OPINION OF THE LEGAL SERVICE

From: Legal Service
To: Working Party on Cooperation in Criminal Matters (COPEN)
Subject: Draft Council Regulation on the establishment of the European Public Prosecutor's Office – issue relating to the ancillary competence of the European Public Prosecutor's Office following the latest revised compromise text

I. INTRODUCTION

1. On 13 May 2015, the Council Legal Service ("CLS") issued a legal opinion on the issue relating to the ancillary competence of the European Public Prosecutor's Office ("EPPO"), on the basis of the Commission Proposal and revised Presidency texts based on Article 86 of the Treaty on the Functioning of the European Union ("TFEU").

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2 Doc. 8904/15 + COR2

3 12558/13.

4 7070/15 and 8316/15 (Article 18).
2. In this legal opinion of 13 May 2015, the CLS concluded the following: "an extension of the EPPO's competence ratione materiae, if confined to ancillary offences arising from identical facts and inextricably linked to facts forming the basis of preponderant PIF offences, is compatible with the legal basis of Article 86 TFEU, which refers in general terms to investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, PIF offences, as determined in the regulation establishing the European Public Prosecutor's Office. Moreover, bearing in mind the application of the ne bis in idem principle, this limited extension of competence ratione materiae would preserve the effectiveness of Article 86 TFEU. For these reasons, subject to setting a precise criterion for the preponderance of PIF offences as opposed to other, ancillary offences, which is currently lacking, Article 18 of the latest Presidency compromise text may be brought into line with the legal basis of Article 86 TFEU."

3. On 2 December 2016, the Presidency presented a revised compromise text\(^5\) for the preparation of a policy debate for the JHA Council of 8 December 2016, in particular on Articles 17 and 20(3) of the draft EPPO Regulation which are new (amended) provisions on the issue relating to the ancillary competence of EPPO. On 22 December 2016, an updated Presidency compromise text\(^6\) was issued with some adjustments to those provisions. This opinion examines this latest text of the draft EPPO Regulation.

4. At the COPEN meeting of 6 December 2016, the written opinion of the CLS was requested on the compatibility of the revised compromise text on Articles 17 and 20(3) of the draft EPPO Regulation with the legal basis of Article 86 TFEU, taking into account the analysis already conducted in the previous legal opinion of the CLS of 13 May 2015 on the basis of previous compromise texts.

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\(^5\) Doc. 15200/16 of 2 December 2016.

\(^6\) Doc. 15760/16 of 22 December 2016.
5. At the COREPER meeting of 7 December 2016, the draft Directive on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") was examined with a view to a political agreement with the European Parliament.

II. **LEGAL FRAMEWORK**

6. Article 86 TFEU, the legal basis for the proposed Regulation, provides that:

"1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. (...)"

2. The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. (…)

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission." (emphasis added).

7. Articles 17 and 20(3) and (3a) of the draft EPPO Regulation provide as follows:

"Article 17

Material competence of the European Public Prosecutor’s Office

1. The European Public Prosecutor’s Office shall be competent in respect of the criminal offences affecting the financial interests of the Union which are provided for in Directive 2017/xx/EU, as implemented by national law, irrespective of whether the same criminal conduct could be classified, under national law, as another type of offence.

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7 Doc. 14902/16 and doc. 15130/16, of 2 December 2016.
8 Doc. 14902/16.
1a. The European Public Prosecutor’s Office shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1.

2. The European Public Prosecutor’s Office shall also be competent for any other criminal offence which is inextricably linked to a criminal conduct falling within the scope of paragraph 1 of this Article. The competence with regard to such criminal offences may only be exercised in conformity with Article 20(3).

3. In any case, the European Public Prosecutor's Office shall not be competent for criminal offences in respect of national direct taxes and the structure and functioning of the tax administration of the Member States shall not be affected by this Regulation.

Article 20(3):

"The European Public Prosecutor’s Office shall refrain from exercising its competence in respect of any offence falling within the scope of Article 17 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 28a if:

a) the maximum sanction provided for by national law for an offence falling within the scope of Article 17(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 17(2), or

aa) the maximum sanction provided for by national law for an offence falling within the scope of Article 17(1) is equal to the maximum sanction for an inextricably linked offence as referred to in Article 17(2) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 17(1) or;

b) there is a reason to assume that the damage caused or likely to be caused, to the Union’s financial interests by an offence as referred to in Article 17 does not exceed the damage caused, or likely to be caused to another victim.

