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NOTE

From: Presidency
To: Delegations

Subject: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

The Italian Presidency has so far focused on an examination of the rules in the proposal concerning investigations and procedural safeguards (Articles 15-19 and 25-36 in the Commission proposal). The said Articles have been discussed thematically in two CATS meetings and then examined more in detail in the COPEN meetings of 17-18 July and on 24-25 September. It is in the light of these discussions that the Presidency has now tentatively redrafted and restructured Articles 15-19 and Articles 25-36 in the Commission proposal, which have been renumbered as Articles 20-33 in the annexed text.

The Presidency recognises that additional work is needed to ensure that Articles 1-19, on one hand, and Articles 20-33, on the other, are fully coherent internally as well as with the principles of independence and efficiency of the Office agreed by Ministers in the March and June Councils. The full text of Articles 1-33 (i.e. the Articles in the annexed text below as well as the 19 Articles discussed under the Greek Presidency) will therefore be developed further in the coming months in order to ensure such coherence.

Delegations are invited to examine the annexed text at the COPEN meeting of 6-7 October 2014.

Draft

COUNCIL REGULATION

on the establishment of the European Public Prosecutor's Office

Article 1- 19¹

[...]

¹ Articles 1-19 are not included in this document, but will be included in later versions of the Presidency draft.

CHAPTER IV

RULES OF PROCEDURE ON INVESTIGATIONS, PROSECUTIONS AND TRIAL PROCEEDINGS

SECTION 1 CONDUCT OF INVESTIGATIONS

Article 20

Registration and verification of information

1. All national authorities of the Member States and all institutions, bodies, offices and agencies of the Union shall immediately inform² the European Public Prosecutor's Office of any conduct which might constitute an offence within its competence³.
2. The European Public Prosecutor's Office shall collect or receive information from any person or source on conduct which might constitute an offence within its competence.
3. Any information brought to the attention of the European Public Prosecutor's Office shall be registered and verified by the Central Office or the European Delegated Prosecutor who received it directly, in accordance with the internal rules of procedure.
4. Where, upon verification, it appears that there is no ground to initiate an investigation, the Central Office or the European Delegated Prosecutor concerned shall decide not to open a case and note the reasons in the Case Management System. They shall inform the national authority, the Union institution, body, office or agency, which provided the information, thereof, and at their request, where appropriate, the persons who provided the information.

² Some delegations have requested that the procedures for providing this information should be described in detail.

³ Many delegations have suggested that this obligation should be delimited and have made various suggestions in this sense.

Article 21

Initiation of investigations and allocation of competences within the European Public Prosecutor's Office⁴.

1. Where, upon verification, there are reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed, a European Delegated Prosecutor, [a European Prosecutor] [or a Permanent Chamber] shall⁵ initiate investigations and note this in the Case Management System.
2. Upon receipt of such notification, the Central Office shall verify that an investigation has not already been initiated by another European Delegated Prosecutor. If an investigation in respect of the same offence had already been initiated, the competent Permanent Chamber, after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, shall decide on the European Delegated Prosecutor who shall lead the investigation in accordance with Article 10(3)⁶. If an investigation in respect of the same offence had not already been initiated, the Permanent Chamber may assign the case to a European Delegated Prosecutor of a Member State, which would have jurisdiction in accordance with Article 10(3).
4. If in a particular case more than one Member State would have jurisdiction over the offence committed and if investigation measures are required in more than one of these Member States, the Permanent Chamber may associate several European Delegated Prosecutors with the investigation and determine the European Delegated Prosecutor who shall lead the investigations.

⁴ Certain rules on the initiation of investigations are already contained in Articles 10(3) and 12(2) in the text presented to JHA Council of 6 June. The most appropriate position in the text of these rules will be considered at a later stage.

⁵ Compare with Article 19(1) and bring in line.

