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NOTE

From:	Presidency
To:	CATS
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office <i>- Thematic discussion on certain issues</i>

1. State of play

Since the October Council, the Presidency has organised six working days in the COPEN Working Party (including one day in a Friends of Presidency setting). The main focus of the meetings was on Articles 17-23, 28a and 36-37¹ in the draft Regulation. The discussions have been held in a very constructive atmosphere and solutions for most issues have been found. However, a few substantive as well as technical issues remain open. The Articles are presented below in view of preparing for an agreement at the Council meeting on 3 December 2015.

¹ As presented in doc 13467/15 EPPO 41 EUROJUST 186 CATS 103 FIN 722 COPEN 288 GAF 46.

2. *Issues to be addressed by CATS : Articles 17, 19, 20, 22a and 28a (2a, 2b and 2c)*

The said Articles contain key provisions on the material competence of the Office and the exercise of the competence (Articles 17 and 20), on reporting, registration and verification of information (Article 19), on the right of evocation of cases of the Office (Article 22a) and on certain aspects of referrals and transfers of proceedings to the national authorities (Article 28a.(2a), 28a.(2b) and 28a.(2c).

These Articles have been discussed repeatedly at different levels during the last two years, and the Council is now close to a compromise solution at expert level. However, a few issues, in particular in Article 17, remain open. On the basis of previous discussions on these Articles, the Presidency notes that they are very closely interlinked. A balanced and acceptable compromise for Member States can therefore only be reached if the issues mentioned are discussed and agreed upon as a package.

3. *Short presentation of the relevant Articles and main open issues*

Article 17

The current version of Article 17 provides, in the first paragraph, that the EPPO shall be competent for offences covered by the so called PIF-Directive, as implemented by national law. The second paragraph provides that the Office shall also be competent for any other criminal offence which is inextricably linked to a criminal conduct falling within the scope of paragraph 1, where the sanction applicable to this offence is less severe than the sanction incurred in respect of the offence affecting the financial interests of the Union.

Two issues in this Article, in particular, are still under debate:

- The character of the reference to the PIF-Directive:

The main debate at expert level has been on whether the reference should be of a static nature, i.e. refer to the PIF-Directive as it will stand on the day of adoption of the Regulation, or if it will be dynamic, i.e. the PIF-Directive as implemented by national law, taking thus into account any future changes on the PIF Directive as well as, and more importantly, any future modifications of national law, on the basis of which the EPPO will be able to act.

- The preponderance criterion:

A number of delegations have questioned whether the preponderance criterion included in paragraph 2 is appropriate. In particular, it has been argued by some that for example organised crime groups would in some states always fall outside the scope of paragraph 2, as the sanction applicable to participation in organised crime will in practice always be more severe than the sanction applicable for the PIF-offence.

Article 19

The rules on reporting, registration and verification of information are extremely relevant for the rules on the competence of the Office, as it is this information that will make it possible for the Office to exercise its competence.

This Article has been the objective of intense negotiations, which have led to the current compromise text which appears to be generally acceptable in the context of the package.

Article 20

Article 20, on the exercise of the competence of the Office, shall be seen in one single context with Article 17. For the first redraft of the Articles 17 to 37 in July, the Presidency chose to limit the exercise of the competence of the EPPO rather than the competence itself, by introducing the preponderance criterion solely in Article 20. The aim of the Presidency was, for the case that national authorities would take over an investigation initiated by EPPO, to ensure that acts already undertaken by the EPPO would not be invalidated and that evidence would not get lost. Following negotiations at working party level, the preponderance criterion was also introduced in Article 17, limiting thus directly the competence of the EPPO and creating a direct link between Articles 17 and 20. The open issues debated in Article 17, and in particular the discussions on the preponderance criterion, will thus have a strong influence on Article 20.

Article 22a

This provision on the right of the Office to under certain conditions evoke cases handled by national authorities should be relatively uncontroversial as part of the global package described in this note.

