**COUNCIL OF THE EUROPEAN UNION**

**Brussels, 5 February 2014**

**6116/14**

**LIMITE**

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

**EPPO 5**
**EUROJUST 29**
**CATS 11**
**FIN 100**
**COPEN 37**
**GAF 7**

**NOTE**

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|---|---|
| from: | Presidency |
| to: | Working Party on Cooperation in criminal matters (EPPO) |
| Subject: | Proposal for a Regulation on the establishment of the European Public Prosecutor's Office |

Following the request of the Presidency to delegations to provide comments, ten delegations have sent their written observations, for which the Presidency is most grateful. These comments are sent out in the Annex to this note.

**ANNEX**

**COMMENTS RECEIVED BY THE GENERAL SECRETARIAT IN RESPECT OF ARTICLE 26 IN THE PROPOSAL FOR A COUNCIL REGULATION ON THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE**

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## AUSTRIA

**I. General remarks**

The Austrian Delegation understands the text proposed by the Commission concerning Art. 26 as a politically acceptable compromise solution between a full set of procedural rules on the one hand and not mentioning investigative measures or "procedural guidelines" at all on the other hand. However, this solution raises fundamental legal problems, in particular concerning the Charter of Fundamental Rights of the EU.

Art. 26 para. 1 mentions a large number of investigative measures, but in most of the cases without stating any further prerequisites, apart from the fact that all measures have to be necessary and proportionate according to Art. 26 para. 3. Instead of stating further prerequisites, the proposal refers to the law of the Member State, where the investigative measure is to be carried out. The Austrian Delegation believes that this solution does not sufficiently fulfil the requirements set out by the Charter of Fundamental Rights of the EU.

In the cases C-293/12 and C-594/12, concerning the Directive of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), still pending before the ECJ, the Advocate General stated in his recently issued opinion that „[t]he **European Union legislature cannot**, when adopting an act imposing obligations which constitute serious interference with the fundamental rights of citizens of the Union, **entirely leave to the Member States the task of defining the guarantees capable of justifying** that interference. It cannot content itself either with assigning the task of defining and establishing those guarantees to the competent legislative and/or administrative authorities of the Member States called upon, where appropriate, to adopt national measures implementing such an act or with relying entirely on the judicial authorities responsible for reviewing its practical application. **It must, if it is not to render the provisions of Article 51 (1) of the Charter meaningless, fully assume its share of responsibility by defining at the very least the principles which must govern the definition, establishment, application and review of observance of those guarantees** (para. 120)."

Furthermore, it has to be noted that the proposal states further prerequisites for some investigative measures, such as in Art. 26 para. 1 (c): "seal premises and means of transport and freezing of data, in order to preserve their integrity, to avoid the loss or contamination of evidence or to secure the possibility of confiscation". For the Austrian Delegation there seems to be no obvious explanation why in some cases certain conditions are set out by the proposal and in other cases the proposal simply refers to the law of the Member States.

**II. Para. 1 – investigative measures**

Concerning the investigative measures as such, it seems for the Austrian Delegation that the term "data" mentioned in para. 1 lit. c seems to be too wide as it might cover data stored by banking institutions as well as data regarding telecommunication. As there is no definition of this word it is not clear, whether electronic data is meant or analogue data, as well. Additionally, the relationship between the (very similar) measures stated in para. 1 (d) – freezing – and (m) – seizing – and (n) – taking samples of goods - might need further clarification, in particular because the measures mentioned in para. 1 (d) require judicial review and the other above mentioned measures not necessarily (Art. 26 Abs. 5). Concerning "instrumentalities of a crime" in general, mentioned in (d), it is clear that such items will always have to be seized to secure evidence (m) for the proceedings. Thus, it is not clear whether judicial review would be necessary or not.

For the Austrian Delegation it is clear that the enumeration of investigative measures in Art. 26 aims at enabling the EPPO to properly fulfil its tasks. Hence, it seems to be necessary to establish whether the list of measures meets the practical needs of the EPPO or if it has to be improved. For example it seems necessary that the EPPO has the possibility to receive informations not only concerning the accused but also other (third) parties, e. g. regarding banking information. In white collar case crimes it is an absolute necessity to follow the way of the money. This might imply the gathering of banking information in respect of third parties, as well. The same is true for telecommunication data. Sometimes the telephone number, which is used by the perpetrator, can only be established through traffic data of a third party contacted by the perpetrator.

Finally, concerning the appointment of experts (para. 1 (u)), the words "ex officio or at the request of the suspected person" seem to be superfluous or even misleading as Art. 35 para. 2 states that „the suspect and accused person shall have, in accordance with national law, the right to request the European Public Prosecutor's Office to gather any evidence".

**III. Para. 2 – Problems concerning the interpretation**

With regard to para. 2, in particular the first and second sentence, it seems not clear whether the investigative measures mentioned in para. 1 have to be available for the EPPO under national law under any condition. In Austria there are e.g. several measures which can only be applied in investigation proceedings concerning facts which are punishable by certain minimum sanctions. This is in particular the case for telephone interception, which is not available for the investigation of fraud not exceeding € 3.000,--. In addition, investigative measures are not applicable in specific cases under Austrian national procedural law. This is e. g. the case for the surveillance of the telecommunication of the attorney of the defendant or house searches/seizure of documents at his/her office. Conducting such measures would be regarded as an infringement of the *nemo tenetur* principle. From the wording of the provision in para. 2, stated above, it is doubtful whether these principles would apply in cases investigated by the EPPO. It is true that the second sentence of para. 2 refers to the law of the Member States and therefore as well to prerequisites mentioned therein. However, the first sentence gives rise to other interpretations, as well. The Austrian Delegation would therefore like further clarification on this topic in the text or at least in the recitals. Concerning a specificity of Austrian procedural law another question arises in this context, namely whether additional control mechanisms can be foreseen and if they are covered by the second sentence of para. 2 as para. 4 and 5 only refer to judicial authorisation. With regard to some investigative technics such as audio and/or video surveillance, access to telecommunication data, which are stored according to data retention regulations etc. Austrian procedural law provides for additional control of prosecutorial action by a so-called Ombudsman, who comes into play not only prior but also after judicial authorisation.

**IV. Para. 2 – Abandoning the principle of *forum regit actum***

Para. 2 further states that other measures than those stated in para. 1 shall only be available if the law of the Member States, where the investigation is to be carried out, provides for them. Consequently, it is possible that a particular investigation is carried out in another Member State which could not be ordered under the law of the Member State responsible for the investigations according to Art. 16 para. 2 of the regulation. To give a short example: The EDP in Germany is investigating a case and is responsible for the investigation. Germany has not implemented data retention regulations. According to telecommunication data stored according to data retention provisions, which were collected in Austria, the identity of the possible perpetrator could be established. Now, the German EDP wants to apply for an arrest warrant in Germany. Is he able to use the evidence collected in Austria although German Procedural Law does not provide for data retention? And if so, would that be the case in every other Member State taking part in the EPPO with regard to the mentioned and similar situations? If not, it seems worth thinking about introducing a provision similar to Art. 30 (or better recital32) for proceedings in the investigation phase.

**V. Para. 4 – Authorisation of a judicial authority**

With regard to judicial control mentioned in para. 4 and 5 it will have to be further clarified whether this means an ex ante or ex post judicial review. Furthermore it has to be noted that there is no definition to be found concerning the term "judicial authority". Therefore also the public prosecution service would be included under Austrian law. We point out that in the text of the EIO Directive, "judicial authority" covers the public prosecution service. For the time being Austria takes it that para. 4 refers to an ex ante review of a court. The feasibility of the principle that the investigation measure has to be authorised by the competent authority of the Member State where the measure is to be carried out needs to be further discussed. It creates difficulties for the European Prosecutor in view of the necessary translations, the transmission of the court files and the need to simultaneously address different judicial authorities of different member states. It should be noted that the proposal allows national law to foresee that different national courts have to be seized with different investigations measures making it possible that the European Prosecutor has to seize different courts even within one member state.

**VI. Para. 6 – Time-Limit**

With regard to para. 6 the Austrian delegation strongly opposes the time limit for a judicial decision. There are no time limits (apart of decisions in connection with pre-trail detention) for judicial decisions under national law. Consequently cases of the EPPO will have priority over national investigations which might not be proportionate in all cases, as the responsible judge might have to deal with a (national) murder case or investigations where the accused are in pre-trial custody.

