



Council of the  
European Union

Brussels, 18 March 2015  
(OR. en)

7070/15

LIMITE

EPPO 21  
EUROJUST 63  
CATS 39  
FIN 198  
COPEN 75  
GAF 6

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

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**NOTE**

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| From:           | Presidency  |
| To:             | Delegations   |
| No. prev. doc.: | 6319/15 EPPO 19 EUROJUST 49 CATS 34 FIN 127 COPEN 55 GAF 5                                |
| Subject:        | Proposal for a Regulation on the establishment of the European Public Prosecutor's Office |

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Following COPEN of 26-27 February 2015 and the discussions of Ministers in Council on 13 March 2015, the Presidency proposes a redraft of the first 29 Articles of the Regulation, as presented in the text in Annex. Changes in relation to the Italian Presidency text from December 2014<sup>1</sup> are indicated in underlined or ~~struckthrough~~. The text in Annex does not include the new draft Articles 7-12, since these provisions will be examined in another context.

The Presidency invites delegations to primarily examine Articles 20 - 26b in view of the COPEN meeting of 25-26 March 2014. Other parts of the text will be examined only if there is time available.

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<sup>1</sup> Doc 16993/14 EPPO 78 EUROJUST 221 CATS 209 FIN 1006 COPEN 318 GAF 68.

Draft

**COUNCIL REGULATION**

**on the establishment of the European Public Prosecutor's Office**

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**CHAPTER I**  
**SUBJECT MATTER AND DEFINITIONS**

*Article 1*  
**Subject matter**

This Regulation establishes the European Public Prosecutor's Office and sets out rules concerning its functioning.

*Article 2*  
**Definitions<sup>2</sup>**

For the purposes of this Regulation, the following definitions apply:

- a) 'person' means any natural or legal person;
- ~~b) 'criminal offences affecting the financial interests of the Union' means the offences provided for by Directive 2014/xx/EU, as implemented by national law;~~

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<sup>2</sup> The definitions will need to be adapted to be consistent with the definitions that will finally be included in the PIF-Directive. The provision in b) will be reformulated in order to be consistent with the final wording of Article 17. The issue of uniformity with EU law needs to be examined further.

- c) 'financial interests of the Union' means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them<sup>3</sup>;
- d) 'administrative personal data' means all personal data processed by the European Public Prosecutor's Office except for operational personal data;
- e) 'operational personal data' means all [case-related] personal data processed by the European Public Prosecutor's Office to meet the purposes laid down in Article [37];
- f) 'staff of the European Public Prosecutor's Office' means personnel which supports the College, the Permanent Chambers, the European Chief Prosecutor, the European Prosecutors and the European Delegated Prosecutors in the day-to-day activities in the executions of the tasks of this Office under this Regulation;
- g) 'handling European Delegated Prosecutor' means the European Delegated Prosecutor responsible for the investigations and prosecutions, which they have initiated, which have been allocated to them or which they have taken over using their right of evocation;
- h) 'assisting European Delegated Prosecutor' means the European Delegated Prosecutor located in the Member State where an investigation or other measure shall be carried out.

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<sup>3</sup> To be aligned with the final definition of the "financial interests of the Union" in the PIF Directive.

## CHAPTER II

# Establishment, tasks and basic principles of the European Public Prosecutor's Office

### *Article 3*

#### **Establishment**

1. The European Public Prosecutor's Office is established as a body of the Union.
2. The European Public Prosecutor's Office shall have legal personality.
3. The European Public Prosecutor's Office shall cooperate with Eurojust and rely on its support in accordance with Article [57].

### *Article 4*

#### **Tasks**

1. The task of the European Public Prosecutor's Office shall be to combat<sup>4</sup> criminal offences affecting the financial interests of the Union, which are provided for in Directive 2014/xx/EU.
2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in the criminal offences referred to in paragraph 1. In that respect the European Public Prosecutor's Office shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States in respect of the offences referred to in paragraph 1, until the case has been finally disposed of<sup>5</sup>.

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<sup>4</sup> A few Member State would replace this term, for example with "prosecute".

<sup>5</sup> Some delegations has suggested that this provision should be modified in order to clarify what functions the Office will have after the Court proceedings, in particular as regards the execution of a judgment. A recital highlighting the necessity for each Member State to foresee the function of a prosecutor with the tasks described in this Regulation shall be elaborated.

## *Article 5*

### **Basic principles of the activities**

1. The European Public Prosecutor's Office shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union.
2. The European Public Prosecutor's Office shall be bound by the principles of rule of law and proportionality in all its activities, and guided by the principle of legality.
3. The investigations and prosecutions on behalf of the European Public Prosecutor's Office shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is responsible for the investigations and prosecutions in accordance with Article 12(1). Where a matter is governed by national law and this Regulation, the latter shall prevail.
4. The European Public Prosecutor's Office shall have competence to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in the criminal offences against the Union's financial interests as determined in Articles 17 and 18 and exercise this competence in accordance with Article 19 in this Regulation.
5. The European Public Prosecutor's Office shall conduct its investigations in an impartial manner and seek all relevant evidence<sup>6</sup>, whether inculpatory or exculpatory.
6. The European Public Prosecutor's Office shall open and conduct investigations without undue delay.
7. The competent national authorities shall actively assist and support the investigations and prosecutions of the European Public Prosecutor's Office at its request and shall refrain from any action, policy or procedure which may hamper or unduly delay their progress.

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<sup>6</sup> Some delegations wish that this and other provisions would clarify the role of investigative judges in cases handled by the EPPO.

*Article 6*

**Independence and accountability**

1. The European Public Prosecutor's Office and all its staff shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors as well as the staff of the European Public Prosecutor's Office shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the office, any Member State or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States and the Union institutions, bodies, offices or agencies shall respect the independence of the European Public Prosecutor's Office and shall not seek to influence it in the exercise of its tasks.
2. The European Public Prosecutor's Office shall be accountable to the European Parliament, the Council and the European Commission for its general activities, and shall issue annual reports in accordance with Article 6a.

