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From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - <i>Orientation debate</i>

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The content of Articles 7-12 in the draft Regulation, which deal with the status and structure of the Office, has been discussed and examined in detail in the COPEN working party since October 2013. After intensive discussions at expert level and in Council, the Greek Presidency presented a compromise text on these and related issues to Council in June 2014. Ministers welcomed the text, on the understanding that the text would need further examination at expert level as regards certain details. The subsequent Italian and the Latvian Presidencies have continued the work on the said Articles in view of having outstanding reserves lifted, and have made considerable advances towards an agreed compromise text.

In the light of these intensive negotiations during the last 1,5 years, the Presidency considers that sufficient time has now been spent on the analysis of the Articles and on addressing the concerns of delegations, and that time has now come to formulate and agree on a detailed balanced compromise on the provisions in question. The Presidency presented such a compromise

text to a meeting of JHA Counsellors on 23 March 2015, in which a very constructive discussion took place. An informal consultation in writing on a modified version of the text followed in April, whereby most delegations have noted their tacit approval of the content of the text. However, a number of delegations have noted concerns, in particular in relation to the rules of the supervision of the work of the Office in the Member States. Indeed, some delegations wish to ensure a high level of independence in the operational activities of the European Delegated Prosecutors based in the Member States, often on the basis of efficiency arguments, whereas others wish to give the Permanent Chambers of the Central Office a strong and active role in the supervision of the operational activities of the Office at national level.

On the basis of these discussions and consultations, the Presidency has made a small number of modifications and believes that the text should now be broadly acceptable to delegations. In particular, the rules on the supervision of the work of the Office in the Member States are now drafted in a way which should strike a balance between the positions and arguments presented by different delegations. The Presidency considers that the time is now ripe to present the text to COREPER. In the Annex to this note, delegations will consequently find the consolidated version of the Presidency proposal for a compromise text, with outstanding reservations and concerns indicated in footnotes.

**With a view to approaching an agreement on the text of this part of the future Regulation, the Presidency invites the Permanent Representatives to:**

- **lift any outstanding reservations on Articles 7 to 12 in the draft Regulation, as presented in Annex,**
- **indicate their support to the text in Annex.**

It is the intention of the Presidency to include Articles 7 to 12 as presented in the Annex in the text to be submitted to Ministers for endorsement in June.

## **CHAPTER III**

### **STATUS, STRUCTURE AND ORGANISATION OF EPPO**

#### **SECTION 1**

#### **STATUS AND STRUCTURE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE**

##### *Article 7*

##### **Structure of the European Public Prosecutor's Office**

1. The European Public Prosecutor's Office shall be an indivisible Union body operating as one single Office with a decentralised structure.
2. The European Public Prosecutor's Office shall be organised at a central level and at a decentralised level.
3. The central level shall consist of a Central Office at the seat. The Central Office shall consist of: the College, the Permanent Chambers, the European Chief Prosecutor, his/her deputies and the European Prosecutors.
4. The decentralised level shall consist of European Delegated Prosecutors located in the Member States.
5. The Central Office and the European Delegated Prosecutors shall be assisted<sup>1</sup> by the staff of the European Public Prosecutor's Office in their duties under this Regulation.

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<sup>1</sup> A recital to explain the role of the staff will be added, with the following tentative wording: 'The staff of the central office shall assist European Chief Prosecutor, the College and Permanent Chambers to discharge their duties under this Regulation, in particular with regard to the supervision of cases handled by European Delegated Prosecutors and the preparation of the decisions to be taken in accordance with Article 9 (3). The staff of the central office shall not have the powers to carry out acts of investigations themselves but may participate in investigations conducted by, or provide assistance to, the national authorities when acting on behalf of the European Public Prosecutor's Office'.

