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Better protection of the Union's financial interests:
Setting up the European Public Prosecutor's Office and reforming Eurojust

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**Better protection of the Union's financial interests:
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This Communication introduces a package of legislative measures to enhance the institutional aspects of protecting the Union's financial interests – and thus taxpayers' money – in accordance with the Commission's policy established in 2011¹. The package consists of a proposal for a Regulation on the establishment of the European Public Prosecutor's Office, and a proposal for a Regulation on the establishment of the European Agency for Criminal Justice Cooperation ("Eurojust"). In addition, the package includes a Communication on OLAF's governance and the enhancement of procedural guaranties in investigations, in view of establishing the European Public Prosecutor's Office.

1. THE MAIN AIMS TO BE ACHIEVED BY CREATING A EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND REFORMING EUROJUST

- Fighting fraud: a priority in times of fiscal consolidation

At a time when many Member States are implementing fiscal adjustments which place considerable burdens on many citizens, it is more important than ever to make sure that the European Union's financial interests – which are provided by the taxpayer – are effectively protected. By establishing the European Public Prosecutor's Office as proposed in this package, it will be possible to introduce for the first time an entity which will have the powers and the resources necessary to investigate, prosecute and bring cases of fraud and other illegal activities affecting the financial interests of the Union, whether national or cross-border, to courts.

It will overcome the functional limitations of the existing Union bodies and agencies because it will be a genuine investigation and prosecution body capable of acting throughout the Union in a uniform way.

- *Making prosecution at EU level more accountable*

The proposals in this package will take advantage of the provisions of the Lisbon Treaty, which gave the Union a unique competence with Article 86 TFEU to create a system of European prosecution for protecting its financial interests and with Article 85 TFEU to enhance Eurojust's efficiency and the democratic oversight of its activities.

In fact, the proposals seek to achieve greater accountability in two ways. Firstly, while fully independent, the European Public Prosecutor's Office will be accountable to the Union institutions, with a requirement to give an annual account on its activities. Secondly, as a consequence of the Lisbon Treaty, the European Parliament and national Parliaments will in the future be involved in the evaluation of Eurojust's activities. This improvement in democratic accountability of Eurojust is included in the proposed Eurojust Regulation. The future European Public Prosecutor Office will give an annual report of its activities to the

¹ On the protection of the financial interests of the European Union by criminal law and by administrative investigations", 26 May 2011, COM(2011) 293.

European Parliament and to national Parliaments, as well as to the Council and the European Commission.

- *The level of protection for those involved in investigations has to be raised*

The European Public Prosecutor's Office is to be set up in a way that provides for the rule of law to be upheld at all the stages of investigations and prosecutions. To achieve this, the proposal ensures that the principles recognised in particular by the Charter of Fundamental Rights of the European Union are respected and thus seeks to provide a high level of protection of the rights of the individuals and companies affected by fraud investigations or prosecutions. Therefore, the text includes a series of Union-level procedural safeguards, such as access to a lawyer as well as to obtain judicial authorisation in case of particularly intrusive investigation measures.

2. WHY THESE REFORMS ARE NECESSARY TO OVERCOME THE STATUS QUO?

- *The current system does not protect the Union's financial interests sufficiently*

The existing national-level and Union-level efforts fail to address properly the problem of fraud against the Union's financial interests. The Union and the Member States have a duty to "counter fraud and any other illegal activities affecting the financial interests of the Union" and "afford effective protection" to those interests.² This duty is particularly relevant in times of fiscal consolidation where every Euro counts. Despite this clear obligation, imposed by EU treaties and the case-law of the European Court of Justice,³ the Union's financial interests remain insufficiently protected in Member States: fraud, corruption and other offences affecting the Union's budget are significant and largely non-prosecuted. The Commission has identified an average of about €500 million of suspected fraud in each of the last three years, but the actual amount of fraud is likely to be significantly higher. The lack of a Union-wide comprehensive and equivalent enforcement system has allowed a certain sense of impunity to emerge among fraudsters.

Today, the Union has virtually no power to intervene in cases of criminal misuse affecting its funds. Criminal investigations or prosecutions concerning offences affecting such funds are still under the exclusive competence of the Member States. Research⁴ and statistics⁵ show that criminal investigations into fraud against the Union's financial interests are often hampered by divergent legislation and uneven enforcement efforts in the Member States. The rate of successful prosecutions concerning offences against the EU budget varies considerably across the EU (from approximately 20% to over 90%)⁶, partly owing to the complexity of the cases, the lack of sufficient national resources and the frequent need to gather evidence outside the national territory. This shows a significant gap in the efficiency of national law enforcement systems in the area of fraud against the Union's financial interests.

