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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Policy debate

The Presidency distributed a consolidated version of the draft Regulation on the establishment of the European Public Prosecutor's Office (EPPO) in July this year[1], on the basis of the results of the previous Presidencies ("broad conceptual support" found in December 2015 and June 2016). The Presidency has continued the work to finalise the text. For this purpose, a considerable number of meetings at working party (COPEN) and JHA Counsellors level has taken place, and the file was discussed also at CATS and Coreper. The Council (JHA) in October also allowed to make important advances on the text. On the basis of this work, the Presidency now presents a consolidated version of the full text of the draft Regulation (in document 15200/16) for agreement by the Ministers.

[1] Doc 11350/1/16.

The Presidency notes that the core elements of the draft Regulation have remained stable since they were agreed over the past years and months. In particular, the provisions on the structure, organisation and the competence of the Office have not changed in substance, apart from the inclusion of a right to exercise its competence to deal with certain cases of VAT fraud, which has been extensively discussed in the negotiations on the draft "PIF Directive[2]", and of offences related to Union funds even in cases where the damage caused to the Union's financial interests does not exceed the damage caused to another victim.

The focus in the consultations of the last months has been on a number of details which do not *a priori* affect these core elements, but which are nonetheless of primordial importance for the functioning of the future office. The changes were made **in particular** to the following provisions:

- *Repercussions at Union level*

  The concept of repercussions at Union level, which is a ground for the European Public Prosecutor's Office to exercise its competence in certain cases, is clarified in a new **recital 51a.**

- *Recovery and collection procedures*

  A new **recital 100a** has been added to clarify that Member States shall not be considered at fault or negligent for the purposes of recovery procedures resulting from decisions taken by the EPPO. The issue of collection procedures is going to be addressed in a Council declaration and possible Commission declaration.

[2] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.

- *Review of decisions of European Delegated Prosecutors within the EPPO*

  Changes have been made in **Article 11** to allow the assignment of work to a supervising European Prosecutor from other country in cases of exceptional high workload and in cases of conflict of interests. Further, the Article has been modified to clarify that certain acts taken by European Delegated Prosecutors may be reviewed by the supervising European Prosecutor if so follows from national law. The corresponding **recital 25** has been modified accordingly.

- *Legal basis for forwarding evidence to national authorities*

  Minor changes have been made in **Article 19** to spell out the obligation of the EPPO to inform national authorities about any criminal offence it becomes aware of but which isoutside its scope of competence and to forward relevant evidence gathered.

- *Exercise of the material competence of the EPPO*

  Article 20(3)(b) has been adapted to ensure that the EPPO will have the right to exercise its competence for offences related to Union funding and for certain major cross-border cases of VAT fraud even if damage to EU budget is lower that to the national budget.

  Article 20(3a) has been introduced to allow investigation of cases where it otherwise would not be possible because the maximum sanction for inextricably linked offece is higher than for the PIF offence.

- *Investigating measures and other measures*

  A new type of investigation measure was introduced in **Article 25** ('track and trace an object by technical means, including controlled deliveries of good'). An obligation to notify the European Public Prosecutor's Office of any limitation to the application of the measures was also introduced.

- *Competences of European Delegated Prosecutors / Permanent Chamber*

  No changes have been made to the core **Article 9**, which sets out the competences of Permanent Chambers. However, to address constitutional concerns and efficiency issues raised by a number of Member states, adjustments have been made in **Article 30** to introduce a silent procedure, whereby decisions proposed by the European Delegated Prosecutor are deemed to be accepted if the Permanent Chamber does not react to the submittal. Also, it has been clarified that the Permanent Chamber cannot refrain a European Delegated Prosecutor from bringing a case to judgment, though it can postpone it, e.g. by asking for furher evidence.

- *Evidence*

  In **Article 31(1)**, the former second subparagraph has been deleted with a view to render the provision compatible with national laws and to eliminate constutional reserves of certain Member States. The guarantees related to fundamental rights recognised by the Charter and Treaty of the European Union are untouched and are still reflected in the Preamble (**recital 70**).

- *Procedural rights*

  Article 35(3) has been amended to reflect the possibility to collect evidence and hear experts also on behalf of defence.

- *Operational costs and expenditure*

  No adaptations have been made to **Article 49** but **recital 104 and 104a** were reworded to explain how resources of the EPPO can be made available to cover certain exceptionally costly investigation measures and to cover the exact scope of the operational expenditures of the EPPO that will be covered from its own budget.

- *Temporary agents*

  A new **Article 54a** has been added to clarify certain formalities regarding the future staff of the EPPO.

- *Non-participating Member States*

  Following in-depth discussions at expert level and in CATS, **Article 59a** has not been changed but **recital 102aa** has been modified to clarify that non-participating Member States are not bound by the Regulation. At the same time the duty of sincere cooperation was highlighted to remind that participating MS, non-participating MS and the Commission will be obliged to cooperate to ensure the continuity of cross-border cooperation after the establishment of the EPPO.

- *Transparency*

  Article 65(1) has been adapted to enlarge the scope of the principle of transparency as regards the activities of the EPPO, while safeguarding the confidentiality of the case files.

The objective of the Presidency efforts was to eliminate the principal reservations made by Member States when previous compromise packages were adopted in Councils (JHA) in 2015 and 2016. On the basis of the discussions over the last months, the Presidency finds that the draft as it currently stands, is a good basis for the establishment of the EPPO under condition that the PIF Directive will be adopted (including the provision on VAT fraud offences).

As a consequence, ministers are invited to reply to the following questions:

1. **Do you agree that the text of the proposed Regulation in document 15200/16 is a good basis for the establishment of the EPPO?**

2. **If not, do you support the establishment of the EPPO?**