*Article 6a<sup>7</sup>*

**Reporting**

1. Every year the European Public Prosecutor's Office shall draw up and issue an Annual Report in the official languages of the Union institutions on its general activities. It shall transmit the report to the European Parliament and to national parliaments, as well as to the Council and the Commission.

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<sup>7</sup> A few delegations are of the opinion that paragraphs 2 and 3 of this provision need clarification. In particular, a few delegations have requested that the notion of "general activities" should be clarified. To that effect, a recital may be added in which it will be clarified that the report should as a minimum contain all relevant statistical data on the work of the Office.

2. The European Chief Prosecutor shall appear once a year before the European Parliament and the Council to give account of the general activities of the European Public Prosecutor's Office, without prejudice to the Office's obligation of discretion and confidentiality as regards individual cases and personal data.
3. National Parliaments may invite the European Chief Prosecutor to participate in an exchange of views in relation to the general activities of the European Public Prosecutor's Office.

# CHAPTER III

## STATUS, STRUCTURE AND ORGANISATION OF EPPO

### SECTION 1

#### STATUS AND STRUCTURE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

[...] <sup>8</sup>

### SECTION 2

#### APPOINTMENT AND DISMISSAL OF THE MEMBERS OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

*Article 13* <sup>9</sup>

#### **Appointment and dismissal of the European Chief Prosecutor ~~and of the Deputy European Chief Prosecutors~~**

1. The European Parliament and the Council shall appoint by common accord the European Chief Prosecutor for a term of nine years, which shall not be renewable. The Council shall act by simple majority.

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<sup>8</sup> See DS 1169/15.

<sup>9</sup> A number of delegations would prefer that the Chief Prosecutor is chosen from among the Members of the College.

2. The European Chief Prosecutor shall be selected from among candidates
  - a) who are active members of the public prosecution service or judiciary of the Member States ;
  - b) whose independence is beyond doubt;
  - c) who possess the qualifications required for appointment, in their respective countries, to the highest prosecutorial or judicial offices and have relevant practical experience of national legal systems and of international judicial cooperation in criminal matters, or have served as European Prosecutors, and
  - d) who have sufficient managerial experience and qualifications for the position.
3. The selection shall be based on an open call for candidates, to be published in the Official Journal of the European Union, following which a Selection panel shall draw up a shortlist of qualified candidates to be submitted to the European Parliament and the Council. The panel shall comprise [...] persons chosen from among former members of the Court of Justice and the Court of Auditors, former national members of Eurojust, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall ~~adopt a decision~~ establishing the panel's operating rules and adopt a decision appointing its members.<sup>10</sup>
4. The Court of Justice of the European Union may, on application by the European Parliament, the Council or the Commission, dismiss the European Chief Prosecutor [or a Deputy European Chief Prosecutor] if it finds that he or she no longer fulfils the conditions required for the performance of his or her duties or that he or she is guilty of serious misconduct.
5. If the European Chief Prosecutor, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the position shall immediately be filled in accordance with the procedure set out in paragraphs 1 – 3 above.

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<sup>10</sup> The composition of the Selection panel remains to be determined. A Recital will be added to duly justify the conferral of implementing powers on the Council, in accordance with Article 291(2) TFEU.

*Article 13a*

**Appointment and dismissal of the Deputy European Chief Prosecutors**

1. The College shall select at least three European Prosecutors appointed in accordance with Article 14 to serve as Deputy European Chief Prosecutors for a renewable mandate period of three years. The selection shall follow in accordance with the internal rules of procedure, taking into account the interest of ensuring a geographical balance between the Deputies. The Deputy European Chief Prosecutors will retain their status of European Prosecutors.
2. If a European Prosecutor selected to act as Deputy European Chief Prosecutor no longer fulfils the conditions required for the performance of his or her duties, the College may decide that he or she shall not serve as Deputy European Chief Prosecutor. Article 14(5) will apply to Deputy European Chief Prosecutors in their capacity of European Prosecutors.
3. If a Deputy European Chief Prosecutor resigns, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the position shall, when the College finds it necessary necessary, immediately be filled in accordance with the procedure set out in paragraph 1.

*Article 14<sup>11</sup>*

**Appointment and dismissal of the European Prosecutors**

1. Each Member State shall nominate three candidates for the position as European Prosecutor from among candidates which:
  - a) are active members of the public prosecution service or judiciary of the Member States ;
  - b) whose independence is beyond doubt, and
  - c) who possess the qualifications required for appointment, in their respective countries, to high prosecutorial or judicial office and have relevant practical experience of national legal systems and of international judicial cooperation in criminal matters.

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<sup>11</sup> Some delegations are of the opinion that it would be enough for each Member State to nominate one candidate for the position as European Prosecutor.

2. The Council shall, after having heard the Selection panel<sup>12</sup>, select and appoint one of the candidates to be the European Prosecutor of the Member State in question. If the Selection Panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council.
3. The European Prosecutors shall be selected and appointed for a non- renewable term of [nine] years by the Council, acting by simple majority.
4. Every [three] years there shall be a partial replacement of a third of the European Prosecutors. The Council, acting by simple majority, shall adopt transitional rules<sup>13</sup> for the appointment of European Prosecutors for and during their first mandate period.
5. The Court of Justice of the European Union may, on application by the European Parliament, the Council or the Commission, dismiss a European Prosecutor if it finds that he or she no longer fulfils the conditions required for the performance of his or her duties or that he or she is guilty of serious misconduct.
6. If a European Prosecutor resigns, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the position shall immediately be filled in accordance with the procedure set out in paragraphs 1 and 2 above.

#### *Article 15*

#### **Appointment and dismissal of the European Delegated Prosecutors**

1. The College shall, upon proposal by the European Chief Prosecutor, appoint the European Delegated Prosecutors nominated by the Member States. The College may reject the nominated person if he/she does not fulfil the criteria referred to in paragraph 2. The European Delegated Prosecutors shall be appointed for a term of five years, which shall be renewable.

