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NOTE

from: Presidency
to: Coreper/Council

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Subject: *Proposal for a Council Regulation on the establishment of the European Public
Prosecutor's Office*
- Report on the State of play and questions to Ministers

1. Introduction

The Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office was adopted on 17 July 2013 and has been discussed in the COPEN working group since October 2013. This report contains a summary of the developments on the file in the first four meeting days in the Working Group under the Hellenic Presidency of the Council. For a full picture of the state of play, the report should be read in conjunction with the Report on the state of play distributed by the former Lithuanian Presidency on 20 December 2013¹. The Hellenic Presidency has continued the negotiations on the basis of the achievements of the Lithuanian Presidency, with due account also taken of the views expressed by national parliaments.

¹ ST 18120/13 EPPO 37 EUROJUST 153 CATS 106 FIN 966 COPEN 252.

2. Negotiations in Council

Under the Hellenic Presidency, the Commission proposal has been discussed in Working Party on Cooperation in Criminal Matters (COPEN) on 13-14 January, 29 January and 10 February. The meetings have been held under a constructive atmosphere and organised in the form of thematic discussions, where delegations have been invited to express their positions on a number of issues. The following themes have thereby been discussed:

- Exercise of competence
- Jurisdiction
- Dismissal of cases and transactions
- Admissibility of evidence
- Disposition of confiscated assets
- Judicial review
- Procedural safeguards

3. Presidency conclusions from the COPEN Working Party

(A) Exercise of competence (Article 14 in the proposal)

A large majority of delegations have expressed support in principle for the proposed rule that the EPPO shall exercise its competence to investigate and prosecute relevant, where such offences were wholly or partly committed on the territory of one or several Member States, or by one of their nationals, or by Union staff members or members of the Institutions. However, most delegations have noted that there is a need for clarification on some points, in particular as regards:

- ✓ The effect of this rule on non-participating Member States;
- ✓ The definition of the notion "committed on the territory" and whether this notion covers the place of commission and/or the effects of the offence;
- ✓ Issues related to a double criminality requirement in some national laws.

(B) Jurisdiction (Article 27(4) in the proposal)

Most delegations agree in principle with the proposed four criteria that the Commission suggest should be taken into account when choosing jurisdiction of trial and determining the competent national court. Most delegations consider that the criteria proposed by the Commission should be considered in hierarchical order, i.e. the first criteria (the place where the offence was committed) should in principle be decisive both in national and cross-border cases. If the first criterion cannot be used, a second criterion regarding the Member State in which the accused person is a national and has his or her habitual residence should then apply. Many delegations consider that the list of criteria should not be exhaustive. Other criteria, such as the place where the evidence is located and the place where the direct victims have their habitual residence, should be optional ('may also be considered').

As regards the nature of Article 27(4), the great majority of delegations consider that it applies only to decisions made by the EPPO and does not provide additional rules on jurisdiction and competent courts for Member States. The provision would thus not be binding in any way for national courts when assessing whether they have jurisdiction in accordance with national law. In addition, a considerable number of delegations advocate the introduction of an explicit rule on the right to challenge the choice of jurisdiction by the EPPO.

(C) Dismissal of cases and transactions (Articles 28 and 29 in the proposal)

Delegations have expressed general support, in principle, for the proposed rules on dismissal. However, the individual grounds have been criticised by some, and their exact implications need to be examined further. A great majority of Member States consider that the decision to dismiss a case should not be a final one. The Regulation should provide for an explicit right to reopen a case, which would apply for at least certain types of cases (e.g. where according to national law prosecution later becomes possible). Furthermore, a time limitation for reopening a case should also be considered.

As regards transactions, a large majority of delegations acknowledged the added value of such a possibility, although a comparative system is not available in some national legal systems. Most delegations underlined the need to deal with the modalities for transactions (e.g. application in minor cases and definition thereof, applicable rules, confirmation by a court etc.) in a more detailed and explicit way, preferably in the Regulation, whilst certain issues of minor importance may be left to national law. The majority of delegations consider that decisions on dismissal and transactions should in principle be subject to judicial review, *mutatis mutandis*. Delegations have the opinion that the proposed system for dismissal and transactions does not seem in principle to jeopardise the effective application of procedural safeguards of the suspect or the accused person.