If investigative measures have to be carried out in a Member State other than the one responsible for the investigation, it might be necessary to apply for judicial authorisation before the measures is to be carried out. Therefore it will be necessary to translate the whole file in order to give the respective judge the opportunity to have a full overview of the file and the evidence. In particular concerning complex cases, an authorisation of a court will need more time than 48 hours for an in-depth study of the file. Finally, the Austrian delegation would like to raise the question what the consequences of exceeding those time-limits would be (infringement procedure?).

**VII. Para. 7 – Arrest / pre-trail detention: Unclear provisions concerning the competent judicial authority and the scope of (possible) application of the EPPO**

Para. 7 states that the EPPO may "request from the competent judicial authority the arrest or pre-trial detention of the suspected person". For the Austrian delegation it is on the one hand not clear, what kind of judicial authority is referred to in this provision as there is no definition (same problem as raised above on para. 4). Therefore the term "judicial authority" would also encompass the public prosecution service in Austria. However, the Austrian Delegation takes it that it will have to be a court deciding on the arrest and the pre-trial detention. On the other hand it is not clear, which judicial authority should be the competent one (the one where the accused has his residence, or where the investigations are carried out according to Art. 16 para. 1; if more than one EDP are responsible for an investigation which one is to be to apply for an arrest etc). Furthermore, it is not clear, whether this provision would also include the search (alert) for a person as well as extradition proceedings (in relation to third States).

Finally, the relationship to the European Arrest Warrant needs to be clarified: can/should the European Prosecutor be able to issue an EAW himself or only by requesting a national prosecutor? Will the EAW be applied between the MS participating in the EPPO and which will be the legal basis for the transfer of the person concerned?

## BELGIUM

*In the view of Belgium the need exists to enumerate investigative measures that as a minimum have to be available to the EPPO. However, the minimum harmonisation should be limited to listing types of investigation measures at the disposal of the EPPO. There should be no mixture of national and European conditions for authorising the measure and categories of measures should be defined in more general terms. Finally, this should be supplemented by minimum approximation of rules on admissibility of evidence.*

1. In principle, Belgium is of the opinion that a set of European rules of procedure applicable to the investigations carried out by the European Public Prosecutor's Office could be elaborated. Since the Treaty foresees that the functions of the EPPO are to be exercised before the competent courts of the Member States, the Member States thus being equally competent in the trial phase, and the fact that the place of trial will not be decided on until the end of the investigation phase, it is clear that a European set of rules for reasons of legal security would have ensured the legality of the measures carried out in the investigations by the EPPO. Belgium would be in principle in favour of elaborating such a set of European rules of procedure.

2. However, since the elaboration of such a set of rules currently is not realistic in a short term and should not be seen as a prerequisite for the establishment of an EPPO, Belgium agrees that a minimum approximation of the investigation measures at the disposal of the EPPO is necessary. The minimum approximation should seek to enumerate the types of investigative measures that as a minimum have to be available to the EPPO and thus ensuring that all Member States participating to the EPPO foresee as a minimum these investigation measures for the EPPO.

3. As to the application of these investigative measures by the EPPO, Belgium believes that this should be left to national law. The investigation measures available for the EPPO should not be subject to a mixture of European and national conditions, but solely be based on national law. The mixture of European and national conditions would needlessly complicate the use of investigation measures by the EPPO as the investigation and prosecution will be carried out on a decentralised level in the Member States.

As an example: Article 26, Par. 1 a) foresees that the EPPO when exercising its competence has the power to request the searching of any premises, land, means of transport, private home, clothes and any other personal property or computer system. Par. 3 of the same Article foresees that this investigative measure shall not be ordered without reasonable grounds and where less intrusive means can achieve the same objective. According to the Belgian legal system no causal connection is necessary between the place where the house search will take place (as ordered by the investigative judge) and the person against whom indications of guilt exists. It suffices that serious indications are present that a criminal offence has been committed. Consequently, a house search can be ordered for the residence of the suspect as well as for any place where the investigative judge presumes that evidence concerning the criminal offence is hidden. The Belgian legislation therefore has a wider scope than what is foreseen in the proposal for a Regulation considering the proportionality test. As a consequence, Belgian legislation would have to be adapted, narrowing down the possibilities concerning EPPO investigations. At the same time, a different set of rules would continue to apply for national investigations.

4. The investigative measures should furthermore be defined in a general way without determining the scope of the measure. Currently several measures provided for in Article 26, par. 1 are drafted in such a way as to possibly limit the scope of the investigative measure, such as c), d), e), f), k), o).

As an example: in Belgium the interception of telecommunication is possible for both the suspected person and other persons involved. Does Article 26 foresee a more strict regime in par. 1 e) by limiting the interception of telecommunication to the suspected person?

5. In order to ensure the efficiency of the proceedings carried out by the EPPO and to improve the legal certainty for the person concerned, such a list of available investigative measures should be supplemented by common rules on admissibility of evidence as provided for in Article 30 of the proposal.

## DENMARK

The proposal is covered by the Danish Opt-Out regarding the cooperation on justice and home affairs. Notwithstanding, in response to the presidency's e-mail of 20 December 2013, the Danish delegation wishes to draw the attention to a few points regarding Article 26 of the proposal.

Generally, it is the position of the Danish delegation/government that the European Public Prosecutor – to the widest extent possible – should function on the basis of national procedural rules.

Secondly, it should be noted that under Danish law the conditions (as set out in the Danish Administration of Justice Act) for applying the various measures in Article 26 would not necessarily be met in all cases falling within the mandate of the European Public Prosecutor.

Finally, the Danish delegation would point out that paragraph 4 of Article 26 does not seem to take into account the practical situation where the measure would be forfeited if a court order were to be awaited. With regard to such situations, it should – in the view of the Danish delegation – fall within the competence of the police to decide upon certain measures. The competence of the police in such situations should, however, be subject to a subsequent judicial control.

## FINLAND

Finland refers to earlier comments on this subject. In addition, we would like to add few comments.

In Article 26 (2) of the proposed Regulation it is stated that Member States shall ensure that the measures referred to in paragraph 1 [of Article 26] may be used in the investigations and prosecutions conducted by the European Public Prosecutor's Office. Such measures shall be subject to the conditions provided for in this Article and those set out in national law.

FI is not sure whether it is necessary and/or possible to list and then accurately define all the investigative measures that are needed while investigating EPPO-crimes. At the same time it is somehow vague and questionable what is meant by saying that these measures are subject to the conditions set out in national law. If, and when, some member states would have to introduce some new investigative measures into their national legislation, would it be possible for them to define the conditions for these measures so strictly that in practice they would not be used after all?

One option would be to demand that similar investigative measures should be available in MS while investigating EPPO-crimes that are nationally available while investigating other offences of the same gravity. In some cases this writing could bring along even more investigative measures within the power of the EPP. In any case this approach would pay attention to the seriousness of the case in question – which is the most important question for FI in relation to this Article.

FI finds it important that certain thresholds are introduced in this context. At least those measures that are more intrusive should only be demanded to be nationally available in serious cases (as applicable in national law). This is of utmost importance as there are no general thresholds in the Regulation as a whole.

**FRANCE**

La France estime que l'article 26 de la proposition de règlement poursuit un but légitime, qui est de tendre vers l'homogénéité, au sein de chacun des États membres participant au Parquet européen, des moyens d'action dont disposera cet organe pour le recueil des preuves.

Cependant, il est patent que cette disposition ne se contente pas de procéder au constat de la disponibilité actuelle des moyens d'enquête dont elle dresse la liste, mais opère une certaine harmonisation *a minima* des règles de procédure pénale qui constitue la contrepartie de l'absence d'un corpus de règles spécifiques de procédure applicables à l'action du Parquet européen.

Si la majorité de ces mesures d'enquête figurent à l'évidence dans l'arsenal juridique de chacun des États membres, certaines en particulier sont, en fonction des Etats membres, soit inexistantes, soit disponibles dans des conditions restrictives.

- **Les autorités françaises souhaitent ainsi exclure de la liste des mesures disponibles le gel des transactions financières prévu au §1 h)**. En effet, en France, cette mesure relève de l'autorité administrative (arrêté du ministre de l'Economie dans le cadre du financement du terrorisme international).

L'article 26 §2 de la proposition de règlement dispose que *« ces mesures sont soumises aux conditions définies dans le présent article et dans celles prévues en droit interne »*.
La délégation française interprète cette mention du droit interne comme faisant référence à la fois :

- aux conditions dans lesquelles, dans le droit national, les mesures d'enquête sont ordonnées par le parquet ou dont l'autorisation est demandée à un juge, c'est-à-dire à la procédure suivant laquelle ces mesures sont prises et exécutées.