Article 28a (2a, 2b and 2c)

These provisions lay out the conditions for when the Office can decide that there is no need to investigate or prosecute a case at Union level. After aligning, in accordance to the conclusions of Coreper of 1st October, paragraphs 2a, 2b and 2c of Article 28a to the criteria set out in Article 9(5), this provision should be relatively uncontroversial as part of the global package described in this note. It shall be noted that paragraphs 1,2,3 and 4 of Article 28a were already the object of the very large support expressed by Ministers at the October Council.

4. *Question to CATS*

In line with the descriptions above, the Presidency submits the draft text of the relevant Articles to CATS for consideration. The text has been elaborated in view of reaching a balanced approach between these closely interlinked provisions. The Presidency considers this package to be a good compromise with a view to reaching an agreement on the package at Council in December.

In light of the above, the Presidency invites delegations to consider the following drafting proposals as a basis for reaching an agreement, and in particular to express themselves on the remaining issues in Article 17. Delegations are notably asked to agree to the dynamic reference and the preponderance criterion as indicated in the current draft of Article 17.

Article 17

Material competence of the European Public Prosecutor's Office

1. The European Public Prosecutor's Office shall be competent in respect of the criminal offences affecting the financial interests of the Union which are provided for in Directive 2015/xx/EU, as implemented by national law, irrespective of whether the same criminal conduct could be classified, under national law, as another type of offence².
2. The European Public Prosecutor's Office shall also be competent for any other criminal offence which is inextricably linked to a criminal conduct falling within the scope of paragraph 1, where the maximum sanction provided for by national law for this offence is less severe than the sanction in respect of the offence affecting the financial interests of the Union.
3. [Within ... Member States shall notify the European Public Prosecutor's Office of an extensive list of the national substantive criminal law provisions applicable to the offences defined in Directive 2015/xx/EU³.]

[...]

Article 19

Reporting, registration and verification of information

1. The institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent in accordance with applicable national law shall report without undue delay to the European Public Prosecutor's Office any criminal conduct in respect of which it could exercise its competence in accordance with Articles 17, 20(2) and 20(3)⁴.
- 1a. Where, at any time from the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that the investigation concerns an offence in respect of which the European Public Prosecutor's Office could exercise its competence over the criminal conduct in accordance with Articles 17, 20(2) and 20(3), this authority shall without undue delay inform the European Public Prosecutor's Office so that the latter can decide whether to exercise its right of evocation in accordance with Article 22a.

² FI expressed concerns regarding the legal base.

³ This paragraph should be further developed or moved.

⁴ A recital reading as follows could be considered: "*Member States should set up a system which will ensure that information is reported to the EPPO as soon as possible. It is up to the Member States to decide whether to set up a direct or centralized system*".

- 1b. The report shall contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons.
- 1c. The European Public Prosecutor's Office shall also be informed in accordance with paragraphs 1 and 1a in cases where an assessment of whether the criteria laid down in Article 20(2) and (3) are met is not possible.
2. Information provided to the European Public Prosecutor's Office shall be registered and verified in accordance with its Internal Rules of Procedure. The verification shall aim to assess whether, on the basis of the information provided in accordance with paragraph 1 and 1a, there are grounds to initiate an investigation or to exercise the right of evocation.
3. Where upon verification the European Public Prosecutor's Office decides that there are no grounds to initiate an investigation in accordance with Article 22, or to exercise its right of evocation in accordance with Article 22a, the reasons shall be noted in the Case Management System.

The European Public Prosecutor's Office shall inform the authority that reported the criminal conduct in accordance with paragraph 1 or 1a, as well as crime victims and if so provided by national law, other persons who reported the criminal conduct.

4. Where the information received by the European Public Prosecutor's Office reveals that a criminal offence outside of the scope of the competence of the European Public Prosecutor's Office may have been committed, it shall without undue delay inform the competent national authorities.
5. The European Public Prosecutor's Office may request further relevant information available to the institutions, bodies, offices and agencies of the Union and the authorities of the Member States⁵. The requested information may also concern infringements which caused damage to the Union's financial interests, other than those within the competence of the European Public Prosecutor's Office in accordance with Article 17, 20(2) and 20(3), where it is essential to establish links with a criminal conduct on which it has exercised its competence.