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<sup>12</sup> The composition of the panel remains to be determined.

<sup>13</sup> A Recital will be added to duly justify the conferral of implementing powers on the Council, in accordance with Article 291(2) TFEU.

2. The European Delegated Prosecutors shall be active members of the public prosecution service or the judiciary of the Member States which nominated them. Their independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national legal system. Member States shall appoint a European Delegated Prosecutor as a Prosecutor under national law if at the time of his or her appointment as a European Delegated Prosecutor, he or she did not have this status already.
3. The appointment of European Delegated Prosecutors shall take effect upon the decision of the College.
4. The College shall dismiss a European Delegated Prosecutor if it finds that he or she no longer fulfils the requirements set out in paragraph 2 or the criteria applicable to the performance of their duties<sup>14</sup>, or that he or she is guilty of serious misconduct.
5. If a Member State decides to dismiss or take disciplinary action against a national prosecutor who has been appointed as European Delegated Prosecutor, it shall consult the European Chief Prosecutor before taking action. A Member State may not dismiss or take disciplinary action against a European Delegated Prosecutor for reasons connected with his activities under this Regulation<sup>15</sup>.
6. If a European Delegated Prosecutor resigns, if his/her services are no longer necessary to fulfil the duties of the Office, if he/she is dismissed or leaves his/her position for any other reason, the relevant Member State shall immediately inform the Central Office and, where necessary, nominate another prosecutor to be appointed as the new European Delegated Prosecutor<sup>16</sup> in accordance with paragraph 1.

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<sup>14</sup> Some delegations have suggested that additional criteria should be added here.

<sup>15</sup> Some delegations have noted that a differentiation between the respective roles of an EDP and of a national prosecutor may need to be spelled out in this context. A number of delegations have also underlined their view that the European Delegated Prosecutors will remain in the national prosecution structure and that national rules on disciplinary actions and other matters should apply to them. One delegation has noted that it must be clarified what the notion "connected with his activities" actually means.

<sup>16</sup> Some Member States have questioned whether the words "where necessary" are sufficient in order to clarify that Member States do not always need to replace EDP's that leave their position.

### SECTION 3

#### INTERNAL RULES OF PROCEDURE

##### *Article 16*

##### **Internal rules of Procedure of the European Public Prosecutor's Office**

1. The internal Rules of Procedure shall govern the organisation of the work of the Office<sup>17</sup>.
2. A proposal for the internal Rules of Procedure of the European Public Prosecutor's Office shall be prepared by the European Chief Prosecutor and adopted by the College by two thirds majority without delay once the Office has been set up.

### SECTION 4

#### COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

##### *Article 17*

##### **Criminal offences within the competence of the European Public Prosecutor's Office**

The European Public Prosecutor's Office shall have competence in respect of the criminal offences affecting the financial interests of the Union, which are provided for in Directive 2014/xx/EU ~~and as implemented by national law~~<sup>18</sup>. The European Public Prosecutor's Office shall exercise this competence on the basis of the applicable national law implementing this Directive.

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<sup>17</sup> It has been agreed that the Regulation will include very detailed rules on allocation of cases.  
<sup>18</sup> The competence of the EPPO as determined by this Article raises complex legal issues that will need to be considered further. One of the open issues in this Article is whether a dynamic reference (the standard solution ensuring legal certainty) or a static reference to the substantive law should be chosen. Some delegations would prefer to see the offences defined in this Regulation directly.

*Article 18*<sup>19</sup>

**Ancillary competence**

1. Where an offence constituting a criminal offence referred to in Article 17 is based on a set of facts which are identical or inextricably linked to a set of facts constituting, in whole or in part under the law of the Member State concerned, a criminal offence other than those referred to in Article 17, the European Public Prosecutor's Office shall also be competent for those other criminal offences, under the condition that the offence referred to in Article 17 is preponderant. Where the offence referred to in Article 17 is not preponderant, the Member State that is competent for the other offence shall also be competent for the offence referred to in Article 17<sup>20</sup>.
2. When assessing whether two set of facts are inextricably linked within the meaning of paragraph 1, account shall be taken as to whether one of the relevant offences has been instrumental in committing the other offence or to whether one offence has been committed with a view to ensuring impunity<sup>21</sup>.
3. An offence in accordance with Article 17 shall be considered to be preponderant:
  - a) if the damage caused or likely to be caused to the Union exceeds the damage caused or likely to be caused by the same act to the Member State or a third party, or<sup>22</sup>,
  - b) in case the same act, under the law of the Member State, constitutes a different type of offence: if the sanction that may be imposed in respect of the offence in accordance with Article 17 is<sup>23</sup> more severe than the sanction that may be imposed in respect of the other type of offence.

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<sup>19</sup> Many delegations continue to question whether the legal basis in Article 86 TFEU covers this Article.

<sup>20</sup> The need for this provision has been questioned by some. Others have noted that it must be seen in the light of the right of evocation as foreseen in Article 21a.

<sup>21</sup> A few delegations have suggested that this provision should rather be a recital. Others have suggested that the text should be given more detail.

<sup>22</sup> Many delegations have pointed out that it would be difficult to measure and compare the financial damage, or that it would at least be difficult to know what the damage is at an early stage of investigation. The assessment of the damage may also change during an investigation. It has been suggested that this rule should be seen as a hierarchical order of criteria. An explanatory recital could be considered to address these concerns.

<sup>23</sup> The Commission and some delegations would add the words "equal or" here.

4. The European Public Prosecutor's Office and the national prosecution authorities shall consult each other in order to determine which authority should exercise its competence pursuant to paragraph 1. Where appropriate to facilitate this choice, Eurojust may be associated in accordance with Article [57].
5. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the exercise of competence pursuant to this Article, the national authorities competent to decide on the attribution of competences concerning prosecution at national level<sup>24</sup> shall decide who shall exercise the ancillary competence.