- au champ d'application de ces mesures, c'est-à-dire notamment les restrictions à des seuils d'emprisonnement encourus ou à une catégorie de d'infractions donnée.

**- Ainsi, la France soutient le principe d'une liste d'infractions, sous la réserve que l'article 26 §2 opère bien, selon cette interprétation, un renvoi pur et simple au droit national.**

Elle souhaite à ce titre souligner que le renvoi à l'applicabilité du droit national ne signifie pas nécessairement le statu quo. Certaines mesures ne sont en effet autorisées en France, exclusivement ou principalement, que dans le cadre de procédures d'informations judiciaires confiées à un juge d'instruction (exemple : la captation des données informatiques prévue par l'article 706-102-1 du code de procédure pénale). Or, comme la France et d'autres délégations ont pu le souligner en groupe de travail, l'institution du Parquet européen est susceptible d'avoir une incidence sur la compétence des juges d'instruction en matière de protection des intérêts financiers de l'Union, ce qui pourrait conduire à une nécessaire adaptation de la procédure pénale.

**- Toutefois, ce soutien au principe d'une liste est sans préjudice de la position de la délégation française au regard du principe posé à l'article 26 §4.**

Ce paragraphe dispose en effet que « *les États membres veillent à ce que les mesures d'enquête énumérées aux points a) à j) du paragraphe 1 soient soumises à l'autorisation de l'autorité judiciaire compétente de l'État membre sur le territoire duquel elles doivent être exécutées.* »

La Commission européenne a eu l'occasion de préciser qu'elle entendait par « autorité judiciaire » un « tribunal », un « juge » ou une « cour », ce qui exclut le parquet, national comme européen. La France conteste cette interprétation et considère que le parquet fait partie intégrante de l'autorité judiciaire.

Or, si la conception de la Commission européenne devait être retenue, cette disposition conduirait les Etats membres à rendre obligatoire l'autorisation par un juge de plusieurs mesures d'enquête actuellement ordonnées en France par le parquet, voire diligentées par les officiers de police judiciaire sous le contrôle du procureur de la République.

La France constate que cette harmonisation d'une grande intensité entraînerait nécessairement des conséquences non négligeables, dans la mesure où il apparaît difficilement concevable que, si elle se fait en faveur du justiciable, elle ne soit pas étendue au-delà du strict champ de compétence du Parquet européen. Elle constate donc que cette harmonisation sectorielle verrait nécessairement ses effets s'étendre à l'ensemble de la procédure pénale.

L'inverse conduirait en effet à une rupture du principe d'égalité devant la loi, qui dépendrait de la seule décision du Parquet européen de se saisir ou non d'un dossier donné (en partant du principe d'une compétence partagée, que la plupart des délégations appellent de leurs vœux).

**- La France souhaite donc la suppression du §4 de l'article 26 afin de soumettre l'ensemble des mesures au regime prévu par le §5 qui prevoit, en l'état du projet, que certaines mesures sont soumises a une autorisation judiciaire si celle-ci est exigée par le droit interne de l'Etat membre sur le territoire duquel la mesure d'enquête doit etre exécutée.**

Il convient d'ajouter que l'article 26 du projet de règlement repose sur une logique d'harmonisation des procédures pénales des États membres. Or, ce texte devra etre adopté à l'unanimité, même si cette unanimité ne devait, *in fine*, être requise qu'entre les États membres participant à une coopération renforcée. Il paraît peu vraisemblable que les États membres participant à cette coopération renforcée parviennent à se mettre d' accord sur une liste de 21 mesures obéissant pour la moitié d'entre elles à une procédure commune. Aussi, la référence simple à des conditions de mises en œuvre conformes au droit national paraît le meilleur moyen d'aboutir.

**- Enfin, la France considère qu'un article supplémentaire devrait être consacré à la possibilité offerte au Parquet européen de demander le placement en détention d'un suspect. Si cette possibilité s'impose, elle ne devrait pas être mentionnée dans un article consacré aux mesures d'enquête.**

## GERMANY

**1.** General comments on the proposed list of investigative measures in Article 26 (1) of the Draft

The necessity for introducing/including the investigative measures named in this list has not been explained. Within the framework of the discussion in the second-to-last COPEN meeting on Article 26 of the Draft Regulation, neither COM nor the MS mentioned any criminal prosecution deficits in the Member States which is a concrete result of the failure to regulate certain investigative measures to combat "PIF" offences in the respective MS. Germany assumes that all Member States have in place the investigative measures necessary to solve criminal offences.

Furthermore, Article 26 brings up systematic concerns. If the Regulation contains a list of investigative measures which every Member State must provide for the European Public Prosecutor's Office, there are three possibilities in this regard. Firstly, the list could be designed in such a way that it includes only investigative measures which the Member States provide for their national authorities in any case. The list would then be superfluous. Secondly, the list could be designed in such a way that it includes measures which not all Member States make available to their national authorities. In such a case, the Member States affected could provide the measures only for the EPPO. However, it will likely prove difficult to explain to citizens that an European authority has more powers than the national authorities in comparable cases. In order to avoid this, the only remaining alternative would be to introduce the investigation measures not only for the EPPO, but rather also for the national authorities although no need for this type of expansion of investigative measures has been shown within the EU MS. Also, the rule in Article 26 section 1 in conjunction with section 3 of the Regulation has the danger of being understood in such a way that the Regulation provides an independent investigative authority when national law does not provide for an investigative measure listed in section 1. However, this would hollow out the fundamental rights protection of EU citizens, since the Regulation - except for the small restriction contained in section 3 - does not contain any detailed rules for the application of the investigative measures.

Therefore, the respectively applicable national law should be determinative for the possible investigative measures of the EPPO.

We would like to point out the following additional aspects:

**2.** We understand Article 26 (2), first sentence to mean that every MS would, as a general rule, have to enable the investigative measures of Article 26 (1) of the Draft according to its domestic criminal procedure law for investigative measures of the EPPO. However, the preconditions for ordering a measure in a concrete case, and the concrete design of the respective investigation measure, follow from the respective national law. For example, in the case of an investigation by the EPPO in Germany, this means that in principle, telephone interception must be available as an investigative measure (pursuant to Article 26 (1) letter e of the Draft). However, if national law sets up certain restrictions regarding the permissibility of this investigative measure (for example, in Germany commercial or gang-based commission, or damage of over 50 thousand euros for a fraud offence), these national standards would also apply to proceedings led by the EPPO, with the consequence that such a measure could not and must not be made available if the concrete proceedings led by the EPPO does not meet these preconditions. The same is true for cases in which national law provides for limited application of an investigative measure (for example, that it is not be directed against a third person rather than against an accused, or that the investigation measure applies only to certain listed offences). In our view, the same must apply to potential effects of an investigative measure, such as the notification obligation provided for in the German Code of Criminal Procedure in the case of covert investigative measures. In Germany, the notification obligation with regard to a person affected by a covert investigative measure will apply to the EPPO as well. Making the text of Article 26 (2), first sentence of the Draft express this understanding more clearly would be a welcome change.

**3.** There are some investigative measures in the listing of Article 26 (1) of the Draft that are known in German criminal procedure law, but are subject to special requirements:

a. For example, ***telecommunications interception*** (Article 26 (1), letter e) of the Draft) is applicable in Germany only for certain criminal offences, e.g. fraud or subsidies fraud in particularly serious cases (committed on a commercial or gang basis; loss of large amounts of assets totalling at least € 50,000). Another precondition is that the offence must be serious in the concrete case, and the investigation into the facts of the case or ascertaining the whereabouts of the accused in another manner would be considerably more difficult or without prospect of success. Also, the measure must not be directed solely toward gaining information from the core area of private life. Finally, the measure may be directed only against the accused or his source of information.

b. ***Covert audio surveillance*** and ***recording*** in non-public places (except for private homes), as provided in Article 26 (1) letter j) of the Draft, is possible in Germany only for certain listed offences. These listed offences include fraud and subsidies fraud, but only in particularly serious cases. Another precondition is that the offence must be serious in the concrete case, and the investigation into the facts of the case or ascertaining the whereabouts of the accused in another manner would be considerably more difficult or without chance of success.