⁵ A recital explaining that the rules of registration and verification set out in this Article shall apply *mutatis mutandis* if the information received refers to any conduct which might constitute a criminal offence within the competence of the EPPO will be considered. The recital will also clarify that Member States may provide any information to the Office. CZ proposes the following wording to be added in a recital: *'Verification shall aim to assess whether the information shows that the conditions set by Articles 17 and 18 determine the competence of the Office'*.

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

1. The European Public Prosecutor's Office shall exercise its competence either by initiating an investigation in accordance with Article 22 or by deciding to use its right of evocation in accordance with Article 22a. If the European Public Prosecutor's Office decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.
2. Where a criminal offence falling within the scope of Article 17 caused or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the European Public Prosecutor's Office may only exercise its competence if:
 - a) the case has repercussions at Union level which require an investigation to be conducted by the European Public Prosecutor's Office, or
 - b) officials or other servants of the European Union, or members of the Institutions could be suspected of having committed the offence.

The European Public Prosecutor's Office shall, where appropriate, consult the competent national authorities or Union bodies to establish whether the criteria defined in (a) and (b) are met.

3. The European Public Prosecutor's Office shall refrain from exercising its competence in respect of any offence falling within the scope of Article 17 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 28a if :
 - a) the maximum sanction provided for by national law for an offence falling within the scope of Article 17(1) is less severe than the maximum sanction for an inextricably linked offence as referred to in Article 17(2), or;
 - b) there is a reason to assume that the damage caused or likely to be caused to the Union's financial interests by an offence as referred to in Article 17 does not exceed the damage caused or likely to be caused to another victim.
4. The European Public Prosecutor's Office shall inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence.

5. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the question whether the criminal conduct falls within the scope of Article 17(2) or 20(2) and (3) the national authorities⁶ competent to decide on the attribution of competences concerning prosecution at national level shall decide who shall be competent for the investigation of the case. Member States shall define the national authority which will decide on the attribution of competence.

[...]

Article 22a

Right of evocation

1. Upon receiving all relevant information in accordance with Article 19(1a), the European Public Prosecutor's Office shall take its decision whether to exercise its right of evocation as soon as possible, but no later than 5 days after having received the information from the national authorities and shall inform the national authorities thereof. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time frame with a maximum prolongation of 5 days, and shall in such case inform the national authorities thereof.
 - 1a. During this time frame the national authorities shall refrain from taking any decision under national law which may have the effect of precluding the European Public Prosecutor's Office from exercising its right of evocation.

The national authorities shall take any urgent measures necessary, according to national law, to ensure effective investigation and prosecution.
2. If the European Public Prosecutor's Office becomes aware, through means other than the information referred to in Article 19(1a), of the fact that an investigation in respect of a criminal offence for which it could be competent is already undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. After being duly informed in accordance with Article 19(1a), the European Public Prosecutor's Office shall take a decision on whether to exercise its right of evocation. The decision shall be taken within the time frame set out in paragraph 1 of this Article.
3. The European Public Prosecutor's Office shall, where appropriate, consult competent authorities of the Member State concerned before deciding whether to exercise its right of evocation.

⁶ A recital explaining that the notion of "*national authorities*" in this provision refers to judicial authorities or other independent authorities who have competence to decide on the attribution of competence in accordance with national law should be added.

4. Where the European Public Prosecutor's Office exercises its right of evocation, the competent authorities of the Member States shall transfer the file to the European Public Prosecutor's Office and refrain from carrying out further acts of investigation in respect of the same offence.
5. The right of evocation set out in this Article may be exercised by a European Delegated Prosecutor from any Member State whose competent authorities have initiated an investigation in respect of an offence falling under the scope of Articles 17 and 18. Where a European Delegated Prosecutor, who has received the information in accordance with Article 19(1a), considers not to exercise the right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State with a view to enabling the Permanent Chamber to take a decision in accordance with Article 9(3a).
6. Where the European Public Prosecutor's Office has refrained from exercising its competence, it shall inform the competent national authorities without undue delay. The competent national authorities shall at any time in the course of the proceedings inform the Office of any new facts which could give the Office reasons to reconsider its previous decision.