⁶ In the text presented to JHA Council of 6 June

Article 22⁷
Urgent Measures and referrals

1. Where immediate action with regard to an offence within the competence of the European Public Prosecutor's Office is required, the national authorities shall - regardless of whether they intend to exercise own competence or not - take any urgent measures necessary to ensure effective investigation and prosecution. The national authorities shall subsequently without delay inform the European Public Prosecutor's Office in accordance with Article 20. If the European Public Prosecutor's Office then decides to revoke the case in accordance with Article 19(3), it shall confirm, if possible within 48 hours from the initiation of its investigation, the measures taken by the national authorities, even if such measures have been undertaken and executed under rules other than those of this Regulation.
2. At any stage of the investigation, where the case gives rise to doubts as to its competence, the European Public Prosecutor's Office may consult the national prosecution authorities to determine which authority is competent. Pending a decision on competence, the European Public Prosecutor's Office shall take any urgent measures necessary to ensure effective investigation and prosecution of the case. Where the competence of the national authority is established, the national authority shall confirm within 48 hours from the initiation of the national investigation the urgent measures taken by the European Public Prosecutor's Office.
3. Where an investigation initiated by the European Public Prosecutor's Office reveals that the conduct subject to investigation constitutes a criminal offence, which is not within its competence, the European Public Prosecutor's Office shall refer the case without delay to the competent national law enforcement and judicial authorities.

⁷ Broadly corresponding to Art. 17 from the Commission proposal; has not yet been discussed.

Article 23

Conducting the investigation⁸

1. The European Delegated Prosecutor handling the case may, in accordance with national law, either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. These authorities shall ensure that all instructions from the European Public Prosecutor's Office are followed and execute the investigation measures assigned to them.
2. In cross-border cases, where investigation measures need to be executed in a Member State other than the one where the investigation was initiated, the European Delegated Prosecutor handling the case shall request that the European Delegated Prosecutor in the Member State where the investigation measure needs to be carried out undertake that measure. The latter European Delegated Prosecutor shall then, in accordance with national law, decide either to undertake the investigation measures himself/herself or instruct the competent national authorities to execute them. In the event of disagreement between the European Delegated Prosecutors concerned, those European Delegated Prosecutors shall refer the matter to the competent Permanent Chamber for instruction in accordance with Article 9.
- 3⁹. The competent Permanent Chambers shall direct and monitor¹⁰ the investigations conducted by the European Delegated Prosecutors and ensure their coordination. The European Prosecutor to whom the Chair of the Permanent Chamber has assigned the case in accordance with Article 10, shall have the powers to instruct, on behalf of his/her Chamber, the European Delegated Prosecutor(s)¹¹ handling the case¹².

⁸ A general rule on the responsibility of the EDP's as regards the conduct of investigations can be found in Art 12(1) in the text presented to JHA Council of 6 June. Some delegations have requested that the "national" chain of command shall be mentioned explicitly in this provision.

⁹ This provision may duplicate Article 9(2) and (4).

¹⁰ It is recalled that the terms monitoring and supervision will be defined in detail at a later stage.

¹¹ Some delegations have suggested that specific grounds for when the EDP can refuse instructions from the Central Office should be indicated here.

¹² To be read in conjunction with Article 12(1) in the text presented to JHA Council on 6 June.

4. In the course of an investigation and until a decision to prosecute in accordance with Article 27 is taken, the Permanent Chamber monitoring the case may, after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to reallocate a case to another European Delegated Prosecutor if such reallocation is in the interest of the efficiency of investigations and in accordance with the criteria set out in Article X¹³.
5. The European Prosecutor to whom the case was assigned by the Chair of the competent Permanent Chamber may - with the approval of that Permanent Chamber - in exceptional cases take the decision to conduct the investigation himself/herself if this appears necessary in the interest of the efficiency of the investigations or prosecution on the grounds of one or more of the following criteria:
 - a) the seriousness of the offence, in particular in view of its possible repercussions on Union level;
 - b) when the investigation concerns a high-level¹⁴ Union staff members or Members of the institutions, bodies, offices and agencies of the European Union;
 - c) when there is no European Delegated Prosecutor or competent national authority in the Member State concerned which could perform the investigation.
6. Where the conduct of the investigation is taken over by a European Prosecutor directly, he/she shall inform the European Delegated Prosecutor in the Member State where investigation measures need to be carried out.
7. Investigations carried out under the authority of the European Public Prosecutor's Office shall be protected by the rules concerning professional secrecy under the applicable Union legislation. Authorities participating in the investigations of the European Public Prosecutor's Office are also bound to respect professional secrecy as provided under the applicable national law.¹⁵

¹³ An Article X outlining these criteria in detail will be considered. See Article 12(5) in the text presented to JHA Council on 6 June.