***Covert video surveillance*** and ***recording*** of non-public places (except for private homes) is generally available in Germany for all criminal offences; however, it is subject to the condition that the investigation of the facts or the ascertainment of the whereabouts of the accused in another manner would have less prospects of success.

c. ***Tracking*** and ***controlling persons*** (Article 26 (1) letter p of the Draft) is possible in Germany only with a time limitation and/or for criminal offences of substantial significance. Furthermore, this measure may be applied only when investigating the facts of the case or ascertaining the whereabouts of the accused in another manner promises less chance of success or is considerably more difficult. If the measure is to be directed at a person other than the accused, certain facts must be present which indicate that this person/these persons have a connection to the accused perpetrator or will establish such contact.

d. ***Tracking*** and ***tracing objects*** with technical means (Article 26 (1) letter q of the Draft) is in principle possible in Germany; however, it is subject to similar preconditions as the measure listed at c). It may be used only in criminal offence of substantial significance; the measure is to be limited in time and may be used only when investigating the facts of the case or ascertaining the whereabouts of the accused in another manner promise less chance of success or is more difficult.

**4.** Other investigative measures listed in Article 26 (1) of the draft, while they are not known in Germany as formulated in Article 26, may be correspondingly utilised in Germany if certain preconditions are met:

a. ***Targeted surveillance*** of the ***suspect*** and ***third persons*** in public places (Article 26 (1) letter r of the Draft) is possible in Germany in principle. However, special preconditions apply here as well. As such, the EPPO will not necessarily be able to utilise that measure in every investigation proceeding.

b. ***Freezing*** (seizure) of ***accounts*** (Article 26 (1) letter h of the Draft) is possible in Germany only as a provisional measure of security for later return or for confiscation/forfeiture.

c. German criminal procedure law does not have any special rules with regard to the right to access premises and to ***take samples of goods*** (Article 26 (1) letter n of the Draft). However, these investigative measures would in principle be able to be included within the investigative measures of search and seizure, which are known in German criminal procedure law.

d. German law does not provide for the ***inspection of means of transport*** where reasonable grounds exist to believe that goods related to the investigation are being transferred (Article 26 (1) letter o of the Draft). However, here as well the searches provided for in German law would, in principle, apply (to the extent that the preconditions are given).

e. ***Sealing of premises and means of transport***, and ***freezing of data*** (Article 26 (1) letter c of the Draft) is not directly regulated in that form in Germany. However, the securing of evidentiary materials which could be of significance for the investigation is provided for in the German Code of Criminal Procedure. These also include premises and means of transport, which could be sealed. Digitally stored data which are located, e.g. on a computer or USB stick, may be secured as well. The so-called "quick freeze" of data is not provided for in that form in Germany.

**5.** Two of the measures enumerated in Article 26 (1) of the Draft are generally not provided for in German criminal procedure law and would not be able to be utilised by the EPPO:

a. ***Monitoring accounts in real time*** (Article 26 (1) letter g of the Draft) is not provided for in the German Code of Criminal Procedure. Germany is not familiar with any deficits in terms of law enforcement in connection with the lack of this investigation measure. There is therefore no need to introduce account monitoring in real time.

b. Covert ***audio surveillance*** and ***storage*** in private homes is possible only for particularly serious criminal offences; this does not include the offences within the planned area of competence of the EPPO. This measure could thus not be made available to the EPPO. There is also no practical need for it. This is because Germany is not familiar with any deficits in terms of law enforcement in connection with the lack of this investigation measure.

**6.** It is unclear whether "competent judicial authority" in Article 26 (4) of the Draft means authorisation by a public prosecution office or judge. Pursuant to the German Code of Criminal Procedure, a judicial decision is mandatory for measures which represent an intensive intrusion. However, given certain preconditions in urgent cases, public prosecutors may give authorisation instead of a judge; but subsequent approval by a judge is required. In the COPEN meeting on 16-17 December 2013, COM stated that "competent judicial authority" was to be understood as meaning only a "judge" / "court". This should be clarified in the text, whereby the EPPO should also be given the authority, based on domestic criminal procedure law, to take measures in urgent cases which would then by subject to approval by a judge.

**7.** Regarding the investigative measures mentioned in Article 26 paragraph 1 of the proposal, the German code of criminal procedure names the following authorities as competent to request or to order these measures:

| **Provision (Article 26 paragraph 1 VO-E)** | **Designation of the investigative measure** | **Competent authority** |
|---|---|---|
| Letter a | Engaging in searches | Court (investigating judge); in urgent cases, public prosecutors and police |
| Letter b | Obtaining the production of any relevant object or data | Police, public prosecutors and court (investigating judge) |
| Letter c | Sealing of premises and freezing of data | Court; in urgent cases, public prosecutors and police |
| Letter d | Freezing instrumentalities or proceeds of crime | For movable property: court (investigating judge); in urgent cases, public prosecutors and police<br>For other valuables: court (investigating judge); in urgent cases, public prosecutor |
| Letter e | Intercepting telecommunications, including e-mails, to and from the suspect | Court (investigating judge); in urgent cases, public prosecutor (approval by court within 3 working days) |

| | | |
|---|---|---|
| Letter f | Real-time surveillance of telecommunication | Court (investigating judge); in urgent cases, public prosecutor (court approval within 3 working days) |
| Letter g | Real-time monitoring of financial transactions | - Measure not applicable in DE – |
| Letter h | Freezing future financial transactions | In DE only to secure the subsequent recovery / forfeiture and confiscation: Court; prosecutor in urgent cases (court approval within one week) |
| Letter i | Undertaking audio surveillance of non-public places (excluding surveillance of private homes)<br><br>Undertaking video surveillance of private homes<br><br>Undertaking video surveillance of non-public places (excluding sur-veillance of private homes) | Court (investigating judge); in urgent cases public prose-cutor (court approval within 3 working days)<br><br>Court (chamber of the Regional Court); in urgent cases: chief Judge (approval by the chamber within 3 working days), only applicable for particularly serious offenses (not applicable to fraud cases)<br><br>Public prosecutor and police |
| Letter j | Undertaking covert investigations | Police with the public prosecutor´s approval; in urgent cases the approval may be obtained within 3 days after the start of the measure |
| Letter k | Summoning suspected persons and witnesses | Police, public prosecutor, court |
| Letter l | Undertaking identification measures by ordering the taking of photos, visual recording of persons and the recording of a person´s biometric features | Police, public prosecutor; after arraignment: court |

| | | |
|---|---|---|
| Letter m | Seizing objects | Court; in urgent cases: public prosecutor and police (approval by the court within three days if the person concerned objects to the measure or neither he/she or an adult family member was present during the seizure) |
| Letter n | Accessing premises and taking samples of goods | Possible only as a search and seizure.<br>Search: court (investigating judge); in urgent cases: public prosecutor and police.<br>Seizure: court (investigating judge); in urgent cases: public prosecutor and police |
| Letter o | Inspecting means of transport | Possible only as a search: court (investigating judge); in urgent cases: public prosecutor and police |
| Letter p | Undertaking measures to track and control persons, in order to establish the whereabouts of a person | Court; in urgent cases: public prosecutor and police (approval by the court within three days) |
| Letter q | Tracking and tracing any object by technical means | Depending on the case:<br><br>1) Court; in urgent cases: public prosecutor and police (e.g. in § 163f Code of Criminal Procedure)<br><br>2) police or public prosecutor (§§ 161, 163 Code of Criminal Procedure)<br><br>3) Court; in urgent cases: public prosecutor (e.g. post-seizure, §§ 99, 100 Code of Criminal Procedure) |
| Letter r | Undertaking targeted surveillance in public places of the suspected and third person | Court (investigating judge); in urgent cases: public prosecutor (approval by the court within 3 working days) |

| | | |
|---|---|---|
| Letter s | Obtaining access to public registers | Police, public prosecutor, court |
| Letter t | Questioning the suspected person and witness | Police, public prosecutor, court |
| Letter u | Appointing experts where specialised knowledge is required | Police, public prosecutor, court; also, an accused person or his/her defender can make a request for evidence by obtaining an expert's opinion |

## THE NETHERLANDS

The interests which are served by Article 26 have merits and deserve our attention. Where the EPPO will always have to operate in national legal systems it is essential that to ensure a clear link with national legislations. The structure chosen for this article and certain aspects in are too intrusive on the national legislation. The Netherlands is convinced that a different approach is possible which can serve all the interests concerned.

1. ***A level playing field for investigative measures (par. 1 and 2)***

- We understand that the Commission seeks to create a level playing field for the EPPO in all the participating Member States when it comes to the use of investigative measures in EPPO cases, in particular of a cross border nature. Such a level playing field is necessary for a well functioning EPPO in cross border cases. (par. 1).