Point b) of this paragraph shall not apply to offences referred to in Article 3(a) and (d) of Directive 2017/xx/EU⁹ as implemented by national law."

⁹ Doc. 14902/16.
Article 20(3a):

"The European Public Prosecutor's Office may, with the consent of relevant national prosecution authorities, exercise its competence even in cases which would otherwise be excluded due to application of paragraph 3 subparagraph a)."

8. Recital (49) of the draft Regulation states:

"The efficient investigation of crimes affecting the financial interests of the Union and the principle of ne bis in idem may require, in certain cases, an extension of the investigation to other offences under national law, where these are inextricably linked to an offence affecting the financial interests of the Union. The notion of inextricably linked offences should be considered in light of the relevant case law which, for the application of the ne bis in idem principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space."

Recital (49a) of the draft Regulation states:

"The notion of instrumental offences should cover in particular offences which have been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as offences strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof."

Recital (49b) of the draft Regulation states:

"In cases of inextricably linked offences, where the offence affecting the Union’s financial interests is preponderant, the competence of the European Public Prosecutor’s Office should be exercised after consultation with the competent authorities of the Member State concerned. Preponderance should be established primarily on the basis of the seriousness of the offence concerned, as reflected in the sanction that could be imposed."
III. LEGAL ANALYSIS

9. As explained in paragraph 12 of the CLS opinion of 13 May 2015, it follows from a literal interpretation of Article 86(2) TFEU that the EPPO's competence *ratione materiae* is not necessarily limited to offences falling within the scope of the PIF Directive\(^\text{10}\), which is a directive on minimal harmonisation of substantive criminal law to be adopted on the basis of Article 83(2) TFEU to cover most (but not all) offences against the Union's financial interests. According to the precise wording of Article 86(2) TFEU, the EPPO's competence *ratione materiae* applies generally to the investigation, prosecution and bringing to judgment of the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the future Regulation establishing the European Public Prosecutor's Office. Therefore, even if offences ancillary or related to PIF offences which may be prosecuted at the same time as 'pure' PIF offences do not fall within the scope of the PIF Directive, that does not mean that they must automatically and necessarily fall outside the scope of Article 86(2) TFEU. On the contrary, these ancillary and related offences may fall within the scope of Article 86(2) TFEU as determined by the EPPO Regulation.

10. In light of the above, the last phrase of Article 17(1) ("(...) irrespective of whether the same criminal conduct could be classified, under national law, as another type of offence") should not be regarded as an extension of the competence of EPPO beyond PIF offences. It actually aims at reflecting the situation where the same criminal conduct which is classified as a PIF offence as provided in the PIF Directive as implemented by national law could also be classified as another type of offence under national law. This may correspond to a situation known in some legal systems as a *concours d'infractions* meaning that several distinct offences based on identical or linked facts may be committed successively or simultaneously by the same perpetrator. This situation as determined by the EPPO Regulation is therefore in compliance with Article 86 TFEU.

\(^{10}\) Doc. 14902/16 of 2 December 2016.
11. Article 17(1a), which has been added in the new revised compromise text, aims at ensuring that the combined application of the rules in Articles 17 and 20(3) of the draft EPPO Regulation does not lead to a lack of competence of EPPO where the focus of the criminal activity of a criminal organisation is to commit a PIF offence, even in cases where the maximum sanction for the participation in such a criminal organisation is more severe than for the pure PIF offence - which is often the case. This new provision, like the above mentioned last phrase of Article 17(1), still limits the competence of EPPO to offences against the Union's financial interests referred to in Article 86(2) TFEU but in such a way as it preserves the effet utile of Article 86 TFEU. As explained in the CLS opinion of 13 May 2015, the preponderance criterion should be clearly defined and should not be a purely quantitative criterion based on financial damage. In this particular case, the criterion used is a qualitative one and refers both to the focus of the criminal activity of the criminal organisation which is defined by reference to Framework Decision 2008/841/JHA and to PIF offences (committed by such a criminal organisation) as defined in Article 17(1). For these reasons, this extension of the material competence of EPPO to offences falling within the scope of Article 17(1a) complies with Article 86 TFEU and the requirement of legal certainty.

