



Brussels, 20 September 2016  
(OR. en)

12344/16

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**Interinstitutional File:  
2013/0255 (APP)**

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**LIMITE**

**EPPO 24  
EUROJUST 115  
CATS 66  
FIN 570  
COPEN 267  
GAF 53  
CSC 254**

**NOTE**

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From:	Presidency
To:	CATS
No. prev. doc.:	doc 11350/1/16 REV 1
Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office <i>- Other issues</i>

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1. Background

The Netherlands' Presidency established a consolidated version of the Regulation, which was welcomed by Council (JHA) on 9 June this year. A few provisions were left out of the consolidated version, as substantial issues had not yet been treated in depth or remained open (in particular as regards judicial review, relations with third countries and cooperation with Eurojust). This paper evokes a number of other issues which have been provisionally agreed upon, but for which substantial reservations remain.

## 2. Issues to discuss

### *a) Article 9: Permanent Chambers*

Article 9 in the draft Regulation includes detailed rules on the organisation and functioning of the Permanent Chambers of the EPPO. Permanent Chambers were not foreseen in the original Commission proposal, but were early introduced in the draft Regulation by the Council. The general idea was to create a link between the European Delegated Prosecutors handling the investigation on the ground, and the supervising European Prosecutor, on the one hand, and a permanent structure within the College, on the other hand, thereby guaranteeing both the efficiency and the independence of the Office.

The Presidency considers that the Permanent Chambers are of fundamental importance for the Office. The chambers will monitor and direct investigations and prosecutions and take a number of key decisions in each case. Through their multi-national composition, they are also an important symbol of and guarantee for the independence and the European character of the Office. It is thus essential that a final agreement on Article 9 is reached as soon as possible.

However, the current text of Article 9<sup>1</sup> includes a number of reservations and footnotes. In substance, a number of delegations consider that the direct powers of the Permanent Chambers should be limited, mainly with a view to facilitating an efficient and independent handling of cases by the European Delegated Prosecutors with limited involvement of the Central Office, but also with a view to ensuring the independence of the operational prosecutors. Other delegations have underlined the need to ensure a strong Central Office and Permanent Chambers that will guarantee the coherence and consistency of the activities of the EPPO throughout the Member States.

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<sup>1</sup> Doc 11350/1/16

After a careful examination of previous discussions and the arguments put forward by Member States, the preliminary assessment of the Presidency is that the current version of Article 9 constitutes a fair compromise between the positions of Member States. It is clear that some delegations have issues with the current wording of the provision<sup>2</sup>, whereas other delegations would have difficulties to accept any weakening of the powers of the Permanent Chamber, but the current text seem to strike a balance between these positions. With the insertion of paragraphs (5a) and (5b), the possibilities for Permanent Chambers to delegate their powers have been enhanced. It is in this light that the following question is submitted to CATS delegations:

**Do delegations agree that the organisation and functions of the Permanent Chambers as described in Article 9 in the current version of the draft Regulation constitute a balanced compromise between their positions?**

*b) Article 20: Competence*

The negotiations with the European Parliament on the so called PIF-Directive<sup>3</sup> have been blocked since June 2015 due to one single issue: the inclusion or not of fraud with VAT in the scope of the Directive<sup>4</sup>. Indeed, the European Parliament - with the support of the Commission - strongly insists on the inclusion of this type of fraud in the Directive. One of the arguments for this position of the EP is that substantial damage to the Union budget is caused by cross-border VAT fraud, and that there is a clear need to give the EPPO the competence to deal with such cases. At the same time, the EPPO would need to focus on serious cases of VAT fraud for its intervention to have a real added value. In the light of in particular the position of the EP, the Council has for some time reflected on how a partial inclusion of VAT fraud can be achieved in a manner acceptable to both the Member States and the European Parliament. A compromise solution may be within sight in the PIF-Directive.

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<sup>2</sup> See footnote 16 in doc 11350/1/16 and WK 497/2016.

<sup>3</sup> Directive on the fight against fraud to the Union's financial interests by means of criminal law; the Council general approach can be found in document 10232/13.

<sup>4</sup> See doc 9804/16 for a detailed description of the state of play.