The European Public Prosecutor's Office may exercise its right of evocation after receiving such information, provided that the national investigation has not already been finalized and that an indictment has not been submitted to and received by a court. The decision shall be taken within the timeframe set out in paragraph 1 of this Article.

7. Where, with regard to offences which caused or is likely to cause damage to the Union's financial interests of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 8(2)⁷, issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.
8. To ensure coherent application of the guidelines, a European Delegated Prosecutor shall inform the competent Permanent Chamber of each decision taken in accordance with paragraph 7 and each Permanent Chamber shall report annually to the College on the application of the guidelines.

[...]

⁷ It is possible that a slight adaptation of Article 8 may need to be considered at a latest stage.

Referrals and transfers of proceedings to the national authorities

1. *Where an investigation conducted by the European Public Prosecutor's Office reveals that the facts subject to investigation do not constitute a criminal offence for which it has a competence in accordance with Articles 17 and 18, the competent Permanent Chamber shall decide⁹ to refer¹⁰ the case without undue delay to the competent national authorities.*
1. *Where an investigation conducted by the European Public Prosecutor's Office reveals that the specific conditions for the exercise of its competence set out in Article 20(2) and (3) are no longer met, the competent Permanent Chamber shall decide to refer the case to the competent national authorities without undue delay and before initiating prosecution before national Courts.*
- 2a. Where, with regard to an offence which caused or is likely to cause damage to the financial interests of the Union of less than EUR 100.000, the Permanent Chamber considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it may refer the case to the competent national authorities.¹¹
- 2b. The Permanent Chamber shall communicate any decisions to refer a case to national authorities on the basis of paragraph 2a to the European Chief Prosecutor. On reception of this information, the European Chief Prosecutor may within three days request the Permanent Chamber to review its decision if she or he considers that the interest to ensure the coherence of the referral policy of the Office so requires. If the European Chief Prosecutor is a Member of the relevant Permanent Chamber, one of his/her Deputies shall exercise the right to request the said review.

⁸ JHA Council on 9 October 2015 expressed very large support for paragraphs 1, 2, 3, 4 and 5. Changes made are simple alignments to the rest of the text.

⁹ It is the understanding of the Presidency that the decision-making power of the chamber referred to in paragraph 1 needs to be inserted in the Article dealing with the decision-making powers of the chamber (currently Article 9(3)).

¹⁰ A recital should be added explaining that in case of a referral by the EPPO national authorities shall preserve full prerogatives under national law to open, continue or to dismiss the investigation.

¹¹ FI would like to introduce a reference to Article 17(2) in this provision.

- 2c. Where the competent national authorities do not accept to take over the case in accordance with paragraph 2 and 2a within a timeframe of maximum 30 days, the European Public Prosecutor's Office shall remain competent to prosecute or dismiss the case according to the rules laid down in this Regulation.
2. *Where the European Public Prosecutor's Office considers a dismissal in accordance with Article 33(3), and if the national authority so requires, the Permanent Chamber shall refer the case without delay to the latter.*
3. *If, following a referral in accordance with paragraphs (1), (2) or (2a) and Article 20(3), the national authority decides to open an investigation, the European Public Prosecutor's Office shall transfer the file to that national authority, refrain from taking further investigative or prosecutorial measures and close the case.*
4. *If a file is transferred in accordance with paragraph (1), (2) or (2a) and Article 20(3), the European Public Prosecutor's Office shall inform the relevant Union institutions, bodies and agencies, as well as, where appropriate in accordance with national law, suspects or accused persons and the crime victims, thereof. The cases dismissed may also be referred to OLAF or to competent national administrative or judicial authorities for recovery or other administrative follow-up.*
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