These shortcomings cannot be addressed within the existing national or European structures. National law enforcement and prosecution agencies can only act within national boundaries. This limits their ability to tackle cross-border crimes. And whereas Union agencies have Union-wide competences, they lack the power to conduct investigations and prosecutions in the Member States. European bodies, such as Eurojust, Europol and OLAF, may only act

² Article 325 TFEU.

³ 21 September 1989, Case 68/88, Commission v. Greece [1989] ECR 2965.

⁴ Euroneeds study. A preliminary report of this study can be downloaded from the website of the Max Planck Institute for Foreign and International Criminal Law (<http://mpicc.de>).

⁵ OLAF 10-year activity report.

⁶ OLAF Annual report 2011 - figures do not include Member States with rates 0% and 100%. EU average: 43%.

within the limits of their respective competences and functions foreseen by the Treaty, which the forthcoming reforms will not change. None of these bodies has or can be granted the powers to conduct criminal investigations or prosecute offenders.

In addition, fighting fraud against the Union's financial interests is not recognised as a priority at national level. This is particularly acute in cross-border fraud cases. Disincentives may exist even in purely national cases: priorities are set at national or regional level where the available law enforcement resources or expertise focus on other types of criminality. As a result, there is little pressure to deal with fraud against the Union's financial interests and the criminal enforcement cycle breaks down. The offences detected are not investigated, or if they are, they are dropped once difficulties appear.

- *Eurojust needs reform*

Eurojust needs reform to overcome the deficiencies in the implementation of its current framework, and thereby improve its overall functioning and become more operational. The reform will clearly distinguish the operational tasks of the Eurojust College⁷ from administrative responsibilities enabling it to focus on the operational tasks without having to tackle many administrative issues. Provision is made for the establishment of an Executive Board in order to assist the College with its administrative tasks. The transformation of the Eurojust Decision into a Regulation in accordance with the TFEU also provides an opportunity to ensure that the powers of national members are further harmonised and align the structure of Eurojust with the standards laid down in the Common Approach on EU decentralised agencies endorsed by the European Parliament, Council and the European Commission in July 2012.

- *The establishment of the European Public Prosecutor's Office and the reform of Eurojust must build on the Lisbon Treaty*

The proposals in this package will take advantage of the possibilities introduced by the Lisbon Treaty, in particular in Article 86 TFEU and Article 85 TFEU. An important novelty of the Lisbon Treaty is the participation of the European Parliament and national Parliaments in the evaluation of Eurojust's activities. This improvement in the democratic accountability of Eurojust is included in the proposed Eurojust Regulation.

Making use of both Articles simultaneously means that the best possible synergies need to be made between the European Public Prosecutor's Office and the reformed Eurojust. This is not only necessary because Article 86 TFEU stipulates that the European Public Prosecutor's Office should be established "from Eurojust", but also because the two organisations will need to work very closely together on cases falling within their respective competences.

Since the objective of this package is to improve the protection of the Union's financial interests, the implementation of Article 86 TFEU, combined with an efficiently functioning Eurojust, is considered the optimal solution. Only the possibility to establish a European Public Prosecutor's Office under Article 86 TFEU provides the full range of measures necessary to adequately investigate and prosecute EU fraud. For instance, the European Public Prosecutor's Office will have the power not only to initiate investigations, but also have them carried out under its oversight and responsibility. The powers of the European Public Prosecutor's Office go beyond what Eurojust could ever do, even if the maximum use had been made of Article 85 TFEU.

⁷ The College is composed of National Members, one from each of the European Union's Member States. The College of Eurojust is responsible for the organisation and operation of Eurojust. Eurojust may fulfil its tasks through one or more National Members or as a College.

The package supplements and reinforces the measures already put forward by the Commission to enable the Union to prevent and combat fraud and other offences affecting its financial interests ("fraud against the Union's financial interests"). These measures include the legislative proposal for a Directive on the harmonisation of the relevant offences and minimum sanctions⁸ and the Commission's Anti-Fraud Prevention Strategy⁹. This package specifically addresses issues identified in the 2011 Communication¹⁰ in the area of criminal prosecution. Two years on from the release of this important Communication, action on these issues, such as this package, is even more pressing.

3. BENEFITS OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Key features of the European Public Prosecutor's Office

The European Commission's legislative proposal seeks to set up the European Public Prosecutor's Office from Eurojust as an office of the Union, which is *independent, accountable and efficient*.