¹⁴ A definition of "high level" will be considered.

¹⁵ This provision and its link with Article 64 in the Commission proposal will be considered further.

Article 24

Lifting privileges or immunities

1. Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under national law, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting in accordance with the procedures laid down by that national law.
2. Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under Union law, in particular the Protocol on the privileges and immunities of the European Union, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Public Prosecutor's Office shall make a reasoned written request for its lifting in accordance with the procedures laid down by Union law.

SECTION 2

INVESTIGATION MEASURES

Article 25

The European Public Prosecutor's Office's authority to investigate

1. [For the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence].¹⁶
2. Where the European Public Prosecutor's Office decides to exercise its competence over an offence which was partly or wholly committed outside the territory of the Member States by one of their nationals, by Union staff members or by members of the Institutions, it shall seek assistance to obtain the cooperation of the third country concerned pursuant to the instruments and procedures referred to in Article 59.

Article 26

Investigation measures

1. Member States shall ensure that prosecutors in the European Public Prosecutor's Office has the right to request or to order the same types of investigative measures which are available to investigators/prosecutors according to national law in similar cases of crime.
2. Where the designated European Delegated Prosecutor or a competent authority acting on his/her instructions in accordance with Article 23 (1) undertakes investigative measures, the law of the Member State in which the measures are undertaken shall apply and

¹⁶ The wording of this provision will be revised in the light of the discussions at the JHA Council of 9-10 October 2014. The concept of the territory of the Union will be clarified when it has finally been decided which Member States will participate in the Office.

determine the conditions, modalities and procedures for the investigative measures available to the European Public Prosecutor's Office. Member States shall ensure that at least the following investigative measures¹⁷ are available under their laws:

- [a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system;
- 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;
- 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;
- 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;
- e) intercept telecommunications, including e-mails, to and from the suspected person, on any telecommunication connection that the suspected person is using;
- 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;
- g) monitor financial transactions, by ordering any financial or credit institution 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;

¹⁷ Delegations are asked to indicate which of these measures they do not consider necessary to list here.

- 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;
- 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;
- j) undertake covert investigations, by ordering an officer to act covertly or under a false identity;
- k) summon suspected persons and witnesses, where there are reasonable grounds to believe that they might provide information useful to the investigation;
- l) undertake identification measures, by ordering the taking of photos, visual recording of persons and the recording of a person's biometric features;
- m) seize objects which are needed as evidence;
- n) access premises and take samples of goods;
- o) inspect means of transport, where reasonable grounds exist to believe that goods related to the investigation are being transported;
- p) undertake measures to track and control persons, in order to establish the whereabouts of a person;
- q) track and trace any object by technical means, including controlled deliveries of goods and controlled financial transactions;
- r) undertake targeted surveillance in public places of the suspected and third persons;
- s) obtain access to national or European public registers and registers kept by private entities in a public interest;
- t) question the suspected person and witnesses;
- u) appoint experts, ex officio or at the request of the suspected person, where specialised knowledge is required.]

3. The individual investigative measures shall not be ordered without reasonable grounds or if less intrusive means can achieve the same objective.
4. [In case of a cross-border investigation as referred to in paragraph 3, the European Delegated Prosecutor in the executing State may postpone the execution of the measure where:
 - its execution might prejudice an ongoing criminal investigation or prosecution until such time as the Delegated Prosecutor deems reasonable;
 - the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.

As soon as the grounds for postponement have ceased to exist, the European Delegated Prosecutor shall forthwith take the necessary measures to execute the investigation measure in question.]