#### *Article 19*

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

1. The European Public Prosecutor's Office has priority competence to investigate and prosecute any criminal offence referred to in Articles 17 and, where applicable, Article 18, where such offence<sup>25 26</sup>
  - a) was committed in whole or in part within the territory of one or several Member States, or
  - b) was committed by a national of a Member State, or
  - c) when committed outside of these territories by a person who was subject to the Staff Regulations or Conditions of Employment of Other Servants, at the time of the offence, provided that a Member State, according to its law, has jurisdiction for such offences when committed outside its territory.

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<sup>24</sup> Some delegations would prefer to refer to the College or to the Court of Justice for these decisions (linked to Article 33 on judicial review).

<sup>25</sup> This jurisdiction provision should at term be in principle identical with the corresponding jurisdiction provision in the PIF-Directive. Some delegations would introduce a reference to "participating Member States" in this and other provisions.

<sup>26</sup> One delegation has requested that non-serious offences for which intent is presumed according to national law should not be covered by the competence of the Office.

2. The European Public Prosecutor's Office shall exercise its competence by initiating an investigation in accordance with Article 21 unless the Office has become aware that national authorities have already opened an investigation in respect of the same offence. If the European Public Prosecutor's Office decides to exercise its competence, the national authorities shall not exercise an own competence in respect of the same offence. If the national authorities have already started a criminal investigation in respect of the same offence, the European Public Prosecutor's Office may take over the investigation initiated by the national authority by exercising its right of evocation in accordance with Article 21a.

## CHAPTER IV RULES OF PROCEDURE ON INVESTIGATIONS, PROSECUTIONS AND TRIAL PROCEEDINGS

### SECTION 1 CONDUCT OF INVESTIGATIONS

#### *Article 20*

#### **Reporting, registration and verification of information**

1. The institutions, bodies, offices and agencies of the Union, and, ~~in accordance with applicable national law,~~ the competent authorities of the Member States competent in accordance with applicable national law shall inform<sup>27</sup> the European Public Prosecutor's Office without delay of any conduct which might constitute an offence within its competence.

Where the conduct caused or is likely to cause damage to the Union's financial interest of less than EUR 10 000, and the national authorities do not have reasons to assume that the Office will exercise its right of evocation in accordance with Article 21a for the reason that the case has ~~does not have~~ repercussions at Union level which require an investigation to be conducted by the Office or has been opened following suspicions that an offence has been committed by officials and other servants of the European Union or members of the institutions, the

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<sup>27</sup> Some delegations have requested that the procedures for providing this information should be described in detail, in particular with a view of ensuring an uncomplicated reporting process.

information obligation may be fulfilled through a summary report [every ~~three~~ months] of conduct which might constitute such offences.<sup>28</sup> Where the conduct has caused or is likely to cause damage to the Union's financial interest which does not exceed EUR 1 000, the information obligation is not mandatory except if the case has repercussions at Union level which require an investigation to be conducted by the Office or if it has been opened following suspicions that an offence has been committed by officials or other servants of the European Union or members of the institutions.

The report shall include, as a minimum, a short description, including place and time, of the offence, available information about victims and perpetrators, and an assessment of the damages caused or likely to be caused. The report may be presented in the form of an automatically generated information from a Member State's criminal case management system<sup>29</sup>.

2. The European Public Prosecutor's Office collects and may receive any necessary information on conduct which might constitute an offence within its competence.
3. Any information brought to the attention of the European Public Prosecutor's Office shall be registered and verified by the European Public Prosecutor's Office in accordance with the internal rules of procedure. The verification shall aim at assessing whether there are grounds for the European Public Prosecutor's Office to initiate an investigation under this Regulation.
4. Where, upon verification, the European Prosecutor's Office decides that there is no ground to initiate an investigation, the reasons shall be noted in the Case Management System. It shall inform the national authority, the Union institution, body, office or agency, and, where appropriate<sup>30</sup>, the persons who provided the information, thereof.

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<sup>28</sup> One delegation has requested that non-serious offences for which intent is presumed according to national law should not be covered by the information obligation.

<sup>29</sup> A Recital with the following wording or similar will be considered: "Member States should present the report in the form of automatically generated information from the national criminal case management system, but may use other means for reporting if they still do not have such a system."

<sup>30</sup> A few delegations would wish to delete "where appropriate", and a few others would prefer to introduce the words "at their request" as regards persons who provided information.

*Article 21*

**Initiation of investigations and allocation of competences within the European Public Prosecutor's Office.**

1. Where, in accordance with this Regulation and the applicable national law, there are reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed, a European Delegated Prosecutor in a Member State which according to its national law has jurisdiction in the case, or in cases referred to in Article 9(3)(a) a Permanent Chamber, shall initiate an investigation and note this in the Case Management System<sup>31</sup>. ~~If more than one Member State has jurisdiction, the competence shall in principle be exercised by the European Prosecutor or a European Delegated Prosecutor in from the Member State where the focus of the criminal activity is.~~
2. Upon receipt of ~~such~~ information of initiation of an investigation in accordance with paragraph 1 of this Article, the Central Office shall verify whether an investigation has not already been initiated by the European Public Prosecutor's Office. If an investigation in respect of the same offence had not already been initiated, the competent Permanent Chamber may, taking into account the criteria set out in paragraph 3, ~~allocate~~<sup>assign</sup> the case to a European Delegated Prosecutor ~~with origin~~ in another Member State, which according to its law ~~would have~~<sup>has</sup> jurisdiction in the case. If an investigation in respect of the same offence has already been initiated by the European Public Prosecutor's Office, the competent Permanent Chamber shall, after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned and taking into account the criteria set out in paragraph 3 of this Article, allocate the case in accordance with Article 12(1).

