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NOTE

from: Presidency
to: CATS
Subject: European Public Prosecutor's Office (EPPO)

The Commission's proposal for a Regulation for the establishment of the European Public Prosecutor's Office (EPPO) was adopted on 17 July 2013 and issued together with other documents being part of a package to enhance the institutional aspects of protecting the Union's financial interests.

Given the importance of the proposal, which will substantially affect certain aspects of European criminal justice, the Presidency considers it appropriate and timely to have an initial debate among delegations on the proposed Regulation already at this point in time.

In general on the proposal

The Lisbon Treaty introduced the new Article 86 in the Treaty on the Functioning of the European Union (TFEU), which gives the Union a competence to establish a European Public Prosecutor's Office (EPPO). The Commission's proposal is based on that Article¹ and constitutes a novelty in Union law. The Commission's earlier 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 ("PIF-Directive"), currently under negotiation, defines the material elements of the criminal offences, as well as the applicable sanctions, which would come within the competence of the EPPO.

The main objective of the EPPO will be to protect the Union's financial interests by means of combating the criminal offences affecting those interests. The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, criminal offences against the Union's financial interests.

¹ Article 86 TFEU: "1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

[...]

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission."

According to the Commission's impact assessment data collected and analysed at EU level identify suspected fraud averaging about €500 million in each of the last three years, but there are good reasons to believe that the actual amount of fraud is significantly higher. The potential size of this "dark figure" could rise from several million euros up to €3 billion per year while only a small fraction of these losses are ever investigated, prosecuted and recovered. The Commission therefore assumes that the financial interests of the European Union are currently insufficiently protected from fraud, in particular due to the gap in the enforcement structure, the lack of continuity in enforcement action and the lack of an underlying common prosecution policy.

The proposed Regulation aims at addressing the described shortcomings by establishing the European Public Prosecutor's Office.

Key aspects of the proposal

The proposal contains detailed provisions on a number of topics, ranging from procedural law to the administrative set-up of the Office. This note will only briefly highlight the following aspects of principal interest:

- On governance the proposal foresees that the EPPO shall be headed by a European Public Prosecutor appointed by the Council with the consent of the European Parliament. European Delegated Prosecutors will be based in each Member State and will act on behalf and under the authority of the European Public Prosecutor while being also integrated at both operational and functional level into the national legal systems and prosecution structures ("double hat"). They will be allowed to act as prosecutors under national law to the extent this will not interfere with their roles as European Delegated Prosecutors.
- The Commission has further proposed that the Office should have an exclusive competence to deal with offences affecting the Union's financial interests as provided for by the "PIF-Directive", although cases may be referred to national authorities under certain conditions.

- The proposed Regulation sets out the types and conditions of the investigative measures which the EPPO should be empowered to use. There are two groups of measures from which the most intrusive ones can be used only subject to a prior judicial authorisation. The conditions for the use of the investigative measures are set out in the national law. These measures are not regulated in detail, but establish the requirements under which the EPPO should be entitled to use them. The European Delegated Prosecutors will have the power to undertake investigative measures on their own or to instruct the competent law enforcement authorities in their Member States. Rules foreseeing admissibility of evidence collected by the EPPO are also proposed.
- The Commission's proposal foresees that for the purpose of the judicial review of its acts, the EPPO will be considered the same as a national authority. The Court of Justice of the EU remains competent to give preliminary rulings under Article 267 TFEU.
- The EPPO would be set up as an independent office, but would share certain operational, administrative and management functions with Eurojust. It would, as foreseen in the proposal, interact with other existing Union bodies (OLAF and Europol) as well as with national law enforcement and prosecution authorities. National authorities would in principle be bound by instructions from the EPPO within the limits of the EPPO competence.

In the light of the Commission's proposal, the Presidency invites delegations to provide a preliminary general assessment on the aspects they see as the most important in this proposal, and to hold a first exchange of views on the following *specific questions*:

1. *Does the proposed structure of the EPPO constitute appropriate grounds for efficient functioning of this organisation?*
2. *Should the EPPO have an exclusive competence as regards the investigation and prosecution of all offences falling under its competence?*