The European Public Prosecutor's Office will be a decentralised structure composed of a European Public Prosecutor and European Delegated Prosecutors in Member States. In order to make the European Public Prosecutor's Office efficient, the European Public Prosecutor will provide central steering and instructions to European Delegated Prosecutors, who will work directly for him on offences falling within the competence of the European Public Prosecutor's Office while remaining integrated in the judicial systems of the Member States ("double-hat"). This will ensure consistency, coordination, speedy action and continued oversight of ongoing investigations and prosecutions. The European Public Prosecutor's Office will act in a decentralised way: cases will be treated at the most appropriate level, which in most cases will be that of the European Delegated Prosecutor, in the Member States. Choosing a decentralised structure which will be integrated in the judicial systems of the Member States will ensure that the European Public Prosecutor's Office acts fast, consistently and efficiently to protect taxpayers' interests and integrate smoothly into national justice systems and rely on their expertise and resources.

The European Public Prosecutor's Office will rely on a small body of EU wide rules – for the scope of the crimes in its competence¹¹, for uniform powers and protection of procedural rights – and on national law for the execution of its tasks.

As an independent structure, the European Public Prosecutor's Office will provide safeguards that nobody can unduly interfere with its investigations and prosecutions. As an accountable body, the European Public Prosecutor's Office will be responsible to the Union institutions, with a requirement to give account on its activities annually.

Setting up the European Public Prosecutor's Office "from Eurojust" means the optimum synergies will be created between this newly established Office and the reformed Eurojust.

- *Fixing institutional weaknesses at national and Union level*

⁸ 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, 11 July 2012, COM(2012) 363.

⁹ COM (2011) 376.

¹⁰ Communication from the Commission "On the protection of the financial interests of the European Union by criminal law and by administrative investigations", COM(2011) 293 of 16.5.2011.

¹¹ Commission proposal for Directive of the European Parliament and Council on the fight against fraud to the Union's financial interest by means of criminal law – 11.7.2012 – COM(2012)363 of 11.7.2012.

The European Public Prosecutor's Office will have the powers and the resources necessary to investigate, prosecute and bring its cases, whether national or cross-border, to courts. It will overcome the functional limitations of the existing Union agencies: it will be a genuine investigation and prosecution body capable of action throughout the Union in a uniform way. While national procedures for criminal investigations will continue to apply, the Union will be considered as one single legal area in which the European Public Prosecutor's Office can act without having to resort to instruments of mutual legal assistance. This will trigger significant gains in the speed and efficiency of the investigation and prosecution process compared to the current situation.

- *Improving prosecution*

The European Public Prosecutor's Office will ensure consistency and coherence throughout the law enforcement cycle: once detected, the European Public Prosecutor's Office will systematically follow-up cases within its competence until they are brought to court. It will restore the enforcement cycle and ensure that one phase follows the other until the case ends up in trial at court. Its investigations, in respect of which the European Public Prosecutor's Office will be able to rely on Europol's analysis and intelligence, and its prosecutions will be driven by a common European prosecution policy based on a Union-wide competence. Such Union-wide competence will allow more efficiency in cross-border cases by steering, coordinating enforcement action and ensuring that the available resources are optimally used.¹²

- *Enhancing the deterrent effect of criminal prosecutions*

The European Public Prosecutor's Office will ensure that every suspected offence against the Union's financial interests will be systematically and efficiently followed up by law enforcement and prosecution authorities. Deterrence will improve as a result of the systematic prosecution of fraudsters, increasing the chances of conviction and the recovery of criminal proceeds through confiscation. Ultimately, the prosecutions brought by the European Public Prosecutor's Office should also have a preventive effect and gradually reduce the volume of the damage caused to the Union's financial interests by such criminal offences.

- *Conducting fraud investigations and prosecutions in accordance with the Rule of Law*

The proposal on the European Public Prosecutor's Office ensures that the principles recognised in particular by the Charter of Fundamental Rights of the European Union are respected and thus seeks to provide a high level of protection of the rights of the individuals and companies affected by fraud investigations or prosecutions in the Union. It includes a series of Union-level procedural safeguards, such as access to a lawyer, the right to be presumed innocent and the right to legal aid. It also requires that investigation measures be subject to judicial authorisation by the competent national courts. The data protection regime of the European Public Prosecutor's Office will provide a high-level protection for personal data, much in the same way as Eurojust's data protection regime. Taken together, these safeguards will provide an unprecedented level of legal protection for suspects and other persons involved in the Union's efforts to combat fraud against the Union's financial interests and enable a system of investigations and prosecutions based on the Rule of Law.

¹² The European Parliament – in its Resolution of 11 June 2013 "on organised crime, corruption, and money laundering: recommendations on action and initiatives to be taken" calls for the establishment of a European Public Prosecutor's Office underlining "that the future office should have an efficient and streamlined structure ...".