5. The European Public Prosecutor's Office may request from the competent judicial authority the arrest or pre-trial detention of the suspected person in accordance with national law.¹⁸

SECTION 3

TERMINATION OF THE INVESTIGATION AND POWERS OF PROSECUTION

Article 27

Prosecution before national courts

1. The prosecutors of the European Public Prosecutor's Office shall have the same powers as national public prosecutors in respect of prosecution and bringing a case to judgement, in particular the power to present trial pleas, participate in evidence taking and exercise the available remedies.

¹⁸ Finland has suggested that the following text could be added to Article 26:
"The European Prosecutor may issue, or request the delegated prosecutor, or the competent national authority, to issue a European Arrest Warrant, a European Investigation Order, or a Freezing Order, according to the relevant EU-instruments."

2. When the competent European Delegated Prosecutor considers the investigation to be completed, he/she shall submit a summary of the case with, where applicable¹⁹, a draft indictment and the list of evidence to the Permanent Chamber for review. Where it does not instruct to dismiss the case pursuant to Article 28, the Permanent Chamber, acting through the competent European Prosecutor, shall instruct the European Delegated Prosecutor to bring the case before the competent national court with an indictment, or refer it back for further investigations. The competent European Prosecutor may also bring the case to the competent national court himself/herself.
3. The indictment submitted to the competent national court shall list the evidence to be adduced in trial.
4. The competent Permanent Chamber shall determine, in close consultation with the European Delegated Prosecutor submitting the case and bearing in mind the proper administration of justice, the jurisdiction of trial in accordance with the following criteria, in this order of priority²⁰:
 - a) the place where the offence, or in case of several offences, the majority of the offences was committed;
 - b) the place where the accused person has his/her habitual residence;
 - c) the place where most of the evidence is located;
 - d) the place where the direct victims have their seat or habitual residence.
- 4a. The competent national court is determined on the basis of national law.
5. Where necessary for the purposes of recovery, administrative follow-up or monitoring, the Central Office shall notify the competent national authorities, the interested persons and the relevant Union institutions, bodies, agencies of the decision taken by the Chamber in accordance with this Regulation.

¹⁹ “Where applicable” refers to cases where the EDP proposes a transaction or to dismiss a case.

²⁰ Many delegations have noted that the competent jurisdiction shall/will rather be chosen early in the investigation phase. Many have also called for specific rules on judicial review of these decisions.

Article 28

Dismissal of the case

1. The competent Permanent Chamber shall, on proposal from the European Delegated Prosecutor, dismiss the case where prosecution has become impossible on account of any of the following grounds:
 - a) death of the suspected person;
 - b) the conduct subject to investigation does not amount to a criminal offence within the competence of the European Public Prosecutor's Office
 - c) amnesty granted;
 - d) immunity granted to the suspect, unless it has been lifted.
 - e) expiry of the national statutory limitation to prosecute;
 - f) the suspected person has already been finally acquitted or convicted of the same facts within the Union or the case has been dealt with in accordance with Article 29;
 - g) lack of relevant evidence.
2. The European Public Prosecutor's Office may refer cases dismissed by it to OLAF or to the competent national administrative or judicial authorities for recovery, other administrative follow-up or monitoring.
- 2a. A decision in accordance with paragraph 1 g) shall not bar further investigations on the basis of new facts, which could not have been known to the European Public Prosecutor's Office at the time of the decision and which became known hereafter and before expiry of applicable statutory limitations in all Member States where the case can be brought to judgment.
3. Where a case has been finally dismissed, the Central Office shall officially notify the competent national law enforcement and judicial authorities and shall inform the relevant Union institutions, bodies and agencies, as well as the injured party, thereof.²¹

²¹ The right of victims of review will be addressed here or in a general provision.