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<sup>31</sup> It is the understanding of the Presidency that the notification in the Case Management System will cover the necessary information from the European Delegated Prosecutor to the Central Office.

3. A case shall in principle be handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competence of the Office have been committed, the Member State where the bulk of the offences has been committed. When allocating a case in accordance with paragraph 2 of this Article, the Permanent Chamber may deviate from that principle on sufficiently justified grounds, taking into account in particular the following criteria, in order of priority:
  - (a) the place where the accused person has his/her habitual residence;
  - (b) the nationality of the accused person;
  - (c) the place where the direct victim has its seat.
4. In the course of an investigation and until a decision to prosecute in accordance with Article 27 is taken, the Permanent Chamber ~~directing monitoring~~ a case concerning more than one Member State may, after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to reallocate a case to a European Delegated Prosecutor in another Member State if such reallocation is in the interest of the efficiency of investigations and in accordance with the general criteria for the choice of ~~competent handling~~ European Delegated Prosecutor set out in paragraph 3 in this Article.

#### *Article 21a*

#### **Right of evocation and transfer of proceedings to the European Public Prosecutor's Office**

1. When a judicial authority or a law enforcement authority of a Member State exercises a competence in respect of an offence where the European Public Prosecutor's Office could exercise its right of evocation in accordance with paragraph 3 of this Article~~referred to in Article 17 or 18~~, it shall without delay inform the European Public Prosecutor's Office so that the latter may decide whether to exercise its right of evocation. The European Public Prosecutor's Office shall take its decision as soon as possible but no later than [14] days after having received the information from the national authority, unless the European Chief Prosecutor in a specific case takes a reasoned decision to prolong the time frame of [14 days] with a maximum of [14 days]. During this timeperiod the national authority 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 Member States' judicial and law enforcement authorities are not required to inform the European Public Prosecutor's Office of cases where the damage caused or likely caused by the alleged offender does not exceed 10 000 Euros unless they have reasons to assume that the Office would exercise its right of evocation in accordance with paragraph 2 and 3 of this Article.

2. If the European Public Prosecutor's Office ~~is informed in accordance with paragraph 1 or~~ becomes otherwise aware of the fact that an investigation in respect of the same case is already undertaken by the judicial or law enforcement authorities of a Member State, it shall inform these authorities without delay, and shall take a decision on whether to exercise its competence within the time periods of the previous paragraph.
- 2a. The European Public Prosecutor's Office shall, where appropriate, consult with ~~these judicial or law enforcement authorities of the Member State concerned before and shall thereafter~~ deciding<sup>32</sup> whether to ~~open its own investigation by exercising~~ its right of evocation. Where the European Public Prosecutor's Office exercises its right of evocation competence, the competent authorities of the Member States shall transfer the proceedings to the Office and refrain from carrying out further acts of investigation in respect of the same offence except when acting on behalf of the European Public Prosecutor's Office in accordance with Article 23.
3. Where a criminal offence 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 shall refrain from exercising its right of evocation competence, unless
  - (a) a case has repercussions at Union level<sup>33</sup> which require an investigation to be conducted by the Office, or

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<sup>32</sup> Some Member States would indicate certain conditions under which such a decision could be taken. It has also been suggested that it should be indicated who within the European Public Prosecutor's Office should be entitled to take such decisions. Others have strongly opposed any condition to the right of evocation; some have suggested that the national competence should only be exercised when EPPO has taken a formal decision not to use its own competence.

<sup>33</sup> Some delegations request that a definition of this concept shall be introduced.

(b) a case has been opened following suspicions that an offence has been committed by officials and other servants of the European Union, or members of the Institutions<sup>34</sup>.

The Office may consult relevant national authorities or Union bodies in view of establishing whether the criteria of the cases defined in (a) and (b) in this provision are fulfilled.

4. The European Public Prosecutor's Office may exercise the right of evocation at any time during the investigation. Where the Office, after having been duly informed by the national authorities in accordance with paragraph 1 in this Article, has refrained from exercising its right of evocation, the competent judicial or law enforcement authority 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.
5. In case of an ancillary competence in accordance with Article 18, the European Public Prosecutor's Office ~~can~~may exercise its right of evocation in accordance with the conditions for the exercise of the said competence set out in the said Article.
6. The right of evocation in accordance with this Article may be exercised by a European Delegated Prosecutor from any Member State, whose judicial or law enforcement authorities have initiated an own investigation in respect of an offence in accordance with Articles 17 or 18. Article 21(2), (3) and (4) shall ~~will~~ apply when the right of evocation is exercised. When taking a decision to allocate ~~sign~~ the case to a European Delegated Prosecutor from another Member State, the Permanent Chamber shall take due account of the current state of the investigations. Where a European Delegated Prosecutor, who has received the information in accordance with paragraph 1 of this Article considers not to exercise the right of evocation, he/she shall inform the ~~competent~~ European Prosecutor of his/her Member State and await his/her instructions.

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<sup>34</sup> A few delegations have questioned whether these cases always need to be handled by the Office. Many delegations would like to see a definition or explanation of the concept of "repercussions at Union level" included in the text.

*Article 22*<sup>35</sup>

**Urgent measures**

The competent national authorities shall take any urgent measures necessary to ensure effective investigation and prosecution with regard to an offence within the competence of the European Public Prosecutor's Office. If the European Public Prosecutor's Office decides to initiate the investigation or to exercise the right of evocation, it shall confirm, if possible within [48 hours] from the initiation of the investigations, the measures taken by the national authorities, even if such measures have been undertaken and executed under rules other than those of this Regulation.