4. THE MAIN ELEMENTS OF THE PROPOSAL ON THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Focused competence on fraud against the Union's financial interests: in accordance with Article 86 (1) TFEU, the European Public Prosecutor's Office would exclusively deal with "crimes affecting the financial interests of the Union". In that area, the competence of the European Public Prosecutor's Office would be exclusive so that it can ensure consistency and oversee investigations at Union level. Given this exclusive competence, such cases can no longer be subject of administrative investigations by OLAF, or if they are, they must be transferred in cases where a criminal suspicion arises.

Independence and accountability: the independence of the European Public Prosecutor's Office will be protected by various safeguards, in particular through its appointment and dismissal procedures, rules on tenure and conflicts of interests. Its accountability will be regulated in a way that the appointing authorities (Union institutions) are kept informed about the work of the European Public Prosecutor's Office and can ask the Court of Justice of the European Union to remove the European Public Prosecutor in case of serious misconduct.

Lifting of immunities: where necessary for its investigations, the European Public Prosecutor's Office will have the power to request the lifting of immunity, whether at national or at Union-level, in accordance with the applicable rules.

Decentralised and integrated architecture: the European Public Prosecutor's Office will be organised as a decentralised office and thus have a presence, and the ability to act, in all Member States. The European Delegated Prosecutors, integrated in the judicial systems of the Member States, will be capable of relaying, coordinating and implementing the European Public Prosecutor's instructions on the ground. The European Public Prosecutor's Office will cooperate closely with the national law enforcement, prosecution and judicial authorities. This decentralised structure has many advantages, in particular the integration into national justice systems (knowledge of national justice system, knowledge of local language, recognition by and integration into local prosecution structure, practice in handling local court cases, etc.). The decentralised architecture will also be reflected in the way the European Public Prosecutor's Office adopts its internal rules by ensuring the participation of European Delegated Prosecutors in the adoption process.

Strong link between the European Public Prosecutor and the European Delegated Prosecutors: as a single office, the European Public Prosecutor's Office will be supported by a hierarchical structure. It will be directed by the European Public Prosecutor with the authority to instruct the "double-hatted" European Delegated Prosecutors on the ground in Member States when they work on offences within the competence of the European Public Prosecutor's Office.

Efficiency: the European Public Prosecutor, assisted by his Deputies and the European Delegated Prosecutors, takes the final decision on prosecution. Clear hierarchical lines ensure swift decision-making and will overcome the current low level of priority accorded to fighting EU fraud. The European Public Prosecutor's Office will be able to pool investigative and prosecutorial resources to address the needs in a given situation, thereby making law enforcement at European and national level more efficient.

Uniform investigation powers: the European Public Prosecutor's Office will be able to employ a wide range of investigative measures to investigate fraud. These measures can be ordered in all Member States in order to ensure an equivalent fight against fraud throughout the Union. The specific conditions and exercise of these measures will continue to be governed by national law. As the difference in national rules of gathering evidence often leads to problems of admissibility of evidence gathered in another Member State, it will be stipulated that

evidence gathered lawfully in one Member State shall be admissible in all Member States, unless the fairness of the proceedings or the rights of defence are adversely affected.

Safeguards and judicial review: the exercise of investigative powers must be accompanied by a system of judicial review and measures to safeguard the rights of suspected persons, witnesses and victims. For a series of most intrusive investigative measures (such as searches and seizures, interceptions of telecommunications, covert investigations), there will be an EU level harmonised requirement for the European Public Prosecutor's Office to obtain a prior judicial authorisation to undertake them. The rights of persons involved in the investigations of the European Public Prosecutor's Office will be guaranteed through the application of Union legislation and national law, and by relying on national courts. Again, this has the advantage that both the European Delegated Prosecutors and the legal representatives of the persons involved will be working within a familiar national system, ensuring that their rights are protected in a manner with which they are accustomed.

Building on existing resources: the European Public Prosecutor's Office will not generate substantial new costs for the Union or the Member States, as its administration services will be handled by Eurojust and its human resources will come from existing entities such as OLAF, as it will no longer carry out administrative investigations on criminal cases involving the Union's financial interests. This change also affects the number of staff required for the tasks of OLAF: it is foreseen that a significant number of OLAF staff will be moved to the European Public Prosecutor's Office, thus reducing the costs of its setting up. Despite this reduction of staff, adequate staffing will remain at OLAF to enable it to exercise its remaining competences.¹³ The overall costs of law enforcement will be more balanced as a result of efficiency gains (duplications can be avoided, investigation time reduced and problems of mutual assistance eliminated).

