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Subject: Proposal for a Regulation on the establishment of the European Public
Prosecutor's Office
- Examination of the Presidency document, with a primary focus on Articles
17-37 of the draft Regulation

In view of the COPEN meeting on 27-28 October 2015, delegations will find in the Annex the revised text on Articles 17-23, 28a and 36-37 of the draft Regulation. Modifications in relation to document 12778/15 are marked in underlined or ~~overstruck~~.

SECTION 1

COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 17

Material competence of the European Public Prosecutor's Office

1. The European Public Prosecutor's Office shall be competent in respect of the criminal offences affecting the financial interests of the Union which are provided for in Directive 2015/xx/EU, as implemented by national law, ~~irrespective of whether the criminal conduct constituting such an offence constitutes as well, under national law, another type of offence.~~
2. The European Public Prosecutor's Office shall also be competent for any criminal conduct which does not fall within the scope of paragraph 1, but which is inextricably linked to and instrumental in the commission of the offence covered thereunder, with the exception of any criminal conduct constituting, under applicable national law, an offence in respect of which a sanction could be imposed that is more severe than the sanction that could be imposed in respect of the criminal conduct falling within the scope of paragraph 1¹. ~~an attack or threat to the physical, mental or moral integrity of natural persons.~~ The same applies where the criminal conduct constituting an offence in accordance with paragraph 1 constitutes as well, under national law, another type of offence.
2. [Within ...] Member States shall notify the European Public Prosecutor's Office of an extensive list of the national substantive criminal law provisions applicable to the offences defined in Directive 2015/xx/EU².

¹ A recital illustrating those offences that the EPPO is not competent for in accordance with Article 17 (2), or should not exercise its competence over in accordance with Article 20 should be added.

² This paragraph should be further developed.

Article 18

Territorial and personal competence of the European Public Prosecutor's Office

The European Public Prosecutor's Office shall be competent for the offences referred to in Article 17 where such offences: ³

- a) were committed in whole or in part within the territory of one or several Member States, or
- b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
- c) were committed outside of these territories referred to in point a) ~~of this Article~~ by a person who was subject to the Staff Regulations of Officials or to the Conditions of Employment of Other Servants of the European Communities, at the time of the offence, provided that a Member State has, according to its law, decided to apply jurisdiction for such offences when committed outside its territory.

SECTION 2

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

Article 19

Reporting, registration and verification of information

1. The institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent in accordance with applicable national law shall report without undue delay to the European Public Prosecutor's Office any criminal conduct ~~on~~ in respect of which it ~~might~~ could exercise its competence in accordance with Articles 17, ~~and 20(62) and 20(3)~~⁴. ~~The report shall contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons.~~

³ This jurisdiction provision should at term be in principle identical with the corresponding jurisdiction provision in the PIF-Directive.

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

- 1a. When a judicial or law enforcement authority of a Member State ~~decides to initiate~~ initiates or has initiated an investigation in respect of a criminal offence for which the European Public Prosecutor's Office could exercise its competence, in accordance with Article 17, 20(2) and 20(3), it shall without undue delay inform the European Public Prosecutor's Office so that the latter can decide whether to exercise its right of evocation in accordance with Article 22a.
- 1b. The report shall contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons.
- 1c. The European Public Prosecutor's Office shall also be informed in accordance with paragraphs 1 and 1a in cases where an assessment of the damage caused or likely to be caused was not possible.
2. Information provided to the European Public Prosecutor's Office shall be registered and verified in accordance with its Internal Rules of Procedure. The verification shall aim to assess whether, on the basis of the information provided in accordance with paragraph 1 and 1a, there are grounds to initiate an investigation.
3. Where upon verification the European Public Prosecutor's Office decides that there are no grounds to initiate an investigation in accordance with Article 22, the reasons shall be noted in the Case Management System.

‡ The European Public Prosecutor's Office shall inform the authority that reported the criminal conduct in accordance with paragraph 1 or 1a, and, if requested, as well as crime victims and other persons who provided the information, if so provided for in by national law, other persons who reported the criminal conduct.
4. Where the information received by the European Public Prosecutor's Office reveals that a criminal offence outside of the scope of the competence of the European Public Prosecutor's Office may have been committed, it shall without undue delay inform the competent national authorities.