*Article 23*

**Conducting the investigation**<sup>36</sup>

1. The handling European Delegated Prosecutor ~~handling the case in accordance with Article 12(1)~~<sup>21</sup> may, in accordance with national law, either undertake the ~~investigation~~ measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. These authorities shall, in accordance with national law, ensure that all instructions from the European Public Prosecutor's Office, coming through the ~~competent~~ handling European Delegated Prosecutor, are followed and undertake the ~~investigation~~ measures ~~allocated~~<sup>signed</sup> to them. The handling European Delegated Prosecutor shall ~~regularly~~ report ~~through the competent European Prosecutor~~ to the Permanent Chamber on ~~significant~~ developments in the case, in accordance with the rules laid down in the Internal Rules of Procedure.
2. In cross-border cases, where ~~investigation~~ measures need to be executed in another Member State, the handling European Delegated Prosecutor ~~handling the case in accordance with Article 21~~ shall act in cooperation with the European Delegated Prosecutor where the ~~investigation~~ measure needs to be carried out in accordance with Article 26a.

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<sup>35</sup> The added value of the provision has been questioned by a few delegations.

<sup>36</sup> A general rule on the responsibility of the EDP's as regards the conduct of investigations can be found in Art 12(1). Some delegations have requested that chain of command, according to which EP's always are those instructing EDP's from their own state shall be mentioned explicitly in this provision.

3. At any time during the investigations, the competent national authorities shall take urgent measures necessary to ensure effective investigations even where not specifically acting under an instruction given by the handling competent European Delegated Prosecutor. The national authorities shall without delay inform the European Delegated Prosecutor of the urgent measures taken.
4. ~~In the course of an investigation and until a decision to prosecute in accordance with Article 27 is taken, the Permanent Chamber monitoring a case concerning more than one Member State may, after having consulted the European Prosecutor and the European Delegated Prosecutor concerned, decide to reallocate a case to a European Delegated Prosecutor in another Member States, if such reallocation is in the interest of the efficiency of investigations and in accordance with the criteria for jurisdiction set out in Article 21(3).~~
- 4a. Should the European Delegated Prosecutor fail to follow the instructions of the Permanent Chamber or the European Prosecutor, the European Prosecutor may propose to the Permanent Chamber to reallocate the case to another European Delegated Prosecutor.
5. The competent European Prosecutor may - with the approval of that Permanent Chamber - in exceptional cases take the decision to conduct the investigation himself/herself, if this appears necessary in the interest of the efficiency of the investigations or prosecution on the grounds of one or more of the following criteria<sup>37</sup>:
  - a) the seriousness of the offence, in particular in view of its possible repercussions on Union level;
  - b) when the investigation concerns Members of the institutions of the European Union;
  - c) when the handling competent European Delegated Prosecutor in the Member State cannot- perform the investigation or prosecution.

When a European Prosecutor decides to conduct the investigation himself/herself, he/she will have all the powers of a European Delegated Prosecutor in accordance with this Regulation and national law.

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<sup>37</sup> A number of delegations oppose that a European Prosecutor should have any right to take over the conduct of investigations, and argue that it is sufficient that they have the right to supervise and instruct. Some have also suggested that the provision should be more flexible. Many delegations have criticised the wording of the criteria in this provision and asked for better clarity. The Presidency considers that the whole provision will be developed further in detail, in particular as regards applicable national law and judicial review.

The competent national authorities and the European Delegated Prosecutors concerned by the case shall be informed without delay of any decision taken under this paragraph.

- Investigations carried out under the authority of the European Public Prosecutor's Office shall be protected by the rules concerning professional secrecy under the applicable Union legislation. Authorities participating in the investigations of the European Public Prosecutor's Office are also bound to respect professional secrecy as provided under the applicable national law.

*Article 24*

**Lifting privileges or immunities**

- Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under national law, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor<sup>38</sup> shall make a reasoned written request for its lifting in accordance with the procedures laid down by that national law.
- Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under the law of the European Union, in particular the Protocol on the privileges and immunities of the European Union, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting in accordance with the procedures laid down by Union law.

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<sup>38</sup> A number of delegations have suggested that this request should rather be made by European Delegated Prosecutors.

**SECTION 2**  
**INVESTIGATION AND OTHER MEASURES**

*Article 25*

**The European Public Prosecutor's Office's authority to investigate**

1. The European Delegated Prosecutor handling the case shall be entitled to order the same types of ~~investigative~~ measures in his/her Member State which are available to investigators/prosecutors according to national law in similar national cases. In addition to the conditions set out in national law, such measures may only be ordered where there are reasonable grounds to believe that the specific ~~investigation~~ measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective.
- ~~2. Before ordering any investigation measure referred to in Article 26, the European Delegated Prosecutor handling the case shall request the authorisation of the competent national court.~~
3. Where the European Delegated Prosecutor handling the case, or a competent authority acting on his/her instructions in accordance with Article 23(1), undertakes ~~investigative~~ measures, the law of the Member State in which the measures are undertaken shall apply.

*Article 26*

**Investigation and other measures<sup>39</sup>**

Member States shall ensure, at least in cases where the offence subject to the investigation would cause or is likely to cause a damage of 100,000 EUR or more,~~Member States shall ensure that the~~ following ~~investigative~~ measures are also available under their laws to the European Public Prosecutor's Office:

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<sup>39</sup> There are many diverging views on the content of this provision. This text is an attempt by the Presidency to reconcile as many as possible of the views expressed by delegations. A recital similar to recital 10 in the EIO Directive will give an explanation of the term "available" in the first paragraph.

- a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
- b) obtain the production of any relevant object or document, or of stored computer data, including traffic data and banking account data, encrypted or decrypted, either in original or in some other specified form;
- c) freeze instrumentalities or proceeds of crime, including freezing of assets, which are expected to be subject to confiscation by the trial court ~~and there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation;~~
- d) freeze future financial transactions, by ordering any financial or credit institution to refrain from carrying out any financial transaction involving any specified account or accounts held or controlled by the suspected or accused person;
- e) intercept electronic communications to and from the suspected person, on any electronic communication connection that the suspected or accused person is using.

