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WORKING PAPER

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From:	DE, FR, IT and RO delegations
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (European Public Prosecutor Office) (EPPO)
Subject:	Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

Delegations will find below contributions from DE, FR, IT and RO delegations.

The German delegation wishes to thank the EU Presidency for the opportunity to provide written comments on the current version of the draft EPPO Regulation as set out in Council document 7761/17.

At the outset we would like to reiterate that in our view the Council should refrain from any attempts to re-negotiate the draft text as it had progressively emerged from several Council meetings in the course of the last three years. Nevertheless, as pointed in a separate document which we had presented on Article 17 of the draft EPPO Regulation (WK 3926/2017), it will be indispensable to address the question of a proper reference to the PIF Directive especially in light of the fact that this directive now does include VAT offences.

On the same lines as indicated by the Commission in the COPEN meeting on 6 April, the German delegation would also offer some additional considerations for a possible improvement of the text.

1) Article 17(3)

The document "compromise elements" that had been issued by the previous Slovak EU Presidency on 13 December 2016 had included the phrase "including offences inextricably linked thereto", which has subsequently been deleted from the text. We are aware that a few Sherpa colleagues had questioned the need for this phrase. In our view it would serve to clarify the purpose of that paragraph if that phrased would be re-inserted. The purpose of paragraph 3, similar to that of paragraph 2 of Article 17 would be to address situations where e.g. an offence of tax fraud in respect of national income tax is inextricably linked with an offence of VAT-fraud. As the former Slovak EU Presidency had explained in that document of 13 December, it would in such rare circumstances be necessary to also exclude a possible EPPO competence in respect of the VAT fraud. Otherwise there would be two independent (parallel) investigations in respect of the same or inextricably linked set of facts, which could thus lead to an infringement of the *ne bis in idem* principle.

Therefore we suggest re-inserting the phrase "including offences inextricably linked thereto". For linguistic purposes we would furthermore suggest to end the sentence with this additional phrase and to place the following text as a new sentence to be phrased along the lines of the draft recital as set out in the document “compromise elements” dated 13 December: "This Regulation does not affect the structure, organisation and the functioning of the tax administration of the Member States and the competences of Member States to determine, assess and collect VAT."

2) Article 20(3a)

The "compromise elements" issued by the Slovak EU Presidency on 13 December included an important element, the introductory phrase "Provided that the offence in accordance with Article 17(2) has been instrumental to commit the offence falling within the scope of Article 17(1)", which has subsequently been deleted from the text. As the former Slovak EU Presidency had explained in that document, this additional phrase would be important to ensure that the limitations of Article 86(1) TFEU are observed. It would serve to clarify that, in case the national offence is more severe than the PIF-offence (in terms of maximum sanction), consent by the national authority can still be given only where the non-PIF-offence is of an ancillary nature (i.e. has been "instrumental" to committing the PIF offence). Thus we ask that this phrase be re-inserted.

3) Article 34(1)

We appreciated the additional sentence that was contained in the document "compromise elements" issued by the Slovak EU Presidency on 13 December. However, the wording has subsequently been changed and the phrase "shall receive prior consent from national prosecution authorities" has been replaced by "shall consult national prosecution authorities". Based on the replies from other Sherpa on those "compromise elements", we wonder why that change has been made. A mere obligation to "consult" would at least not be sufficient in cases where the national damage by far exceeds the EU damage. On the other hand, it would actually be rather surprising if the EPPO would be obliged to "consult" the national authority only in case of an offence as referred to in Article 3 (a) of the PIF Directive and not also in case of other offences which concern as well the prosecution authorities of a Member State.

We thus request that the text as used in the "comprise elements" of 13 December be taken up again. Furthermore, we still believe that it would be appropriate to delete in Article 34 (2)(a) the phrase: "to the financial interests of the Union" or to amend it by "and other victims". At least in cases where the offence primarily caused a damage to victims other than the EU, it would not be appropriate for the EPPO to take such decisions without taking into the account the total damage caused by the offence.

4) Clarification of the term "Member States"

As pointed out in the COPEN meeting on 6 April, we believe that it would be prudent to clarify in the EPPO Regulation that, except where otherwise indicated, the term "Member States"

is to be understood as reference only to those Member States that participate in the establishment of the EPPO. We note the fact that the new paragraph 2 of Article 75 determines that the Regulation "…. shall apply in the Member States which participate in enhanced co-operation…" and that the last sentence of Article 75 paragraph 3 now uses the term "participating Member States". On the other hand, there is at least one article in the draft regulation, where the term "Member States" is specifically used in the context of the non-participating Member States (c.f. Article 59a).

While it may be self-understood that any article which imposes obligations on Member States obviously can apply only in the Member States participating in the establishment of the EPPO, there are a few articles where the use of the term "Member States" may be less obvious (c.f. e.g. Article 18). In particular, questions may arise in respect of the applicable rules on data protection and more specifically the exchange of personal data which differentiate only between "Member States" and "third countries (c.f. e.g. Article 37(1)(a) on the one hand and Articles 43a pp on the other).