- We consider it essential to limit the application of investigative measures ordered by or requested by delegated/national members of EPPO and only on the territory of their own Member State. (par. 2)

2. ***A realistic list of investigative measures (par. 1)***

- We are of the opinion, that the list of measures in paragraph 1 is from a legal point meaningless. The listing of measures does not say anything of what those measures entail. Thus it is a list of empty shells. The meaning of the measures must be found in national legislations because no harmonisation on EU level is envisaged. Therefore a link to the national legislations of the Member States must be established in the text of the article. This link could be achieved by using wording to the effect that Member States will enable their delegated/national member to request or to order at least the following measures as prescribed in their national legislation and in accordance with the conditions set out by their national law: ....(list of measures)....

- The lists of measure in article 26 must be reviewed carefully with the aim to clarify the meaning of the measures involved and by assessing the necessity as well as the proportionality of using such measures in relation to PIF offences. The result should a common list. If national laws provide also other measures it is up to those rules and the Member State whether they may be used by EPPO.

***3. No mandatory judicial authorisation (par. 4 and 5)***

- We want to rely the procedural safeguards that are embedded in the national procedural rules. As a consequence we consider paragraph 5 to be redundant. We do not want to include a mandatory judicial authorisation as foreseen in paragraph 4 for the following reason.

- The Netherlands has serious doubts as to the secondary goal of the idea of the Commission to raise the standards for the application of investigative measures merely by introducing EU wide a mandatory authorisation by a judge/tribunal for the application of the measures under a to j. The idea that such a rule on EU level would be necessary overlooks or simply neglects that national legislations themselves prevent in accordance with the European rights convention the abuse of the application of investigative measures in many different ways while taking into account all the interests involved, including the rights of defendants.
- Abuse of the application of investigation measures is prevented in national legislation in particular by one or more of the following:

  - a precise description of what the measure entails;
  - a description under which circumstances it may be applied;
  - a limitation of the application in time;
  - a limitation of the use for certain types of offences;
  - a limitation of the use for offences that carry a maximum sanction of a certain duration;
  - a precise description who may order the use of the measure;
  - a precise description of who may apply the measure;

- formalities to be followed when requesting and/or ordering the application of measures
- prior authorisation by the public prosecutor himself or a judge prior to the application for certain measures;
- judicial review immediate after the application of the measure automatically or upon request) or in a later stage by the trial judge.

4. ***No general time limit or other prescribed formalities (par.6)***

- We consider it disproportionate to prescribe time limits on the application of investigative measures on behalf of the EPPO. Neither do we see a need for rules on EU level concerning formalities to be followed at the by national authorities. National law describe such formalities.

- PIF cases are important and require proper attention from the national authorities with a view of efficient handling of those cases. Nevertheless one should keep in mind that national authorities deal with all the criminal cases on their territory on a daily basis which include offences that are generally considered to me more serious than EU fraud such as murder, sexual offences, cybercrime, etc.

- In national systems investigative measures that as from their nature are urgent will be dealt with in a different manner than other measures. We should leave time limits and formalities to the national legislations.

5. ***No common rules on arrest on EU level***

- The Netherlands oppose specific rules on arrest at EU level, because every national legislation will have rules on arrest, including safeguards for the arrested persons.

- The measure of arrest should be included in the common list of investigative measures.

**Comparative overview of competences listed under Article 26 of the draft regulation on the EPPO**

| Artikel 26/Article 26 | **Wetboek van Strafvordering/ Dutchcode of criminal procedure** |
|---|---|
| a. search (all) | **doorzoeken/onderzoeken** van:<br>110 elke plaats ter inbeslagneming<br>101 jo 104 woning<br>96c plaatsen<br>97 verschoningsgerechtigden<br>96b vervoermiddel<br>55 + 56,1 onderzoek kleding<br>55b voorwerpen bij aanhouding<br>125j + 125k computersystemen<br>126c elke plaats (SFO) |
| b. production (all) | **uitlevering /overlegging**<br>96a voorwerpen vatbaar voor inbeslagneming<br>100 poststukken<br>105 voorwerpen<br>126 nc identificerende gegevens<br>126nd bepaalde/vastgelegde gegevens<br>126ne toekomstige gegevens<br>126nf ???<br>126ng aanbieder telecom<br>126h versleuteling |
| c. sealing premises, freezing data | 96,2 verzegelen en andere maatregelen ter voorkoming wegmaking<br>125 maatregelen m.h.o. doorzoeking |
| d. freezing instrumentalities, assets purpose confiscation | 94 inbeslagneming voorwerpen<br>94a inbeslagneming ontneming |
| e. interception telecommunication to/from suspect | 125m opnemen telecommunicatie<br>126 ma in buitenland |
| f. real time surveillance telecom | 126m<br>126n lokaliseren en met wie contact |
| g. monitoring financial transactions | 126nd bestaande gegevens periodes van 4 weken<br>126ne toekomstige gegevens Periodes van 4 weken<br>126a bestaande gegevens (SFO) |
| h. freezing future transactions | onbekend |
| i. surveillance actions in non public places except woningen | 126g stelselmatige observatie heimelijk waarnemen besloten plaats<br>126k besloten plaats (BOB)<br>126l opnemen vertrouwelijke communicatie met technisch hulpmiddel |

| | |
|---|---|
| | (BOB) |
| j. Under covert actions by an officer, acting covertly and under false identity | 126i/q pseudokoop<br>126j stelselmatig inwinnen info door niet kenbare ops amb<br>126h infiltratie door niet kenbare ops amb |
| k. summoning suspects and witnesses | 167 dagvaarding verdachte (258)<br>260 getuigen, slachtoffers, nabestaanden, deskundige, tolken oproepen voor zitting<br>263 getuigen à décharge |
| l. ordering identification measures | Identificatie maatregelen<br>27a bij aanhouding verdachte<br>29a bij verhoor verdachte<br><br>55b onderzoek kleding verdachte<br>55c foto's, vingerafdruk verdachte<br>61a verdachte |
| m. Seizing objects for the purpose of evidence | 94 inbeslagneming waarheidsvinding<br>95 bij staandehouding<br>96 heterdaad<br>104 inbeslagneming door rc |
| n. access to premises and taking samples of goods | Betreden gebouwen, monsterneming<br>55 ter aanhouding op heter daad, muv woningen<br>96 ter inbeslagneming |
| o. inspecting means of transport. | 55<br>96 |
| p. measures to track and control persons | 126g stelselmatige observatie |
| q. track and trace objects by technical means, including controlled delivery and controlling financial transactions | 126k technisch hulpmiddel plaatsen<br>126ff verbod op doorlaten |
| r. targeted surveillance in public places of suspects and third persons | 126g stelselmatige observatie personen in belang onderzoek, incl. derden |
| s. obtain access to national and European *public* registers and registers kept by *private entities* with a public interest | ???? |
| t. question suspects and witnesses | 29 verdachte |
| u. appoint experts, where specialised knowledge is required | 150 benoeming deskundige<br>150c bij tegenonderzoek<br>227 benoeming door rc |

## SWEDEN

As a general remark concerning article 26, Sweden believes that the investigative measures available to the EPPO should be in full correspondence with the measures available in national cases and in accordance with the national legislation in the Member State where the investigation takes place. It is questionable whether the legal basis in article 86 TFEU covers the Commission´s proposal to create a list of investigative measures.

### 1.1. Paragraph 4

During the discussions in the working group, the Commission argued that the expression "competent judicial authority" should be understood as "competent court". Sweden does not agree with such a narrow interpretation which is furthermore not in line with how the expression has been interpreted in other EU-instruments, e.g. the Council Framework Decision on the European arrest warrant (2002/584/JHA).

### 1.2. Paragraph 6

Sweden believes that the exact time frame mentioned in the paragraph (48 hours) should be replaced with a more flexible wording, e.g. "without undue delay".

## SLOVENIA

Slovenia as one of the co-signatories of the non-paper signed by six Member States would like to once more express appreciation to the fact that the Commission proposal has envisaged a system by which in most part the procedural rules rely on the existing Member States' law.

However, the comprehensive list stipulated in Article 26 of the Commission proposal goes in our opinion too far. It includes also measures which are not existing in our national law at all for the types of criminal offences that the EPPO will be dealing with. For example, under the Slovenian Criminal Procedural Act (CPA) real time surveillance of telecommunications is allowed only for most serious criminal offences (crimes against humanity and for crimes punishable by at least 8 year prison sentence). Very similar to that the CPA treats interception of telecommunications, undertaking of surveillance measures in non-public places and covert investigations. Moreover, the jurisprudence of the Slovenian Constitutional Court on the subject is very restrictive and is becoming more and more detailed. Introduction of so intrusive investigative measures to lesser criminal offences would distort the balance in our criminal justice system.