However, if the current wording of Article 20(3) in the EPPO Regulation is maintained, the inclusion of VAT in the PIF Directive would not solve the concerns of the EP, nor does it ensure the effectiveness of the EPPO. Article 20(3)(b) in the draft EPPO Regulation says that the EPPO '*shall not exercise its competence if the damage caused or likely to be caused to the Union does not exceed the damage caused to another victim*'. The effect of this provision appears to be that fraud with VAT will *de facto* never fall under the competence of the EPPO even if this type of offence is included in the PIF Directive, since Member States will always suffer far greater damages than the Union from such offences.

The Presidency considers that the possible inclusion of certain cases of VAT fraud in the PIF-Directive will thus not solve the problem of the EP, which is likely to request that also Article 20(3)(b) in the draft EPPO Regulation is amended before it can agree to the PIF-Directive. It should thereby be noted that representatives of the EP have also in other contexts indicated that the Parliament has substantial problems with the general limitation of the right of the EPPO to exercise its competence following from Article 20(3)(b), as it automatically deprives the EPPO from its core competence over PIF offences, if these may cause more damage to other victims than the Union.<sup>5</sup> It is in this light that the Presidency would ask CATS delegations the following:

**In case certain types of VAT fraud are to be included in the final version of the PIF-Directive, do you agree that a modification/deletion of Article 20(3)(b) in the draft EPPO Regulation should also be considered, with a view to reaching a global compromise with the EP which gives a competence to the EPPO as regards investigation and prosecution of at least certain cases of VAT fraud?**

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<sup>5</sup> It should be noted that the EPPO Regulation may only be adopted after having obtained the consent of the European Parliament.

*c) Article 26: Investigations*

Article 26, read together with Article 31 and Article 35 of the draft EPPO Regulation in its current wording, creates a system for cross-border investigations which deviates from the EIO provisions on investigative measures as set out in Articles 9-11 of the EIO Directive.

The objective is to make cross-border investigations for the EPPO easier than agreed in the EIO Directive: the latter will function on the basis of mutual recognition between equivalent national authorities, whereas EPPO should function as a single European body across EU Member States.

To simplify the reading of the following text we will use terms “handling MS” and “assisting MS” (adjusted EPPO terminology). In case of EIO these terms should be read as “issuing State” and “executing State”.

The current EPPO text

Article 26(3) stipulates that judicial authorisation shall be obtained in the assisting MS if such authorisation is needed in that state. The handling MS shall issue judicial authorisation only in cases where such authorisation is not needed in the assisting MS.

The draft EPPO Regulation does not regulate the details of judicial authorisation but it leaves them to national applicable law. In most of the cases it would be the law of the assisting MS. In cases where such applicable law requires a thorough analysis of the criminal file before granting the judicial authorisation for the assigned measure, this could lead to situations where the court of the assisting MS would ask for the translation of the whole file to conduct its own analysis (rather than rubber stamping the authorisation).

Risks

Translation of the file and its analysis by the court in the assisting MS could take months. Moreover, by diverting from the EIO rules, the courts will be exposed to different standards / procedures, which could be applicable to the same kind of cases, only based on whether the EPPO decided to exercise its competence or not. Furthermore, Article 49 (5) of the draft Regulation provides for translations necessary for the internal functioning of the EPPO but as a rule leaves it to MS to pay for the translation of the file to be submitted to courts.

## EIO Directive

The judicial authorisation is primarily made in the handling MS and the assisting MS shall recognise an EIO without any further formality being required (Article 9). The Directive does not allow for extensive study of the file in case of EIO recognition and enforcement in the assisting MS. There are limited grounds for non-recognition or non-execution in the assisting MS (Article 11).

## Possible solutions

One option could be that the EPPO provisions would be aligned with the EIO rules (by reference or by including specific provisions). Nevertheless, the majority of MS rejected this option in the past and agreed on a *sui generis* regime for EPPO, also at Council level. Therefore, taking into account the very sensitive compromise on Article 26, this option does not seem very realistic since it would completely deviate from the idea that EPPO should function as a single European body across EU Member States and not on the basis of mutual recognition.

The second option could be to partially limit the judicial authorisation in the assisting MS, so that we will not end up in situations, where under the EIO the national prosecutor will receive evidence much faster than the EPPO under the EPPO provisions due to application of national rules on judicial authorisation leading to the translations and study of the whole criminal file by the court in the assisting MS. A possible solution could include a recital in the draft EPPO Regulation which would clarify that the decision of the assisting court should be made, as a rule, based only on the translated summary of the case and that the court may only refuse granting authorisation in limited cases (e.g. lack of proportionality). The assisting court may require further information from the assisting EDP where the summary of the case is not sufficient for the assessment of the request.