5) Article 58(2)

The most recent version of that provision contains a change of the text in comparison to the previous outcome of negotiations and, moreover, is incomplete as it is worded now. We suggest going back to the previously agreed version.

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RÉPUBLIQUE FRANÇAISE

REPRESENTATION PERMANENTE DE LA FRANCE
AUPRES DE L'UNION EUROPEENNE

SERVICE DE LA JUSTICE
ET DES AFFAIRES INTERIEURES

Bruxelles, le 19 avril 2017

Le Chef du service de la justice et des affaires intérieures

à

Madame le Directeur général de la justice et des affaires intérieures
Secrétariat général du Conseil

Objet : Commentaires des autorités françaises sur la proposition de règlement portant création du Parquet européen

Réf. : cad-2017-270901-jud 289

P.J. : note des autorités françaises

Vous trouverez ci-joint la réponse des autorités françaises à la demande de commentaires de la Présidence sur la proposition de règlement portant création du Parquet européen.

P/O JEAN MAFART

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NOTE DES AUTORITÉS FRANÇAISES

Objet : Réponse à la demande de commentaires adressée par la Présidence sur la proposition de règlement portant création du Parquet européen

Depuis le printemps 2013, c'est-à-dire avant même la présentation de la proposition de règlement par la Commission en juillet 2013, les autorités françaises défendent une vision ambitieuse du parquet européen. Elles ont très activement participé aux discussions, aussi bien au niveau des groupes d'experts que des groupes conseillers JAI, des réunions sherpas et des Conseils JAI avec la participation des ministres de la justice. La France a œuvré pour trouver les meilleurs compromis possibles et pour préserver l'ambition du projet.

Comme tous les États membres qui participent au projet, les autorités françaises ont fait des concessions en ce qui concerne tant l'obligation de remontée d'information que la définition des mécanismes d'exercice de la compétence (article19, article 20§3), tout comme la liste des mesures d'enquête prévues à l'article 25 qui aurait pu être plus étendue. De même, elles auraient préféré que la « boîte à outils » prévue à l'article 59 (relations avec les États tiers et les organisations internationales) soit d'une portée plus limitée, et que les références au droit national soient moins nombreuses.

Pour autant, conformément à la position que la France défend depuis plusieurs mois maintenant, les autorités françaises ne formulent aucune proposition rédactionnelle et souhaitent rappeler encore une fois que le texte actuel constitue le meilleur compromis possible. Leur objectif désormais, comme la Présidence, est de parvenir à une approche générale au Conseil JAI du mois de juin.

Ainsi, les autorités françaises ne souhaitent pas remettre en cause les grands équilibres du texte, même si elles sont prêtes à discuter de légers ajustements formels qui pourraient permettre d'améliorer à la marge certains mécanismes.

Drafting proposal from the Italian delegation on Articles 19 and 20

In view of the discussions on the proposal for Regulation setting up the European Public Prosecutor's Office at the meeting of the COPEN Working Party on 27-28 April, the Italian delegation would like to submit to the attention of delegations the proposal in the Annex for modifications of Articles 19 and 20.

The principal aim of the proposals is to better balance the existing criteria for distribution of competence between EPPO and national authorities in case of inextricably linked PIF and non-PIF offences (Article 20 (3) letter (a) – preponderance of penalty – and (b) – preponderance of damage) with the necessity for EPPO to be aware of the decision of national authorities to invoke such criteria and, if appropriate, ask for review of such decision.

In this respect:

- the criteria for exercise of EPPO's competence, and in particular the preponderance criteria in Article 20(3), are left untouched;

- the "preponderance of penalty" criterion (letter a) is partially moderated by the exception in case of "mere instrumentality" of the non-PIF offence;

- the "preponderance of damage" criterion (letter b) is maintained, with the proposal to extend its non-application to all cases relating to EU expenditure (reference to Article 3, letter b), of the PIF Directive);

- in Article 19, the information obligation on national authorities is extended to those cases when they decide that EPPO shouldn't exercise its competence in accordance with Article 20(3). In this case, in our view, EPPO should be aware of the existence of a proceedings involving (among others) a PIF offence with a view, if it believes that the criteria in Article 20(3) have been wrongly applied, to be able to apply for review to national authorities (in accordance with Article 20(5)).

The proposal concerns also, in the same spirit, a partial modification of the provision on the power of EPPO to request information on specific PIF offences on which it is not investigating (Article 19 (5)), as well as a redraft of Article 20 (3a) with a view to focusing the aim and procedure described therein.

These proposals, if accepted, would entail at least a partial re-balancing in the distribution of competences between EPPO and national authorities, as well strengthening the effectiveness of EPPO's powers of investigation. This would substantially improve, in the view of our delegation, the overall balance of the text.

Article 19

Reporting, registration and verification of information

1. The institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent in accordance with applicable national law shall report without undue delay to the European Public Prosecutor's Office any criminal conduct in respect of which it could exercise its competence in accordance with Article 17, Article 20(2) and Article 20(3).