Also, the safeguards written down in paragraphs 2 and 3 (reasonable grounds, authorization by the competent judicial authority) are in our opinion insufficient. First, besides authorization by the court and reasonable suspicion that a so called "catalogue criminal offence" was committed, our CPA stipulates additional safeguards, for example principle of proportionality and others (eg. reasonable expectation that it will be possible to obtain evidence that could not be gathered by using less intrusive measures), secondly in the text it is not clear what "reasonable grounds" in paragraph 3 mean (reasonable grounds that the criminal offence has been committed or that evidence will be obtained by using the measure?), and thirdly it is not entirely clear what "competent judicial authority" stands for in the text. Namely, from the Report on the state of play (doc 18120/13) it is obvious that many Member States suggested competent judicial authority should be interpreted in a broad manner, in order to allow prosecutors and other authorities in charge of investigations at national level to decide on measures under their authority. In the context of the intrusive investigative means we see such interpretation as very problematic.

Therefore, the position of Slovenia is to delete the list of investigative measures from the text and to allow application of national procedural rules (inlcuding all national rules on judicial review or judicial control in wider sense), or as a way of compromise at least deletion of points e), f), i) and j) from paragraph 1 in Article 26.

## CZECH REPUBLIC

The following table contains on analysis of the various investigative measures with regard to CZ domestic law (without specifying the detailed conditions) and their availability for the PIF crimes. As a result of such an analysis, the Czech Republic is ready to examine and contribute to appropriate changes of both the list of investigative measures and their structure in relation to judicial authorisation, which in our view should be in principle reserved exclusively for courts only in relation to the most intrusive investigative measures (of course, in full compliance with ECHR and the settled Strasbourg case-law).

### ARTICLE 26 PAR 1 OF THE COUNCIL REGULATION on the establishment of the EPPO

| Investigation measures | National provisions (Code of Criminal Procedure) | Availability of the investigative measure for the PIF crimes | Selected Conditions | Autorisation |
|---|---|---|---|---|
| a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system;[1] | § 83 - Příkaz k domovní prohlídce /**Search warrant** | **YES** | - The search warrant must be issued in writing and justified.<br>- It shall be served on the person, in the premise of whom the search is to be carried out, during the search, and if this is not possible, within 24 hours at the latest from elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor |
| | § 83a - Příkaz k prohlídce jiných prostor a pozemků/**Search warrant of other premises or land** | **YES** | The warrant must be issued in writing and justified. It shall be served on the user of the concerned premises or land, and if not caught during the search, immediately after elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor<br><br>The police authority may inspect the |

[1] Please note the limitations of investigation measures under confidentiality obligations, e.g. search warrant concerning the premise of the attorney (although the limitation are probably within the meaning of Article 28, paragraph 2 which assumes national conditions and possible limitations of the measures as well)

| | | | | |
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| | | | | premises or other property without search warrant, if it is not possible to deliver it in advance and the search cannot be delayed. In this case the police authority shall without delay additionally require the consent of the competent authority (in pre-trial proceedings through the public prosecutor).<br><br>If the consent is not subsequently granted, the results of the search cannot be used in further proceedings as evidence.<br><br>The police authority may inspect the premises or other property without search warrant if the user of the premises or other property or lands declares in writing that it agrees with it. In this case, the judge and in the pre-trial proceedings prosecutor must be immediately informed about this. |
| | § 83b- Příkaz k osobní prohlídce /**Body search warrant** | **YES** | | The presiding judge or in pre-trial proceedings the public prosecutor or police body with the public prosecutor's consent are authorised to order body search.<br><br>The police authority may proceed to body search without warrand or consent only if it is not possible to deliver it in advance and the search cannot be delayed, or if the person is caught during the act or it the warrant of arrest was issued against this person. |

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|---|---|---|---|---|
| | § 83c -Vstup do obydlí, jiných prostor a na pozemek/ **Entry into Residence, other Premises or Land** | **YES** | The police authority may enter a residence, other premises, or land property only if the matter cannot be delayed, and entry is necessary to protect human life or health, or to protect other rights and freedoms, or to avert a serious threat to public safety and public order.<br><br>The police authority may also enter the places in the case there is a person who,<br>- is the subject of any arrest warrant or order for delivery to prison or under protective measures involving deprivation of liberty<br>- must be presented for the purpose of criminal proceedings, or<br>- must be detained.<br><br>Upon entering the site referred to above, no actions other than those which serve to eliminate immediate danger or the presenting of a person can be performed. | without any autorisation |
| | § 42 Zastavení a prohlídka dopravního prostředku / **Stop and search of a mean of transport,** Act No 273/2008 Coll., on the Police of the Czech Republic | **YES** | A police officer can stop a means of transport and carry out search of it if<br><br>a) pursues an offender of intentional criminal act, or<br><br>b) searches for offender of intentional criminal act or things originating from or relating to such a criminal act,<br><br>when the police officer has reasonable suspicion that such an offender or a thing can be found in the mean of transport.<br>For the purpose of the search the police officer is entitled to open a mean of transport or even to force an entry to it when necessary. | Police authority without any authorisation (under conditions defined by the law). |

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| 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;[2] | § 78 - Povinnost k vydání věci/ **Obligation to Release Property** | **YES** | - if the person fail to comply with the call, the property may be removed from them<br><br>Exceptions - instruments whose content relates to the circumstances of the ban on interrogation | presiding judge; in pre-trial proceedings public prosecutor, or police authority when prompted |
| | § 79 - Odnětí věci/ **Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released when those who have it in their possession are prompted, it may be removed from their possession on the warrant of the presiding judge, and in preliminary hearing, the public prosecutor or police authority. | presiding judge; in pre-trial proceedings public prosecutor, or police authority (The police authority needs to have the prior approval of the public prosecutor for the issue of such warrant. Without the prior consent the warrant may be issued by the police authority only if prior approval cannot be achieved and the matter cannot be delayed.) |
| | § 8/2 – Údaje, které jsou předmětem bankovního tajemství a údaje z evidence cenných papírů/ **Request of information subject to banking secrecy and data from the security register** | **YES** | - the conditions under which the law enforcement authority may require the data obtained in the administration of taxes are stipulated under a special Act<br>- data obtained under this provision may not be used for a purpose other than the criminal proceedings for which such data was requested. | public prosecutor and, after the indictment or a punishment petition, the presiding judge |

[2] It is not clear what this means, but it's hard to find a legal basis in CZ law to require the provision of such data in other than the original or other available form of body data provided. Eg. it is not possible to order that a private entity provides a record of the security camera system in the format "avi" when its system of direct conversion to this format does not allow it

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| c) seal premises and means of transport and freezing of data, in order to preserve their integrity, to avoid the loss or contamination of evidence or to secure the possibility of confiscation; | § 43 Act No 273/2008 Coll., on the Police of the Czech Republic | **YES** | a Police officer shall be entitled to order all persons not to enter for a necessary period a determined place, not to stay there or to stay there for a necessary period | without any autorisation |
| | § 83 - Příkaz k domovní prohlídce /**Search warrant** | **YES** | The search warrant must be issued in writing and justified.<br>- It shall be served on the person, in the premise of whom the search is to be carried out, during the search, and if this is not possible, within 24 hours at the latest from elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor |
| | § 83a - Příkaz k prohlídce jiných prostor a pozemků/**Search warrant of other premises or land** | **YES** | The warrant must be issued in writing and justified. It shall be served on the user of the concerned premises or land, and if not caught during the search, immediately after elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor<br><br>The police authority may inspect the premises or other property without search warrant, if it is not possible to deliver it in advance and the search cannot be delayed. In this case the police authority shall without delay additionally require the consent of the competent authority (in pre-trial proceedings through the public prosecutor).<br><br>If the consent is not subsequently granted, the results of the search cannot be used in further proceedings as evidence.<br><br>The police authority may inspect the premises or other property without |

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| | | | | search warrant if the user of the premises or other property or lands declares in writing that it agrees with it. In this case, the judge and in the pre-trial proceedings prosecutor must be immediately informed about this. |
| | § 83c -Vstup do obydlí, jiných prostor a na pozemek/ **Entry into Residence, other Premises or Land** | **YES** | The police authority may enter a residence, other premises, or land property only if the matter cannot be delayed, and entry is necessary to protect human life or health, or to protect other rights and freedoms, or to avert a serious threat to public safety and public order.<br><br>The police authority may also enter the places in the case there is a person who,<br>- is the subject of any arrest warrant or order for delivery to prison or under protective measures involving deprivation of liberty<br>- must be presented for the purpose of criminal proceedings, or<br>- must be detained.<br><br>Upon entering the site referred to above, no actions other than those which serve to eliminate immediate danger or the presenting of a person can be performed. | without any autorisation |
| | § 78 - Povinnost k vydání věci/ **Obligation to Release Property** | **YES** | - if the person fail to comply with the call, the property may be removed from them | judge, public prosecutor, or police authority when prompted |