~~5.—Where the criminal conduct caused or is likely to cause damage to the Union's financial interests of less than EUR [10 000/20 000], and neither has repercussions at Union level⁵ which require an investigation to be conducted by the Office nor involve a criminal offence that has been committed by officials or other servants of the European Union or members of the institutions, the information obligation of national competent authorities may be fulfilled every six months through a summary report.~~

~~The summary report shall group all relevant cases and shall contain for each case, as a minimum, the names of the implicated persons, the damage caused or likely to be caused and the possible legal qualification.~~

~~6.—Based on such summary reports, the College may request national authorities to provide without undue delay additional information regarding offences matching a specific pattern likely to cause damage to the Union's financial interests of less than EUR [10 000/20 000] when committed in circumstances deemed to have repercussions at Union level.~~

~~7.—Based on such summary reports, the College may, for future reports regarding offences of less than EUR [10 000/20 000] when committed in circumstances deemed to have no repercussions at Union level, determine specific modalities for the provision of information.~~

~~8 Information referred to in this Article shall be processed in a structured way, as established in the Internal Rules of Procedure . The reports referred to in paragraphs 1, 6, 7 and 8 may be presented in the form of automatically generated information.~~

⁵ A definition of "repercussion at Union level" will be added in a recital. "*A particular case should be considered as having repercussions at Union level inter alia where a criminal offence has a transnational nature and scale, where such an offence involves a criminal organisation, or where the specific type of offence could be a serious threat to the Union's financial interests or the Union's Institutions credit or the Union's citizen's confidence.*"

- 9 5. The European Public Prosecutor's Office may request further relevant information available to the institutions, bodies, offices and agencies of the Union and the authorities of the Member States that provided the information⁶. The requested information may also concern infringements which caused damage to the Union's financial interests, other than those within the competence of the European Public Prosecutor's Office in accordance with Article 17, 20(2) and 20(3), where it is essential to establish links with a criminal conduct on which it has exercised its competence.

Article 20

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

1. The European Public Prosecutor's Office shall exercise its competence either by initiating an investigation in accordance with Article 22 or by deciding to use its right of evocation in accordance with Article 22a. If the European Public Prosecutor's Office decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.
2. Where a criminal offence falling within the scope of Article 17 caused or is likely to cause damage to the Union's financial interests of less than EUR [10 000/20 000], the European Public Prosecutor's Office may only exercise its competence if:
 - a) ~~a~~ the case has repercussions at Union level which require an investigation to be conducted by the European Public Prosecutor's Office, or
 - b) ~~a case has been opened following suspicions that an offence~~ the offence has been committed by officials or other servants of the European Union, or members of the Institutions.

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

⁶ A recital explaining that the rules of registration and verification set out in this Article shall apply mutatis mutandis if the information received refers to any conduct which might constitute a criminal offence within the competence of the EPPO will be considered. The recital will also clarify that Member States may provide any information to the Office. CZ proposes the following wording to be added in a recital: '*Verification shall aim to assess whether the information shows that the conditions set by Articles 17 and 18 determine the competence of the Office*'.

3. ~~Where during the investigation it appears that the offense referred to under Article 17(1) is not preponderant in respect of those referred to in Article 17(2),~~ The European Public Prosecutor's Office may ~~refrain from exercising~~ not exercise its competence ~~in respect of any offence falling within the scope of Article 17~~ and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 28a if :

~~For the purpose of this Regulation an offence shall be considered to be preponderant if the damage caused by it to the Union's financial interests significantly exceeds the damage caused to other parties.~~

- a) in case of inextricably linked offences as referred to in Article 17(2), the sanction that may be imposed in respect of the offence mentioned in Article 17(2) is more severe than the sanction that may be imposed in respect of the offence covered by Article 17(1), or
- b) there is a reason to assume that the damage caused or likely to be caused to the Union's financial interests by an offence as referred to in Article 17 does not exceed the damage caused or likely to be caused to other parties.
4. ~~Where~~ The European Public Prosecutor's Office decides to exercise its competence either by initiating an investigation in accordance with Article 22 or by deciding to use its right of evocation in accordance with Article 22a or has refrained from exercising its competence, it shall inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence.
5. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the ~~exercise of their competence regarding~~ question whether the criminal ~~conducts falling~~ conduct falls within the scope of Article 17(2) or 20(3), the national authorities⁷ competent to decide on the attribution of competences concerning prosecution at national level shall decide who shall be competent for ~~the offences referred to under paragraph 2~~ the investigation of the case.