*Article 26a*<sup>40</sup>

**Cross-border investigations**

1. The European Delegated Prosecutors shall assist each other in cross-border cases. Where an ~~investigation~~ measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor ~~handling the case~~, the latter (~~“handling European Delegated Prosecutor”~~) shall assign the measure to ~~notify~~ the European Delegated Prosecutor located in the Member State where that ~~investigation~~ measure needs to be carried out.
2. The handling European Delegated Prosecutor may assign ~~notify~~ any ~~investigation~~ measure in his or her competence in accordance with this Regulation or with national law of the Member State where he or she is located. The adoption, ~~and justification and judicial authorisation of~~ such measures shall be governed by the law of the Member States where the adoption, justification and/or judicial authorisation takes place. ~~of the handling European Delegated~~

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<sup>40</sup> There are many diverging views on the content of this provision. This text is an attempt by the Presidency to reconcile as many as possible of the views expressed by delegations.

~~Prosecutor.~~ The enforcement of such measures, including conditions, modalities and procedures for taking such measures, shall be governed by the law of the Member State of the assisting European Delegated Prosecutor.

- ~~3. Where this Regulation or the law of the Member State of the handling European Delegated Prosecutor requires a judicial authorisation for the measure in question, that European Delegated Prosecutor shall obtain the authorisation according to national law and/or in accordance with special procedural requirements provided for by the law of the Member State of the handling European Delegated Prosecutor.~~
4. The assignment ~~notification~~ shall set out, in particular, a description of the ~~investigative~~ measures(s) needed, ~~including the evidence to be obtained~~, and where necessary any specific formalities that have to be complied with, evidence to be obtained, a description of the facts and the legal qualification of the criminal act which is the subject of the investigation. The assignment~~request~~ may call for the measure to be undertaken within a given time.
5. Where the law of the Member State of the assisting European Delegated Prosecutor requires judicial authorisation for a particular ~~investigative~~ measure, the said European Delegated Prosecutor shall seek such authorisation, unless it can be established, through prior consultation between the European Delegated Prosecutors involved, that such authorisation was already obtained in the Member State of the handling European Delegated Prosecutor. ~~The authorisation may only be refused if the measures are contrary to fundamental principles of law of the assisting State.~~
6. The assisting European Delegated Prosecutor shall undertake the assigned ~~notified~~ measure, or another ~~investigative~~ measure that would achieve the same result, or ask the competent national authority to do so.

7. Where the assisting European Delegated Prosecutor considers that:
- a) the assignment notification is incomplete or contains a manifest relevant error,
  - b) the measure cannot be undertaken within the time limit set out in the assignment notification for justified and objective reasons,
  - c) a less intrusive measure would achieve the same results as the measure assigned~~requested~~, or
  - d) the ~~notified~~assigned measure does not exist or would not be available in a similar domestic case under the law of his or her Member State,
- he or she shall consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally. This consultation shall take no longer than 5 working days.
8. If the European Delegated Prosecutors cannot resolve the matter and the assignment~~request~~ is maintained, the matter shall be referred to the competent Permanent Chamber. The same applies where the ~~notified~~assigned measure is not undertaken within the time limit set out in the assignment~~notification~~ or within a reasonable time.
9. The competent Permanent Chamber shall decide without undue delay whether and by when the measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision through the competent European Prosecutor.

*Article 26b*

**Pre-trial arrest and cross-border surrender**

1. The European Public Prosecutor's Office may request from the competent judicial authority the arrest or pre-trial detention of the suspected or accused person in accordance with national law.

2. Where the arrest and surrender of a person who is not present in the Member State in which the European Delegated Prosecutor handling the case is located, is necessary, the latter shall request, for the purpose of conducting a criminal prosecution, the competent authority of that Member State to issue a European Arrest Warrant in accordance with Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

### SECTION 3

#### TERMINATION OF THE INVESTIGATION AND POWERS OF PROSECUTION

##### *Article 27<sup>41</sup>*

##### **Prosecution before national courts**

- ~~1. The European Delegated Prosecutors shall have the same powers as national public prosecutors in respect of investigations, prosecution and bringing a case to judgment in their Member States of origin, in particular the power to present trial pleas, participate in evidence taking and exercise the available remedies.~~
2. When the ~~competent~~handling European Delegated Prosecutor considers the investigation to be completed, he/she shall submit a summary of the case with, where applicable, a draft indictment and the list of evidence<sup>42</sup> to the competent European Prosecutor and Permanent Chamber for review. Where it does not instruct to dismiss the case pursuant to Article 28, the Permanent Chamber, acting through the competent European Prosecutor, shall instruct the European Delegated Prosecutor to bring the case before the competent national court with an indictment, or refer it back for further investigations. If the European Delegated Prosecutor has not received any instruction in this sense within [x working days], it may decide to bring the case to the competent national Court on its proper initiative.

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<sup>41</sup> It has suggested that a new Article with an enumeration of the decisions that the Office can take to terminate an investigation are indicated should be introduced before this provision.

<sup>42</sup> A number of delegations would prefer the deletion of the words "and the list of evidence"

3. The competent Permanent Chamber shall determine, in close consultation with the European Delegated Prosecutor submitting the case and bearing in mind the proper administration of justice, the Member State in which the prosecution shall be brought. The Permanent Chamber shall in principle bring the prosecution in the Member State of the European Delegated Prosecutor ~~allocated~~signed the case in accordance with Article 21(2). The Chamber may determine another Member State if there are sufficiently justified grounds related to the criteria for determining the ~~competent~~handling European Delegated Prosecutor in Article 21 (2) and (3)<sup>43</sup>.
4. The competent national court is determined on the basis of national law.
5. Where necessary for the purposes of recovery, administrative follow-up or monitoring, the Central Office shall notify the competent national authorities, the interested persons and the relevant Union institutions, bodies, agencies of the decision taken by the European Public Prosecutor's Office in accordance with this Regulation.