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|---|---|---|---|---|
| | § 79 - Odnětí věci/ **Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released when those who have it in their possession are prompted, it may be removed from their possession on the warrant of the presiding judge, and in preliminary hearing, the public prosecutor or police authority. | judge, public prosecutor, or police authority (The police authority needs to have the prior approval of the public prosecutor for the issue of such warrant.) |
| d) freeze instrumentalities or proceeds of crime, including freezing of assets, if they 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; | § 78 - Povinnost k vydání věci/ **Obligation to Release Property** | **YES** | - if the person fail to comply with the call, the property may be removed from them | presiding judge; in pre-trial proceedings public prosecutor, or police authority when prompted |
| | § 79 - Odnětí věci/ **Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released when those who have it in their possession are prompted, it may be removed from their possession on the warrant of the presiding judge, and in preliminary hearing, the public prosecutor or police authority. | presiding judge; in pre-trial proceedings public prosecutor, or police authority (The police authority needs to have the prior approval of the public prosecutor for the issue of such warrant. Without the prior consent the warrant may be issued by the police authority only if prior approval cannot be achieved and the matter cannot be delayed.) |

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| | § 79a – Zajištění peněžních prostředků na účtu banky/ **Freezing of Funds in a Bank Account**<br><br>§ 79c - Zajištění zaknihovaných cenných papírů/ **Freezing of Booked Securities**<br><br>§ 79d – Zajištění nemovitosti/**Freezing of the Real Estate**<br><br>§ 79e – Zajištění jiné majetkové hodnoty/**Freezing of Other Assets** | | | presiding judge and in the pre-trial proceedings, the public prosecutor or police authority<br><br>the police authority needs to have the prior approval of the public prosecutor for the issue of such warrant<br><br>Prior approval of the public prosecutor is not necessary in urgent matters that cannot be delayed. In such a case, the police authority is obligated to file its decision to the public prosecutor, who will either grant it or revoke it within 48 hours. |
| | § 79f – Zajištění náhradní hodnoty / **Freezing of Replacement Value** | | | |

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| e) intercept telecommunications, including e-mails[3], to and from the suspected person, on any telecommunication connection that the suspected person is using; | § 88 – odposlech a záznam telekomunikačního provozu/**Interception and Recording of telecomunications** | **NOT FOR ALL PIF CRIMES**[4] | The interception is possible in proceedings conducted for crimes with maximum term of imprisonment of at least eight years) or for other intentional crimes, to prosecution of which binds the promulgated international treaty and at the same time it can be reasonably supposed that facts important to criminal proceedings will be acquired and reaching this aim in a different manner would be impossible or substantially more difficult. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor |
| f) undertake real-time surveillance of telecommunications by ordering instant transmission of telecommunications traffic data to locate the suspected person and to identify the persons who have been in contact with him at a specific moment in time; | § 88 – odposlech a záznam telekomunikačního provozu/**Interception and Recording of telecomunications** | **NOT FOR ALL PIF CRIMES**[5] | The interception is possible in proceedings conducted for crimes with maximum term of imprisonment of at least eight years or for other intentional crimes, to prosecution of which binds the promulgated international treaty and at the same time it can be reasonably supposed that facts important to criminal proceedings will be acquired and reaching this aim in a different manner would be impossible or substantially more difficult. | presiding judge and in a pre-trial proceedings based on a motion of a public prosecutor |

[3] *It is not clear whether it concerns just a running e-mail communications or detection of the content of e-mail already delivered*

[4] *Only for criminal offences as provided by article 4/1 ii), iii) and iv) of Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (text from GA 10232/13 DROIPEN 67) and in case of criminal offence provided by article 3 of the mentioned Proposal only if an offender shall be punished by a prison sentence of five to ten years ( if the large-scale damage is caused by offender)*

[5] *Only for criminal offences as provided by article 4/1 ii), iii) and iv) of Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (text from GA 10232/13 DROIPEN 67) and in case of criminal offence provided by article 3 of the mentioned Proposal only if an offender shall be punished by a prison sentence of five to ten years ( if the large-scale damage is caused by offender)*

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| | § 88a – zjištění údajů o telekomunikačním provozu, které jsou předmětem telekomunikačního tajemství anebo na něž se vztahuje ochrana osobních a zprostředkovacích dat/ ascertain data on the telecommunications service that are the subject of a telecommunications secret or that are subject to the protection of personal and intermediation data | **NOT FOR ALL PIF CRIMES**[6] | | presiding judge and in a pre-trial proceedings based on a motion of a public prosecutor |
| | § 158d) odst. 1, odst. 3 – sledování pohybu osoby prostřednictvím jejího mobilního telefonu/**the surveillance of the persons via mobile phone** | **YES** | | Surveillance during which audio, video or other records are to be obtained may be performed only upon the written authorisation of the public prosecutor.<br><br>If the surveillance is to interfere with in the inviolability of residence, the confidentiality of correspondence, or finding the contents of other documents and records kept in private place with the use of technology, then it may be performed only with the prior authorisation of a judge. |

[6] *Only for criminal offences as provided by article 4/1 ii), iii) and iv) of Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (text from GA 10232/13 DROIPEN 67) and in case of criminal offence provided by article 3 of the mentioned Proposal only if an offender shall be punished by a prison sentence of at least three years*

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| g) monitor financial transactions, by ordering any financial or credit institution[7] to inform the European Public Prosecutor's Office in real time of any financial transaction carried out through any specific account held or controlled by the suspected person or any other accounts which are reasonably believed to be used in connection with the offence; | §8 – sledování bankovního účtu nebo účtu u osoby oprávněné k evidenci investičních zástrojů/ **surveillance of the bank accounts or accounts of persons entitled to the records of investment instruments** | **PARTIALLY** | the surveillance of the bank accounts or accounts of persons entitled to the records of investment instruments is possible - this provision cannot be applied by analogy to any transaction without restriction | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor |
| h) 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 person; | § 79a and § 79b - zajištění peněžních prostředků na účtu u banky - **Freezing of Funds in a Bank Account** | **YES** | If the established facts indicate that the funds in a bank account are intended for committing a criminal offence, or that they were used to commit a criminal offence, or are the proceeds of a criminal activity, | presiding judge and in pre-trial proceedings the public prosecutor or police authority (prior approval of the public prosecutor in necessary)<br><br>In urgent matters the prior approval of the public prosecutor is not necessary (in such a case the police authority is obligated to file its decision to the public prosecutor, who will either grant it or revoke it within 48 hours). |

[7] *It is necessary to clarify what is meant by "financial or credit institution"*

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| i) undertake surveillance measures in non-public places, by ordering the covert video and audio surveillance of non-public places, excluded video surveillance of private homes, and the recording of its results; | § 158 d) - sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | | Surveillance during which audio, video or other records are to be obtained may be performed only upon the written authorisation of the public prosecutor.<br><br>If the surveillance is to interfere with in the inviolability of residence, the confidentiality of correspondence, or finding the contents of other documents and records kept in private place with the use of technology, then it may be performed only with the prior authorisation of a judge. |
| j) undertake covert investigations, by ordering an officer to act covertly or under a false identity; | § 158e – použití agenta/ **Use of an Agent** | **NOT FOR ALL PIF CRIMES**[8] | - An agent is a member of the Police of the Czech Republic, or the General Inspection of Security Forces performing tasks assigned to them by the police authority,or member of a foreign security force | the use of an agent is allowed by the judge of the High Court upon the motion of the public prosecutor of the High Public Prosecution office |
| k) summon suspected persons and witnesses, where there are reasonable grounds tobelieve that they might provide information useful to the investigation; | § 158 odst. 7/Výzva k podání vysvětlení/ **Summuns and forced escort** - Procedure Prior to the Commencement of the Criminal Prosecution | **YES** | The police authority is entitled to ask the person to appear to give an explanation<br>If a person, who was duly summoned to give an explanation, does not appear without a sufficient excuse, they may be escorted to the competent authority (police, public prosecutor, judge) | without any autorisation |

[8] *Only for criminal offences as provided by article 4/1 ii), iii) and iv) of Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (text from GA 10232/13 DROIPEN 67) and in case of criminal offence provided by article 3 of the mentioned Proposal only if an offender shall be punished by a prison sentence of five to ten years ( if the large-scale damage is caused by offender)*