⁷ A recital explaining that the notion of "*national authorities*" in this provision refers to judicial authorities or other independent authorities who have competence to decide on the attribution of competence in accordance with national law should be added.

CHAPTER IV

RULES OF PROCEDURE ON INVESTIGATIONS, INVESTIGATION MEASURES, PROSECUTION AND ALTERNATIVES TO PROSECUTION

SECTION 1

RULES ON INVESTIGATIONS

Article 22

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

1. Where, in accordance with 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 shall, without prejudice to the rules set out in Article 20(6 2) and (3), initiate an investigation and note this in the Case Management System⁸.
2. Where upon verification in accordance with Article 19(2), the European Public Prosecutor's Office decides to initiate an investigation, it shall without undue delay inform the authority that reported the criminal conduct in accordance with Article 19(1) or 19(1a).
3. Where no investigation has been initiated by a European Delegated Prosecutor, the ~~The~~ Permanent Chamber to which the case has been allocated shall, under the conditions of paragraph 1, instruct ~~the~~ a European Delegated Prosecutor to initiate ~~the~~ an investigation, ~~in accordance with the criteria referred to in paragraph 4, where no investigation has been initiated by a European Delegated Prosecutor.~~

⁸ The following recital may be considered: "*The European Public Prosecutor's Office should, when establishing the Case Management System, ensure that the necessary information from the European Delegated Prosecutors to the Central Office is covered*".

4. A case shall as a rule be initiated and 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 competences of the Office have been committed, the Member State where the bulk of the offences has been committed. A ~~Permanent Chamber may only instruct a European Delegated Prosecutor of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber⁹~~ to initiate an investigation ~~where that Member State has jurisdiction for the case and~~ where a deviation from the above mentioned principles is duly justified, taking into account the following criteria, in order of priority:
- a) the place where the suspect or accused person has his/her habitual residence;
 - b) the nationality of the suspect or accused person;
 - c) the place where the main financial damage has occurred.
5. Until a decision to prosecute in accordance with Article 30 is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:
- d) reallocate a case to a European Delegated Prosecutor in another Member State;
 - e) merge or split¹⁰ cases and in each case choose the European Delegated Prosecutor handling the case;

⁹ A recital to be added to Article 9 in order to ensure permanence amongst Permanent Chambers in situations where no Permanent Chamber is yet designated should be considered.

¹⁰ The term "*split*" will be explained in a recital, which could have the following wording: "*In principle a suspect shall only face one investigation or prosecution by the EPPO in order to best safeguard the rights of the defendant. Therefore the Permanent Chamber should seek to merge/combine proceedings concerning the same suspect but may refrain from doing so where this is in the interest of the efficiency of investigations or prosecutions. Where an offence has been committed by several persons, the EPPO should in principle initiate only one case and conduct investigations in respect of all suspects jointly. Where several European Delegated Prosecutors have opened investigations in respect of the same criminal offence, the Permanent Chamber should in principle merge/combine such investigations. The Permanent Chamber may decide not to merge/combine or decide to subsequently split such proceedings if this is in the interest of the efficiency of investigations, e.g. if proceedings against one suspect can be terminated at an earlier stage whereas proceedings against other suspects still have to be continued or if splitting the case could shorten the period of pre-trial detention of one of the suspects etc. Where different Permanent Chambers are in charge of the cases to be merged, the Rules of Procedure should determine the appropriate competence and procedure. In case the Permanent Chamber decides to split a case its competence for the cases should be maintained*".

if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the European Delegated Prosecutor handling the case set out in paragraph 3 ~~4~~.

6. Whenever the Permanent Chamber is taking a decision to reallocate, merge or split a case it shall take due account of the current state of the investigations.
7. The European Public Prosecutor's Office shall inform the competent national authorities without undue delay of any decision to initiate an investigation.