1a. When a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the European Public Prosecutor's Office could exercise its competence in accordance with Article 17, Article 20(2) and Article 20(3), or where, at any time after the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that an investigation concerns such an offence, this authority shall without undue delay inform the European Public Prosecutor's Office so that the latter can decide whether to exercise its right of evocation in accordance with Article 22a.

1aa. When a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence as defined in Article 17 and considers that the European Public Prosecutor's Office could not exercise its competence as the criteria in Article 20(3) are not met, it shall inform the European Public Prosecutor's Office thereof [1].

1b. The report shall contain, as a minimum, a description of the facts, including an assessment of the actual or likely damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons.

[1] A recital should be added explaining that this information is given to allow EPPO to assess the correct application of the criteria (instrumental nature, preponderance of damage) set out in article 20 (3) letters a) and b); reference should be made to the fact that, in case of disagreement, EPPO shall first consult national authorities and, should the disagreement persist, it may be solved in accordance with the procedure set out in Article 20 (5).

1c. The European Public Prosecutor's Office shall also be informed in accordance with paragraphs 1 and 1a of this Article in cases where an assessment of whether the criteria laid down in Article 20(2) ~~and 20(3)~~ are met is not possible~~, or where an assessment of the instrumental nature of the inextricably linked offence referred to in Article 20(3)(aa) has to be made~~.

2. Information provided to the European Public Prosecutor's Office shall be registered and verified in accordance with its internal rules of procedure. The verification shall aim to assess whether, on the basis of the information provided in accordance with paragraph 1 and 1a, there are grounds to initiate an investigation or to exercise the right of evocation.

3. Where upon verification the European Public Prosecutor's Office decides that there are no grounds to initiate an investigation in accordance with Article 22, or to exercise its right of evocation in accordance with Article 22a, the reasons shall be noted in the case management system.

The European Public Prosecutor's Office shall inform the authority that reported the criminal conduct in accordance with paragraph 1 or 1a, as well as crime victims and if so provided by national law, other persons who reported the criminal conduct.

4. Where it comes to the knowledge of the European Public Prosecutor's Office that a criminal offence outside of the scope of the competence of the European Public Prosecutor's Office may have been committed, it shall without undue delay inform the competent national authorities and forward all relevant evidence.

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

6. The European Public Prosecutor's Office may request other information ~~Such information may also be requested~~ in order to enable the College, in accordance with Article 8(2), to issue general guidelines on the interpretation of the obligation to inform the European Public Prosecutor's Office of cases falling within the scope of Article 20(2).

Article 20

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

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

   The European Public Prosecutor's Office shall, where appropriate, consult the competent national authorities or Union bodies to establish whether the criteria set out in (a) and (b) are met.
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 <u>equal to or</u> less severe than the maximum sanction for an inextricably linked offence as referred to in Article 17(2) <u>unless the latter offence has been instrumental to commit the offence falling within the scope of Article 17(1)</u>; 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)[, (b)] and (d) of Directive 2017/xx/EU as implemented by national law.

3a. Competent national ~~prosecution~~ authorities may propose that ~~T~~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)~~b), if it appears that the Office is better placed to ~~conduct the investigation~~investigate or prosecute.[2]

4. The European Public Prosecutor's Office shall inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence.

5. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Articles 17(1a), 17(2), 20(2) or 20(3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall define the national authority which will decide on the attribution of competence.

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2 A recital should be added illustrating in which cases it could be considered when the Office is better placed to perform the investigation.

RO comments on the EPPO draft regulation

Article 49 (5a)

Where an exceptionally costly investigation measure is carried out on behalf of the Office, the European Delegated Prosecutors may, at the reasoned request of the competent national authorities or on their own initiative, **request** the Permanent Chamber **to entirely or partially cover the cost of the investigation measure from the European Public Prosecutor's Office budget**. Such request shall not delay the investigation.

The Permanent Chamber may then, upon consultation with the Administrative Director and based on the proportionality **criteria** of the measure carried out in the specific circumstances and the extraordinary nature of the cost it entails decide to accept or refuse the request, in accordance with the rules on the assessment of these criteria to be set out in the Internal Rules of Procedure. The Administrative Director shall then decide on the amount of the grant to be awarded based on the available financial resources. The Administrative Director shall inform without delay the handling European Delegated Prosecutor of the decision on the amount.

The investigation measures involving more than three Member States, those considered as crucial for the investigation or over a certain amount should be covered entirely.

Reasoning:

The situations where costs of the investigation measures may be covered from the EPPO budget should be stipulated in the EPPO regulation more precisely, using objective and clear criteria such as the number of Member States involved or the amount to be paid for the investigation measure. The criminal investigation in complex cross-border cases should not be impeded or delayed because of the burden of costs. Furthermore, the Permanent Chamber should rather be requested and not consulted in such cases, as it will subsequently decide to accept or refuse such a request.