same time, delegations agree that the EPPO should have a certain right of evocation of cases which fall under its general competence, but which are handled by national prosecution authorities. Many delegations thereby believe that, at the very least, minor offences should be exempted from the said right of evocation.

¹ DS 1892/13.

(D) Substantive competence (art. 12 and 14)

There is general support from delegations for the general substantive competence of the EPPO proposed by the Commission. Delegations do not wish to enlarge the competence of the EPPO to other offences than those covered by the draft PIF Directive.

(E) Ancillary competence (art. 13)

Although most delegations have been critical towards the provision on ancillary competence in the proposal, they agree on the need to ensure efficient investigations and prosecutions of cases which are closely related to each other and based on identical facts, not the least in order to avoid *ne bis in idem* situations and to ensure an efficient administration of justice. The Presidency believes that a generally acceptable solution could be found in the course of the future negotiations, possibly by working on defined criteria.

(F) Investigation measures (art. 26)

A majority of the delegations agree that a list of the investigation measures that must be available to the EPPO in all Member States shall be included in the Regulation. Some delegations are not convinced that such a list is necessary and would prefer if national law is applied in this regard. Many delegations have asked for more precise conditions and restrictions of the use of the listed investigation measures to be introduced. Some delegations have suggested that more than one list should be included in the Regulation, covering more and less intrusive measures, as the applicability of the measures could also depend on the seriousness of an offence.

Many Member States suggested that the notion of competent judicial authority in Article 26 of the proposal should be interpreted in a broad manner, in order to allow prosecutors and other authorities in charge of investigations at national level to decide on certain measures under their own authority. The Commission argued in favour of a more restrictive interpretation so that only courts are covered under the term “judicial authority”. It was also suggested that, in situations where urgent investigation measures are required, it should be possible to obtain judicial confirmation after the measures have been taken rather than advance authorisation.

(G) Cooperation between Member States and international cooperation (art. 18)

Delegations agree that cooperation between participating Member States in relation to cross-border cases covered by the competence of the EPPO must be simple and efficient. The great majority of delegations also agree that such cooperation can in any case not only be based on mutual legal assistance and mutual recognition instruments. As the EPPO and its branches will constitute a single unity, informal contacts and cross-border cooperation must be possible. Delegations have called for the introduction of clear and detailed rules on the conditions for cross-border cooperation, preferably in the Regulation itself. Many technical issues related to cross-border cooperation, in particular as regards transfer of evidence and decisions on the identification of the location of an offence and/or investigations, will also need to be developed further in this context.

(H) The role of European Delegated Prosecutors and the powers of the Central Office to supervise, monitor and give instructions to the delegated prosecutors (art. 16-18)

Delegations have expressed support in principle for the introduction of the idea of establishing strong European Delegated Prosecutors based in the Member States. The delegated prosecutors should be supervised by the central level of the EPPO, but the majority of delegations are of the view that direct interventions by the Central Office in the case work should only occur in exceptional cases. The latter cases should be defined in a precise manner in the Regulation. Many delegations are of the opinion that such interventions should, in principle, be limited to cross-border cases and cases involving EU officials, and not be possible in purely national cases. According to some, the introduction of legal definitions of the terms instruction, supervision and monitoring should also be considered. Some delegations have suggested that the European Delegated Prosecutors should be entitled to challenge instructions from the Central Office under certain well defined conditions.

Delegations have also raised a number of practical issues, which should be analysed further in the same context as the general issues regarding the EPPO's structure and competence, in particular:

- How should the independence of the European Delegated Prosecutors be ensured, considering their potential status as both national prosecutors and delegated prosecutors ("double hat")?
- How should conflicts of interests and organisational difficulties within national systems be avoided and resolved?
- How, and by whom, should the European Delegated Prosecutors be appointed and dismissed?

(I) The division of power between the central EPPO and its representatives at the national level (European Delegated Prosecutors) (art. 16-18, 27-29)

Many delegations have emphasized that the balance between the decentralised and the central (EU) level should be reflected in the distribution of powers between the Central Office of the EPPO, on the one hand, and the European Delegated Prosecutors, on the other. Many delegations have also argued that the Commission proposal attributes the Central Office - regardless of how it will be structured - with powers which are too extensive, in particular as regards investigations.

Delegations are generally of the opinion that the internal delimitation of powers between the central and the decentralised level of EPPO should be spelled out explicitly and in detail in the Regulation.

Following the detailed discussion on the powers of the EPPO which took place in COPEN on 24-25 October, the following preliminary positions on the level of decision-making were expressed regarding nine typical cases of decisions that any EPPO would be empowered to take:

a) Direct exercise of investigative and prosecutorial authority, including taking over of a case already opened by a European Delegated Prosecutor, as well as referral of the case to national authorities: The majority of delegations spoke out against a direct exercise of investigative and prosecutorial authority by the Central Office. Some noted that an exception to this principle of locally run investigations could be cases where there are no law enforcement resources available in a given jurisdiction.

b) Proposing a transaction to a suspect: The delegations agreed that the decentralised level (delegated prosecutors), as well as national authorities, should steer such transactions as much as possible.

c) Initiation of an investigation: The majority of delegations believe that such decisions should mainly be taken at decentralised level. However, in cross-border cases, central decision making will often be necessary, in particular where an intervention of the central level is needed in order to decide in which Member State an investigation should be initiated.

d) Taking urgent measures necessary to ensure effective investigation and prosecution of the case: Delegations noted that urgent measures will in almost all cases need to be decided at the decentralised level.

- e) *Instructing a European Delegated Prosecutor to bring the case before a competent national court or to refer it back for further investigation*: Delegations have diverging views as regards where these decisions are best taken. Some advocate central decision-making, some an obligation for the delegated prosecutors to consult the central level, and some that the delegated prosecutors should take such decisions independently. Many delegations noted that certain cases may need central decision-making, and that different rules should apply for different types of cases. Some noted that central decision-making would be facilitated if the central level was organised as a college.
- f) *Dismissal of a case*: The majority of delegations spoke out in favour of central decision-making as regards dismissal of cases. They also noted that minor cases should be exempted from this principle, and that the decentralised level (delegated prosecutors) or national authorities should deal with such cases according to detailed criteria of what constitutes minor cases.
- g) *Bringing the case to the competent national court*: The delegations that have expressed a position favoured decision-making at the decentralised level (delegated prosecutors) in this respect.
- h) *Choice of the jurisdiction of trial and determination of the competent national court*: The majority of delegations spoke out for central decision-making as regards the choice of State of jurisdiction. This choice should be made according to clearly defined criteria, but the choice of the competent national court should be left to the decentralised level.
- i) *Lodging of appeals and exercise of available remedies*: The delegations that have expressed a position favoured decision-making at the decentralised level (delegated prosecutors) in this respect.
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