(D) Admissibility of evidence (Article 30 in the proposal)

Many delegations agree with the principle of admissibility of evidence as proposed by the Commission, provided that this does not undermine the rights of defence of the suspect. Other delegations have spoken out against the proposed principle. In particular, the need to ensure a freedom of appreciation for the competent judge has thereby been underlined. There is however general agreement that the principle of admissibility of evidence will not bind the competent court in its assessment of the value or merit of the evidence. The idea of introducing a procedure of certification of evidence in the Member State where the evidence is collected found no support among delegations.

(E) Disposition of confiscated assets (Article 31 in the proposal)

The idea of providing for a specific mechanism for the disposition of confiscated assets was generally supported. However, issues such as the need for parallel compensation for natural or legal persons that have possibly been damaged in addition to the European Union, bearing of expenses, proper estimation of the confiscated assets' value, cases where assets' value does not suffice to compensate all damages etc., shall have to be clarified further, preferably in the text of the Regulation itself.

(F) Judicial review (Article 36 in the proposal)

The great majority of delegations are in favour of a system of judicial review of the decisions taken by the EPPO, incumbent to national judicial authorities, for reasons of simplicity and decentralisation. They believe that the common legal traditions and general principles applied in all Member States diminish the risk of a less coherent application of judicial review instruments. It was also considered that national provisions on judicial review would ensure proper judicial review of those decisions of the EPPO for which such a need may arise. There is a common understanding, however, that judicial review of certain decisions of the EPPO, i.e. those of a “European nature” by definition (e.g. the choice of *forum conveniens* etc.), should be left to a EU (central) jurisdiction.

(G) Procedural safeguards (Article 32-35 in the proposal)

Delegations generally agree that the Regulation should contain adequate procedural safeguards such as the right to a fair trial and equal treatment of suspect or accused persons in all Member States and the respect of human rights. Some delegations are in favour of the Commission’s proposal to establish minimum common rules on individuals’ rights in criminal proceedings as they consider that references to national law will not ensure a sufficient safeguard of the relevant rights, which may lead to unequal treatment of suspects and accused persons. Many have also underlined that it must be made clear in the text of the Regulation that the same procedural safeguards apply both at the stage of prosecution and at trial proceedings. Other delegations are of the opinion that the Regulation would provide little added value concerning procedural rights, and that the Directives already adopted in this area - in addition to national law - provide a satisfactory level of procedural safeguards for suspects and accused persons. To this end, some consider that references to specific types of procedural safeguards are unnecessary.

(H) Relations with Eurojust (Article 57 in the proposal)

Most delegations agree that the cooperation between the EPPO and Eurojust must be based on strong operational, administrative and management links. They support equal and effective cooperation between the two organisations. However, they consider that the nature of this cooperation must be examined further, particularly if some but not all Member States participate in the EPPO. Questions were raised about the functioning of this cooperation in practice, regarding the competence and ancillary competence of the EPPO, sharing of information, transfer of data and requests for mutual legal assistance.

4. Future steps: questions to Ministers

The Presidency will continue to work on the basis of the findings presented in this Report. In view of advancing on the file, it also refers the following questions to Ministers:

1) Throughout the discussions on different aspects the proposal, the idea of setting up a College in the Central office of the EPPO has been given support from a substantial number of delegations. The Presidency invites Ministers to reflect on whether they are in this light in principle in favour of having in the EPPO a college of European Public Prosecutors, and - if the reply is affirmative - how the independence/efficiency of the Office can thereby be safeguarded.

2) Delegations as well as the Commission have constantly underlined the need to ensure that the EPPO will add value in practice and that its efficiency can be guaranteed. Some delegations have thereby noted that it may be more efficient to let national investigators and/or prosecutors handle minor cases of fraud locally. The Presidency invites Ministers to reflect on how the tasks and competences of the EPPO can ideally be organised in order to achieve these objectives.