Article 22a

Right of evocation

1. Upon receiving ~~the~~ all relevant information in accordance with Article 19(1a), the European Public Prosecutor's Office shall take its decision whether to exercise its right of evocation as soon as possible, but no later than 5 days after having received ~~all relevant~~ the information from the national authorities and shall inform the national authorities thereof. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time frame of ~~5 days~~ with a maximum prolongation of 5 days, and shall in such case inform the national authorities thereof.
- 1a. During this time frame the national authorities shall refrain from taking any decision under national law which may have the effect of precluding the European Public Prosecutor's Office from exercising its right of evocation.
Notwithstanding, the national authorities shall be entitled to ~~but shall~~ take any urgent measures necessary, according to national law, to ensure effective investigation and prosecution.
2. If the European Public Prosecutor's Office becomes aware, through means other than the information referred to in Article 19(1a), of the fact that an investigation in respect of a criminal offence for which it could be competent is already undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. After being duly informed in accordance with Article 19(1a), the European Public Prosecutor's Office shall take a decision on whether to exercise its right of evocation. The decision shall be taken within the time frame set out in paragraph 1 of this Article.
3. The European Public Prosecutor's Office shall, where appropriate, consult competent authorities of the Member State concerned before deciding whether to exercise its right of evocation.

4. Where the European Public Prosecutor's Office exercises its right of evocation, the competent authorities of the Member States shall transfer the proceedings file to the European Public Prosecutor's Office and refrain from carrying out further acts of investigation in respect of the same offence.
5. The right of evocation set out in this Article may be exercised by a European Delegated Prosecutor from any Member State whose competent authorities have initiated an investigation in respect of an offence falling under the scope of Articles 17 and 18. Where a European Delegated Prosecutor, who has received the information in accordance with Article 19(1a), considers not to exercise the right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State with a view to enabling the Permanent Chamber to take ~~the appropriate measures~~ a decision in accordance with Article 9(3a).
- ~~6. Where the European Public Prosecutor's Office decided to exercise its competence either by initiating an investigation in accordance with Article 22 or by deciding to use its right of evocation in accordance with Article 22a or~~ has refrained from exercising its competence, it shall inform the competent national authorities without undue delay. The competent national authorities shall at any time in the course of the proceedings inform the Office of any new facts which could give the Office reasons to reconsider its previous decision.
- The European Public Prosecutor's Office may exercise its right of evocation after receiving such information, provided that the national investigation has not already been finalized and that an indictment has not been submitted to and received by a court. The decision shall be taken within the timeframe set out in paragraph 1 of this Article.
7. Where, with regard to an offence which caused or is likely to cause damage to the Union's financial interests of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no interest to investigate or to prosecute at Union level, it shall in accordance with Article 8 (2)¹¹, issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case without informing the competent Permanent Chamber as foreseen in paragraph 5.

¹¹ It is possible that a slight adaptation of Article 8 may need to be considered at a latest stage.

Conducting the investigation

1. The European Delegated Prosecutor handling the case may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. These authorities shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them. The European Delegated Prosecutor handling the case shall 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. At any time during the investigations conducted by the European Public Prosecutor's Office, the competent national authorities shall take urgent measures necessary to ensure effective investigations even where not specifically acting under an instruction given by the European Delegated Prosecutor handling the case. The national authorities shall without undue delay inform the handling European Delegated Prosecutor of the urgent measures taken.
3. The competent Permanent Chamber may, on proposal of the supervising European Prosecutor decide to reallocate the case to another European Delegated Prosecutor in the same Member State when the European Delegated Prosecutor handling the case
 - a) cannot perform the investigation or prosecution, or
 - b) fails to follow the instructions of the competent Permanent Chamber or the European Prosecutor.
4. In exceptional cases¹², and after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation himself/herself, including when necessary by instructing the relevant competent authorities, if this appears indispensable in the interest of the efficiency of the investigation or prosecution on the grounds of one or more of the following criteria:
 - a) the seriousness of the offence, in particular in view of its possible repercussions at Union level;
 - b) when the investigation concerns officials or other servants of the European Union or members of the Institutions;

¹² BE, HU, NL emitted a reservation on this provision.

c) in case of failure of the reallocation mechanism foreseen in paragraph 3.