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| | § 98 – předvolání a předvedení svědka/ **Summons and Forced escort of a Witness**<br><br>§ 90 – předvolání a předvedení obviněného/**Summons and Forced excort of an Accused** | **YES** | If a witness/accused person who was duly summoned fails to appear without sufficient excuse, they may be escorted to the competent authority (police, public prosecutor, judge). | without any autorisation |
| l) undertake identification measures, by ordering the taking of photos, visual recording of persons and the recording of a person's biometric features; | §114 - Prohlídka těla a jiné podobné úkony/ **Body Examinations and Other Similar Actions** | **YES** | | Without any autorisation or with autorisation of the prosecutor in case of resistance of the suspect or accused person (*for overcoming such resistance*) |
| | § 65 Act No 273/2008 Coll. – Získávání osobních údajů pro účely budoucí identifikace/ **Obtaining Personal Data for the Purpose of Future Identification** | **YES** | The police authority is authorised (*under conditions stated by the law*) take fingerprints, use distinguishing physical features, carry out anthropometrical measurements, make audio-visual or other records, or take biological samples to obtain genetic information. | without any autorisation |
| m) seize objects which are needed as evidence; | § 79 – odnětí věci/**Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released, it may be removed from the possession | the order of the presiding judge; in pre-trial proceedings the order of the public prosecutor or police authority (the police authority needs to have the prior approval of the public prosecutor) |

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| n) access premises and take samples of goods; | § 83 Příkaz k domovní prohlídce /**Search warrant** | **YES** | - The search warrant must be issued in writing and justified.<br>- It shall be served on the person, in the premise of whom the search is to be carried out, during the search, and if this is not possible, within 24 hours at the latest from elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor |
| | § 83a Příkaz k prohlídce jiných prostor a pozemků/**Search warrant of other premises or land** | **YES** | The warrant must be issued in writing and justified. It shall be served on the user of the concerned premises or land, and if not caught during the search, immediately after elimination of the obstacle preventing from the service. | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor<br><br>The police authority may inspect the premises or other property without search warrant, if it is not possible to deliver it in advance and the search cannot be delayed. In this case the police authority shall without delay additionally require the consent of the competent authority (in pre-trial proceedings through the public prosecutor).<br><br>If the consent is not subsequently granted, the results of the search cannot be used in further proceedings as evidence.<br><br>The police authority may inspect the premises or other property without search warrant if the user of the premises or other property or lands declares in writing that it agrees with it. In this case, the judge and in the pre-trial proceedings prosecutor must be immediately informed about this. |

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| | § 79 – odnětí věci/**Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released, it may be removed from the possession | the order of the presiding judge;<br>in pre-trial proceedings the order of the public prosecutor or police authority (the police authority needs to have the prior approval of the public prosecutor) |
| o) inspect means of transport, where reasonable grounds exist to believe that goods related to the investigation are being transported; | § 42 Zastavení a prohlídka dopravního prostředku / **Stop and search of a mean of transport**, Act No 273/2008 Coll., on the Police of the Czech Republic | **YES** | | Police authority without any authorisation (see above in a)). |
| | § 83a Příkaz k prohlídce jiných prostor a pozemků/**Search warrant of other premises or land** | **YES** | The warrant must be issued in writing and justified. It shall be served on the user of the concerned premises or land, and if not caught during the search, immediately after elimination of the obstacle preventing from the service | presiding judge and in pre-trial proceedings the judge based on motion of the public prosecutor<br><br>The police authority may inspect the premises or other property without search warrant, if it is not possible to deliver it in advance and the search cannot be delayed. In this case the police authority shall without delay additionally require the consent of the competent authority (in pre-trial proceedings through the public prosecutor).<br><br>If the consent is not subsequently granted, the results of the search cannot be used in further proceedings as evidence.<br><br>The police authority may inspect the premises or other property without search warrant if the user of the premises or other property or lands |

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| | | | | declares in writing that it agrees with it. In this case, the judge and in the pre-trial proceedings prosecutor must be immediately informed about this. |
| | § 78 Povinnost k vydání věci/ **Obligation to Release Property** | **YES** | - if the person fail to comply with the call, the property may be removed from it<br><br>Exceptions - instruments whose content relates to the circumstances of the ban on interrogation | judge, public prosecutor, or police authority when prompted |
| | § 79 Odnětí věci/ **Seizure of Property** | **YES** | If the property important to the criminal proceedings is not released when those who have it in their possession are prompted, it may be removed from their possession on the warrant of the presiding judge, and in preliminary hearing, the public prosecutor or police authority. | judge, public prosecutor, or police authority (The police authority needs to have the prior approval of the public prosecutor for the issue of such warrant.) |
| p) undertake measures to track and control persons, in order to establish the whereabouts of a person; | § 158d/1 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if not acquired any audio, video or other recordings | without any autorisation |
| | § 158d/2 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if audio, video or other records are to be obtained | with the written authorisation of the public prosecutor |
| | § 158d/3 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | If the surveillance is to interfere with in the inviolability of residence, the confidentiality of correspondence, or finding the contents of other documents and records kept in private with the use of technology, | with the prior authorisation of a judge |

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| q) track and trace any object by technical means, including controlled deliveries of goods and controlled financial transactions[9]; | § 158d/1 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if not acquired any audio, video or other recordings | without any autorisation |
| | § 158d/2 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if audio, video or other records are to be obtained | with the written authorisation of the public prosecutor |
| | § 158d/3 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | If the surveillance is to interfere with in the inviolability of residence, the confidentiality of correspondence, or finding the contents of other documents and records kept in private with the use of technology, | with he prior authorisation of a judge |
| | §87b sledovaná zásilka /**Monitored Delivery** | **YES** | | order of the public prosecutor |
| r) undertake targeted surveillance in public places of the suspected and third persons; | § 158d/1 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if not acquired any audio, video or other recordings | without any autorisation |
| | § 158d/2 – sledování osob a věcí/ **Surveillance of Persons and Items** | **YES** | if audio, video or other records are to be obtained | with the written authorisation of the public prosecutor |

[9] *it is not clear what is meant by trace any controlled financial transactions - in our opinion, it is identical to the investigative measure which is listed under letter. g) - will be necessary to clarify*

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| s) obtain access to national or European public registers and registers kept by private entities in a public interest; | This measure is unclear, it would be necessary to clarify what registers it concerns. The access to certain public registers is provided directly by law (such as Criminal Records for example), others are accessible to the general public (such as Land Register for example)<br>From some registries, the public prosecutor or the judge can obtain the requested information on an application made under the provisions of Article 8 of the Criminal Procedure. | | | |
| t) question the suspected person and witnesses; | General provisions of evidence, § 89 (2) | | Evidence may be anything that may help to clarify matters, in particular the testimonies of the accused and witnesses,…… | |
| | 1. **Procedure prior to the commencement of the criminal prosecution**, § 158 (8) | | An explanation cannot be requested from persons who would violate the State's expressly imposed or recognised obligation of confidentiality, unless this obligation was exempted by the competent authority or the person in whose interest this requirement lies. A person giving an explanation, other than the suspect, is obliged to tell the truth and not conceal anything; an explanation may be refused if it would thereby endanger the criminal prosecution of themselves or persons; such person, from whom an explanation is required, must be instructed in advance. | |
| | 2.<br>3. § 158 (3) a)/vyžádání vysvětlení/ **Requirement of an explanation – (**Procedure Prior to the Commencement of the Criminal Prosecution) | **YES** | the police authority shall secure the necessary evidence and necessary explanations, and traces of the criminal offence to clarify and verify the facts reasonably suggesting that a criminal offence was committed - as part of it the police authority is also particularly entitled to require an explanation from natural persons and legal entities and public authorities,<br>4.<br>5. | without any autorisation |

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| | § 158a/výslech v případě neodkladného nebo neopakovatelného úkonu/**Interrogation in case of urgent or non- reproducible task** Procedure Prior to the Commencement of the Criminal Prosecution | **YES** | the interrogation of a witness is necessary in case of urgent or non-reproducible task (when reviewing the facts indicating that a criminal offence was committed and in identifying the offender) | upon the petition of the public prosecutor, in the presence of a judge |
| | § 97 – povinnost svědčit/ **Obligation to Testify** | **YES** | Everyone is obligated to appear upon a summons and testify as a witness. | without any autorisation |
| | § 91 – výslech obviněného/ **Interrogation of the Accused** | **YES** | | without any autorisation |
| u) appoint experts, ex officio or at the request of the suspected person, where specialised knowledge is required. | § 105 přibrání znalce/ **Appointment of Experts** | **YES** | | presiding judge; in pre-trial proceedings public prosecutor, or police authority |