Article 29

Transaction²²

1. Where the case is not dismissed and it would serve the purpose of proper administration of justice, the competent European Delegated Prosecutor or competent European Prosecutor may, after the damage has been compensated, propose to the suspected person to pay a lump-sum. If the suspected person agrees, the proposed transaction shall be submitted to the competent Permanent Chamber for validation. The suspected person shall thereafter pay the lump sum fine to the Union.
2. The European Public Prosecutor's Office shall supervise the collection of the financial payment involved in the transaction.
3. Where the transaction is validated and paid by the suspected person, the competent Permanent Chamber shall finally dismiss the case and officially notify the competent national law enforcement and judicial authorities and shall inform the relevant Union institutions, bodies, agencies and injured parties thereof.

SECTION 4

ADMISSIBILITY OF EVIDENCE

Article 30

Admissibility of evidence

1. Evidence presented by the prosecutors of the European Public Prosecutor's Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence or other rights as enshrined in the Charter of Fundamental Rights of the European Union, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence.

²² It has been suggested that this term should be replaced with "Settlement" in the final English version of the text.

2. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the prosecutors of the European Public Prosecutor's Office at trial shall not be affected²³.

SECTION 5

CONFISCATION

Article 31

Disposition of the confiscated assets

Where the competent national court has decided by a final ruling to confiscate any property related to, or proceeds derived from, an offence within the competence of the European Public Prosecutor's Office, the monetary value of such property or proceeds shall be transferred to the Union's budget, to the extent necessary to compensate the prejudice caused to the Union and subject to other legitimate claims.

CHAPTER IV

PROCEDURAL SAFEGUARDS

Article 32

Scope of the rights of the suspects and accused persons as well as other persons involved

1. The activities of the European Public Prosecutor's Office shall be carried out in full compliance with the rights of suspected persons enshrined in the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the rights of defense.

²³ Some delegations have suggested the addition of an explicit rule permitting a national judge to decide that evidence will not be admitted on the ground that it is irrelevant.

2. Any suspect and accused persons as well as other persons involved in the proceedings of the European Public Prosecutor's Office shall, as a minimum, have the procedural rights as they are provided for in Union law, including directives adopted on the basis of Article 82(2) of the Treaty such as:

- (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU of the European Parliament and of the Council,
- (b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU of the European Parliament and of the Council,
- (c) the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention, as provided for in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,
- (d) the right to remain silent and the right to be presumed innocent as provided for in Directive 201x/xx/EU of the European Parliament and of the Council to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings,
- (e) the right to legal aid as provided for in Directive 201x/xx/EU of the European Parliament and of the Council on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant,
- (f) the right to present evidence, appoint experts and hear witnesses,
- (g) ...

3. Without prejudice to the rights provided in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the European Public Prosecutor's Office shall have all the procedural rights available to them under the applicable national law.

4. The rights referred to in paragraph 2 shall also apply to any person other than a suspect or accused person who is heard by the European Public Prosecutor's Office if, in the course of questioning, interrogation or hearing, he/she becomes suspected of having committed a criminal offence.

CHAPTER V

JUDICIAL REVIEW

Article 33

Judicial review

OPTION 1:

When adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office shall be considered as a national authority for the purpose of judicial review.

OPTION 2:

Only procedural measures taken by the European Public Prosecutor's Office on the basis of Articles 18(6)²⁴, 27(4) [and ...] shall be subject to review of their legality before the Court of Justice of the European Union in accordance with Article 263 of the Treaty²⁵.

²⁴ Article 18(6) on ancillary competence should be redrafted as a consequence of this provision.

²⁵ A Recital should set out the criteria taken into account to limit the competence of the ECJ on actions for annulment to those specific cases, in the light of the objectives and principles referred to in the CLS legal opinion (doc. 13302/1/14 REV1) .

Other procedural measures taken by the European Public Prosecutor's Office in the performance of its functions, in particular investigation measures provided for in Article 26 and procedural measures taken by it after the indictment has been acknowledged by the competent national court, shall be subject to judicial review before the competent courts of the Member States²⁶.

²⁶ A Recital should clarify that this provision is without prejudice to Article 267 of the Treaty, in particular preliminary rulings on the validity of procedural measures taken by the European Public Prosecutor's Office.