**Do delegations agree that the outlined additional clarifications to the sensitive compromise agreed in principle at the Council would be acceptable in view of ensuring the effectiveness and added value of the EPPO?**

d) *Article 49: Operational costs*

The financing of the operational costs of the EPPO is regulated in Article 49(5) and Article 49(5a) of the draft Regulation. The provisions state, *inter alia*, that operational expenditure of the EPPO shall in principle not include costs related to investigation measures carried out by competent national authorities or costs of legal aid. However, when an exceptionally costly investigation measure is carried out on behalf of the Office, the cost of the investigation measure could partly be met by the EPPO, in accordance with the procedure set out in Article 49(5a).

Some delegations have emitted reservations on these rules. In particular, they have requested that more clarity is needed on the scope of the possibility to request that the EPPO meets some of the costs of an exceptionally costly investigation measure. Recital 104 in the preamble, in its current form<sup>6</sup>, does not give enough clarity.

A number of delegations have suggested that the said exception should be clarified further. The Presidency believes that this could be done through an extension of the existing recital, meaning that concrete types of cases where the EPPO could meet some of the costs of an exceptionally costly investigation measure, and the conditions to consider a measure exceptionally costly, could be indicated. Delegations are therefore asked to consider the following:

**Should recital 104, or Article 49(5a), in the draft text of the Regulation be modified in the sense proposed above, i.e. so that the types of investigation measures, and the conditions to consider them exceptionally costly, are given, and introduced in the draft text?**

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<sup>6</sup> *'Exceptionally high costs for investigation measures such as complex experts' opinions, or extensive police operations or surveillance activities over a long period of time could partly be reimbursed by the Office in accordance with this Regulation and the applicable financial rules.'*

*e) Article 54(5): The status of the European Delegated Prosecutors*

The question on the (hybrid) status of European Delegated Prosecutors is how this new position will fit into the existing national structures (i.e. their legal position, social security and pension rights, autonomy and hierarchy) when they exercise European powers derived from the EPPO Regulation. Some of these matters have been addressed in the Regulation itself, while others will need to be addressed by the Member States. There remain two issues on which some delegations have reservations: 1) contractual status (Art. 54(5)), including the question on social security, and 2) autonomy of EDPs and the possibility for the Permanent Chambers to give instructions to EDPs (Art. 9(5), 11 and 54(5a)).

Contractual status of EDPs

The Council text foresees in Article 54(5) that EDPs shall be engaged as Special Advisors. This is the only category of Union staff under the EU Staff Regulations and Conditions of Employment of Other Servants of the EU which allows for the possible exercise of parallel functions, such as required for the double-hatted status of EDPs (European and national Prosecutor). The text foresees (Art. 54(5)) that "adequate arrangements" are in place so that EDPs' rights related to social security, pension and insurance coverage under the national scheme are maintained. Furthermore, the total remuneration of an EDP shall not be lower than what it would be if he or she would have remained a national prosecutor only. The text states that the general working conditions and work environment of the EDPs falls under the responsibility of the competent national judicial authorities. There is also a clarifying recital concerning the remuneration of EDPs.

This issue concerns internal national matters and it is up to the MS to ensure that national Prosecutors working as EDPs do not face disadvantages related to their remuneration and social security rights.



## Autonomy of EDPs – rights of instructions by Permanent Chambers

Some MS have raised a constitutional issue regarding the autonomy of prosecutors and the separation of powers. They opposed that EDPs may receive instructions from the European Prosecutors or the Permanent Chambers. The problem was addressed by a compromise text in Art. 54(5a), which states that, in the exercise of investigations, EPs and EDPs may not receive any orders, guidelines or instructions other than those provided for in the Regulation, as referred to in Art 6. Art. 6 states that the EPPO shall be independent and that all EPPO Prosecutors (i.e. EP and EDP) shall neither seek, nor take instructions from any person external to the EPPO. This ensures their independence status as a matter of European Union law.

**Do delegations agree that in light of given clarifications the issues concerning EDPs' status have been addressed satisfactorily in Article 54?**

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