~~When a European Prosecutor conducts the investigation himself/herself, In such exceptional cases Member States shall ensure that the European Prosecutor is entitled to order or request investigative measures and that he/she has~~ shall have all the powers, responsibilities and obligations of a European Delegated Prosecutor in accordance with this Regulation and national law.

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

- [5. *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. Any person participating or assisting in carrying out the functions of the European Public Prosecutor's Office shall be bound to respect professional secrecy as provided under the applicable national law.*]¹³

Article 28a¹⁴

Referrals and transfers of proceedings to the national authorities

1. *Where an investigation conducted by the European Public Prosecutor's Office reveals that the facts subject to investigation do not constitute a criminal offence for which it has a competence in accordance with Articles 17 and 18, the competent Permanent Chamber shall decide¹⁵ to refer¹⁶ the case without undue delay to the competent national authorities.*

¹³ This paragraph should be moved to the provisions on confidentiality in article 64 of the Commission's initial proposal.

¹⁴ Paragraphs 1, 2, 3, 4 and 5 were agreed during JHA Council on 9 October 2015. Changes made are simple alignments to the rest of the text.

¹⁵ It is the understanding of the Presidency that the decision-making power of the chamber referred to in paragraph 1 needs to be inserted in the Article dealing with the decision-making powers of the chamber (currently Article 9(3)).

¹⁶ A recital should be added explaining that in case of a referral by the EPPO national authorities shall preserve full prerogatives under national law to open, continue or to dismiss the investigation.

2. *Where an investigation conducted by the European Public Prosecutor's Office reveals that the specific conditions for the exercise of its competence set out in Article 20(2) and (3) are no longer met, the competent Permanent Chamber shall decide to refer the case to the competent national authorities without undue delay and before initiating prosecution before national Courts.*
- 2a. Where, with regard to an offence which caused or is likely to cause damage to the financial interests of the Union of less than EUR 100.000, the Permanent Chamber considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no interest to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it may refer the case to the competent national authorities.
- 2b. The Permanent Chamber shall communicate any decisions to refer a case to national authorities on the basis of paragraph 2a to the European Chief Prosecutor. On reception of this information, the European Chief Prosecutor may within three days request the Permanent Chamber to review its decision if she or he considers that the interest to ensure the coherence of the referral policy of the Office so requires. If the European Chief Prosecutor is a Member of the relevant Permanent Chamber, one of his/her Deputies shall exercise the right to request the said review.
- 2c. Where the competent national authorities do not accept to take over the case in accordance with paragraph 2 and 2a, the European Public Prosecutor's Office shall remain competent to prosecute or dismiss the case according to the rules laid down in this Regulation.
3. *Where the European Public Prosecutor's Office considers a dismissal in accordance with Article 33(3), and if the national authority so requires, the Permanent Chamber shall refer the case without delay to the latter.*
4. *If, following a referral in accordance with paragraphs (1), (2) or (2a) and Article 20(3), the national authority decides to open an investigation, the European Public Prosecutor's Office shall transfer the file to that national authority, refrain from taking further investigative or prosecutorial measures and close the case.*

5. *If a file is transferred in accordance with paragraph (1), (2) or (2a) and Article 20(3), the European Public Prosecutor's Office shall inform the relevant Union institutions, bodies and agencies, as well as, where appropriate in accordance with national law, suspects or accused persons and the crime victims, thereof. The cases dismissed may also be referred to OLAF or to competent national administrative or judicial authorities for recovery or other administrative follow-up.*

Article 36

Judicial review before the Court of Justice of the European Union

1. Procedural measures taken by the European Public Prosecutor's Office on the basis of Articles 9(3)(c), 9(3a), 20, 21, 30(2), (3) and (4) shall be subject to review before the Court of Justice of the European Union in accordance with Article 263 of the Treaty.
2. Without prejudice to Article 267 of the Treaty, the courts of Member States shall be competent to review other procedural decisions taken by the European Public Prosecutor's Office in the performance of its functions, in accordance with the requirements and procedures laid down by national law.

Article 37

Legal remedies for cross-border measures

1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to cross-border measures of the European Public Prosecutor's Office.
- ~~2. The grounds, justifications and substantive reasons for ordering the measure may only be challenged at a court in the Member State of the handling European Delegated Prosecutor.~~