5. SYNERGIES BETWEEN THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND EUROJUST

Article 86 TFEU stipulates that the European Public Prosecutor's Office must be created "from Eurojust" and there are good reasons for creating a privileged partnership between the two:

- Transferring Eurojust's cases of fraud against the Union's interests to the European Public Prosecutor's Office. As the European Public Prosecutor's Office will have exclusive competence in the area of fraud and other offences affecting the Union's financial interests, Eurojust's competence in this area (coordination of judicial cooperation in cross-border cases) will be transferred to ensure consistency.
- Dealing with hybrid cases requires daily operational coordination. There are, and will always be, cases where both the European Public Prosecutor's Office and Eurojust need to be involved, in particular cases where the suspects are involved in both crimes affecting the Union's financial interests and other forms of crime. This implies that there will be a need for continuous close cooperation. To ensure that this takes place, provisions have been included in both the Regulation on the European Public Prosecutor's Office and the Regulation on Eurojust, setting out that this Office can request that Eurojust, or its national members, intervene, coordinate, or otherwise use their powers in a given case. In addition, in cases of overlapping competence in hybrid cases, Eurojust may provide assistance in settling the question of jurisdiction.

¹³ Proposal for a Regulation amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999, 17 March 2011, COM(2011) 135.

- Cost-efficiency requires sharing resources. It is envisaged that Eurojust will provide practical support services to the European Public Prosecutor's Office in administrative issues, such as personnel, finance and IT. This approach delivers considerable cost savings, and counteracts unnecessary duplication of functions. One example of such cost savings is that the European Public Prosecutor's Office will be able to use the IT infrastructure of Eurojust, including using its Case Management System, temporary work files and index. The details of this arrangement will be laid down in an agreement between the European Public Prosecutor's Office and Eurojust.

6. THE IMPACT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE ON OLAF

Given the exclusive competence of the European Public Prosecutor's Office to deal with criminal offences affecting the Union's financial interests, OLAF will not conduct administrative anti-fraud investigations where there are suspicions of a criminal behaviour. It also follows that, in the future, OLAF will report suspicions of such criminal offences, at the earliest stage, following a preliminary evaluation of allegations brought to its attention in accordance with the current legal framework, to the European Public Prosecutor's Office. This change will facilitate a speedier investigation process and will help to avoid duplications of administrative and criminal investigations into the same facts. In this way, resources will be saved and the chances of a successful prosecution increased. Further adjustments to OLAF's legislative framework will be proposed to take account of the establishment of the European Public Prosecutor's Office and should enter into force concurrently with the Regulation setting it up.

In the meantime, substantial benefits will be achieved through the revised OLAF Regulation, which will very soon enter into force. Furthermore, taking inspiration from the substantial reinforcement of procedural guarantees, that will be brought about by the establishment of the European Public Prosecutor's Office, the Commission intends to propose further systemic improvements of the OLAF Regulation even before the European Public Prosecutor's Office is established. These possible measures, in particular the procedural safeguards in investigations, are spelt out in more detail in the Communication on OLAF's governance.

7. ADOPTION PROCEDURE FOR THE PROPOSAL ON THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 86 TFEU provides for a special legislative procedure to establish the European Public Prosecutor's Office, which requires unanimity in the Council and the consent of the European Parliament. In addition, national Parliaments will, in accordance with Protocols No. 1 and No. 2 of the Lisbon Treaty, be consulted. The Commission will take utmost account of these opinions.

The procedure under Article 86 TFEU also foresees a second step based on "enhanced cooperation", should the Council fail to agree unanimously on the initial Commission proposal. In essence, this procedure enables a group of at least 9 Member States to refer the proposal to the European Council, which either comes to a consensus on the text or, after 4 months, is deemed to have granted authorisation to a group of 9 Member States willing to proceed with enhanced cooperation. This procedure differs from "ordinary" enhanced cooperation in that it does not require a formal Council authorisation. The relevant Treaty provisions (Articles 326-334 TFEU) otherwise apply. The participating Members States need to unanimously agree to adopt the proposal.

8. CONCLUSION

The legislative package submitted by the Commission with this Communication is both ambitious and forward-looking. It will change the current landscape of law enforcement and criminal justice in the Union and its Member States. Once adopted, this package will have a substantial and long-term impact on the legal framework and institutional set up of the Union's area of freedom, security and justice. The Commission will in due course carefully take stock of the extent to which the objectives of the measures have been realised. This review will also examine the mandate of the European Public Prosecutor's Office and the legal regime applicable to its activities.