12. Article 17(2) of the draft EPPO Regulation extends the competence of EPPO to inextricably linked offences in line with the case law of the Court of Justice on the ne bis in idem principle as developed in the CLS opinion of 13 May 2015. In order to improve legal certainty, Recital 49 of the draft EPPO Regulation gives some guidelines on how to interpret this concept of inextricably linked offences.

13. Article 17(3) which has been added in the last Presidency compromise text aims at excluding offences in respect of national direct taxes in the unlikely event that those offences could be considered as inextricably linked offences. It is indeed unlikely that for a VAT fraud offence and a national direct tax offence, the material facts would be identical or substantially the same within the meaning of the Court case law referred to in Recital 49 of the Presidency compromise text.
14. The previous criterion of preponderance, with which the CLS had misgivings\textsuperscript{11} as to its lack of precise definition or as being defined by reference to a purely quantitative criterion based on financial damage, has now been removed from Article 17(2) and has been circumscribed and clearly defined in Article 20(3) of the draft EPPO Regulation. The first criterion now used in Article 20(3) relates to the severity of the maximum sanction, unless, in the case of "equal" maximum sanctions, the inextricably linked offence has been instrumental to commit the offence. Furthermore, pursuant to Article 20(3a), where the severity test is not met, the competence of EPPO may be extended with the consent of relevant national prosecution authorities.

15. The severity of the sanction is an objective test of preponderance. As regards the instrumentality test used in Article 20(3)(aa) by exception to the main test related to the severity of the sanction, it is the one used by the Court of Justice when assessing the preponderance and ancillary components of offences in order to exercise judicial review on the choice of the legal basis by the Union legislature\textsuperscript{12}. Furthermore, the instrumentality test is clarified in the new Recital 49a.

\textsuperscript{11} See paragraph 25 of the CLS opinion of 13 May 2015 (doc. 8904/15 + COR2).
\textsuperscript{12} See paragraph 25 and footnote 21 of the CLS opinion of 13 May 2015 (doc. 8904/15 + COR2).
As regards the last criterion used in Article 20(3)(b) which is based on financial damage, it is a horizontal criterion which applies to PIF offences whatever their classification under national law (Article 17(1)), to PIF related offences in the context of a criminal organisation (Article 17(1a)) and to inextricably linked offences (Article 17(2)). It aims at delimiting the competence of EPPO vis-à-vis the competence of national authorities on the basis of the damage caused to the Union's financial interests mainly on subsidiarity grounds and taking into account the fact that, contrary to the Commission's Proposal, the EPPO does not have an exclusive competence to investigate, prosecute and bring to judgment PIF offences. The CLS notes that this financial damage criterion has been circumscribed since it does not apply in a number of cases, in order to preserve the effectiveness of the EPPO's material competence on PIF offences. The last subparagraph of Article 20(3)(b) excludes this criterion for VAT fraud as defined in Article 3(d) of the PIF Directive. Otherwise EPPO would never be able to exercise its material competence on such an offence, since the damage to the national budget in the case of VAT fraud will always be higher than the damage to the Union's budget. The same subparagraph also excludes this criterion for fraud in respect of non-procurement related expenditure (e.g. structural funds involving co-financing between the EU and national budgets).

The combination of the above-mentioned clearly defined criteria for the exercise of the competence of EPPO limits the competence of EPPO to what is necessary to preserve the *effet utile* of Article 86 TFEU and does not go beyond offences which are ancillary to PIF offences on the basis of clearly defined criteria. It does not therefore encroach on the powers of the Union legislature on the basis of Article 86 TFEU.
IV. CONCLUSION

18. The delimitation and extension of the EPPO's competence *ratione materiae*, in accordance with Article 17 and Article 20(3) and (3a) of the draft EPPO Regulation in its version of 22 December 2016 (doc. 15760/16), both as regards the definition of the offences falling within the material competence of EPPO and the limitations of the exercise of such a competence based on clearly defined criteria, are compatible with the legal basis of Article 86 TFEU.