#### *Article 28*

#### **Dismissal of the case**

1. The competent Permanent Chamber shall, on proposal from the handling European Delegated Prosecutor, dismiss the case against a person where prosecution has become impossible on account of any of the following grounds<sup>44</sup>:
  - a) death of the ~~suspected~~ or accused person;
  - b) amnesty granted in the state which has jurisdiction in the case;
  - c) immunity granted to the suspect, unless it has been lifted.
  - d) expiry of the national statutory limitation<sup>45</sup> to prosecute;

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<sup>43</sup> Many have called for specific rules on judicial review of the decision on jurisdiction of trial.

<sup>44</sup> Delegations have made a number of suggestions as regards the grounds. A criterion regarding permanently deranged persons has been called for, and a link to the prescription rules has also been asked for.

<sup>45</sup> The question under which national law this should be assessed in cross-border cases has been raised.

- e) the suspected or accused person has already been finally acquitted or convicted of the same facts within the Union or the case has been dealt with in accordance with Article 29 (transaction);
- f) lack of relevant evidence.

~~2. The European Public Prosecutor's Office may refer cases dismissed by it to OLAF or to the competent national administrative or judicial authorities for recovery, other administrative follow-up or monitoring.~~

3. A decision in accordance with paragraph 1 shall not bar further investigations on the basis of new facts, which could not have been known to the European Public Prosecutor's Office at the time of the decision and which became known hereafter and before expiry of applicable statutory limitations in all Member States where the case can be brought to judgment.

4. Where a case has been ~~finally~~ dismissed, the Central Office shall officially notify the competent national law enforcement and judicial authorities and shall inform the relevant Union institutions, bodies and agencies, as well as the injured party, thereof.<sup>46</sup> The cases dismissed may also be referred to OLAF or to competent national administrative or judicial authorities for recovery, other administrative follow-up or monitoring.

5. Where an investigation initiated by the European Public Prosecutor's Office reveals that the conduct subject to investigation constitutes a criminal offence, which is not within its competence, the European Public Prosecutor's Office shall refer the case without delay to the competent national law enforcement and judicial authorities.

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<sup>46</sup> ~~The right of victims of review of such decisions should be addressed here or in a general provision. A number of delegations have also requested that a more detailed rule on *ne bis in idem* should be inserted in this Article.~~

*Article 29<sup>47</sup>*

**Transactions**

1. After obtaining the approval of the competent Permanent Chamber, ~~Where the case is not dismissed according to Article 28 and where the suspected persons' guilt is considered to be of a minor nature and it would serve the purpose of proper administration of justice, the handling European Delegated Prosecutor ~~or competent European Prosecutor~~ may, after the damage has been compensated,~~ propose to the suspected person to pay a lump-sum fine (hereafter: fine) which, once paid, entails the final dismissal of the case (transaction), if the following cumulative criteria are satisfied:

a) the damages caused in total, to the Union's financial interests as well as to other victims, does not exceed 50 000 euros;

aa) the offence has not been committed in circumstances that may be considered to be particularly serious

b) it would serve the purpose of proper administration of justice and the general criminal law objectives;

c) the damage has been compensated to all victims;

d) the suspect has neither been the subject of a transaction under this Regulation nor been convicted of offences affecting the Union's financial interests before.

~~If the suspected person agrees, he/she shall pay the lump-sum fine to the Union within a period of maximum four months.~~

2. The suspected person shall receive legal advice on the advisability of accepting or refusing the proposal for the transaction as well as on its legal consequences, in accordance with national law. The European Delegated Prosecutor or the European Prosecutor handling the case may propose a transaction in cases which can not be considered serious, or where the damage caused to the Union's financial interests does not exceed [xxx Euros], and the suspected person has not been convicted of offences affecting the interests of the Union before..

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<sup>47</sup> Some delegations would prefer if this Article is deleted from the Regulation, of that the provision give Member States the possibility to apply alternative mechanisms instead. .

3. The European Public Prosecutor's Office shall ensure that the amount of the fine is proportionate to the damage caused and to the suspected ~~person~~'s financial means. The amount of the fine shall be calculated in accordance with the method of calculation defined by the rules referred to in Article 72 (e)<sup>48</sup>.
4. The transaction proposal shall set out the alleged facts, the identity of the suspected ~~person~~, the alleged offence, the compensation made and the commitment of the European Public Prosecutor's Office to dismiss the case if the suspected ~~person~~ agrees with this proposal and pays the ~~fine~~ lump-sum to the Union budget, as well as the time-limit within which the suspected ~~person~~ has to pay the ~~fine~~ lump-sum, which shall not exceed 4 months. Where the suspected ~~person~~ agrees to such proposal, he/she shall pay within the set time-limit following receipt of the proposal of the European Public Prosecutor's Office. The European Public Prosecutor's Office can upon the request of the suspected ~~person~~ extend the period for the payment by another [15/30/45] days, where this is justified.
5. The European Public Prosecutor's Office shall supervise the collection of the financial payment involved in the transaction. Where the ~~transaction fine~~ is paid by the suspected ~~person~~ within the time-limit set out in paragraph 4, the handling European Delegated Prosecutor ~~or the European Prosecutor handling the case~~ shall finally<sup>49</sup> dismiss the case and notify the competent national law enforcement and judicial authorities and shall inform the relevant Union institutions, bodies, agencies and injured parties thereof. The transaction shall be noted in the Case Management System of the European Public Prosecutor's Office.
6. If the proposed fine is not paid within the time set out in paragraph 4 the handling European Delegated Prosecutor ~~or the European Prosecutor handling the case~~ shall continue the prosecution of the case.

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<sup>48</sup> A number of delegations have requested that a more precise method for calculation should be included already in this Article.

<sup>49</sup> A number of delegations have argued that the dismissal should only be final after the transaction has been confirmed in a national Court, at least if such a confirmation is foreseen in national law.

7. The European Public Prosecutor's Office or the competent national authorities may not prosecute the suspected ~~person~~ for the same facts which constituted the offence being the subject of the final dismissal through a transaction.
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