## Article 8

### The College

1. The College of the European Public Prosecutor's Office shall consist of the European Chief Prosecutor and one European Prosecutor per Member State. The European Chief Prosecutor shall chair the meetings of the College and be responsible for their preparation.
2. The College shall meet regularly and be responsible for the general oversight<sup>2</sup> of the activities of the Office. It shall take decisions on strategic matters, and on general issues arising from individual cases<sup>3</sup>, in particular in view of ensuring coherence and consistency in the prosecution policy of the Office throughout the Union, as well on other matters as specified in this Regulation. The College shall not take operational decisions in individual cases. The Internal rules of procedure shall provide for the modalities of the general oversight of activities and decisions on strategic matters and general issues by the college in accordance with this Article.
3. On a proposal by the European Chief Prosecutor and in accordance with the Internal Rules of Procedure, the College shall set up Permanent Chambers.

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<sup>2</sup> In this document, the terms 'general oversight', 'monitoring and directing' and 'supervision' are used to describe different control activities. These terms will need more detailed explanations in the text and/or recitals, in line with the following:

- ✓ The 'general oversight' refers to the general administration of the activities of the Office, in which instructions are only given on issues which will have a horizontal importance for the Office;
- ✓ 'monitoring and directing' refers to certain clear powers to monitor and direct individual investigations and prosecutions when such directions appear to be necessary.
- ✓ 'supervision' refers to a closer and rather continuous oversight of investigations and prosecutions, including full powers to, whenever necessary, intervene and give instruction on investigations and prosecution matters.

NL, PT, SI have noted that this tentative definition of supervision may not be acceptable, as it would imply an infringement of the principle of autonomy of their national prosecutors, as laid down in their national law and constitutions. BE opposes the tentative definition of supervision, as it does not properly reflect the hierarchical structure of the Office. Consequently, according to BE, the permanent chambers should be in charge of the supervision of the work of the Office in the Member States.

<sup>3</sup> A recital with the following wording could be considered: 'The College should take decisions on strategic matters, including as regards determining the priorities and policy of the Office, as well as on general issues arising from individual cases, for example as regards to the application of the Regulation, the correct implementation of the policy of the Office or questions of principle or of significant importance for the development of a coherent prosecution policy of the Office'. CZ and IE wish to add the following phrase to the said proposed new recital 'The decision of the College cannot affect the principle of legality as it is applied in the criminal proceedings of Member States'.

4. The College shall adopt Internal Rules of Procedure of the European Public Prosecutor's Office in accordance with Article 16, and shall further specify the responsibilities for the performance of functions of the members of the College and the staff of the European Public Prosecutor's Office.
5. Unless stated otherwise in this Regulation, the College shall take decisions by simple majority. Any member of the College shall have the right to initiate voting on matters to be decided by the College. Each Member of the College shall have one vote. The European Chief Prosecutor shall have a casting vote in the event of a tie vote on any matter to be decided by the College<sup>4</sup>.

#### *Article 9*

#### **The Permanent Chambers<sup>5</sup>**

1. The Permanent Chamber shall be chaired by the European Chief Prosecutor or one of the Deputies, or a European Prosecutor appointed as Chair in accordance with the Internal Rules of Procedure<sup>6</sup>. The Permanent Chamber shall have two additional permanent<sup>7</sup> Members. The number of Permanent Chambers as well as the division of competences between the Chambers shall take due account to the functional needs of the Office and be

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<sup>4</sup> A recital indicating that the College and the Permanent Chambers should in principle strive towards consensual decision-making will be considered, for example as follows: 'The College and Permanent Chambers should use their best efforts to reach consensus. If such a consensus cannot be reached, decisions should be taken by voting.' SE would like this recital to be in the body of the text.

<sup>5</sup> SE, supported by CZ, HU, IR; NL and SI, maintains its general opinion that a system where the EDP's are responsible for taking the bulk of the operative decisions would contribute significantly the effectiveness of the EPPO. The EDP:s should to the furthest extent possible take the necessary decisions in the cases they are handling. Sweden still believes that the Regulation should move in that direction. This could be achieved in a number of different ways, preferably by shortening the list of decisions that the Chambers should make in Article 9. Other options, such as enhanced possibilities for the Permanent Chambers to delegate their powers to the EDP's and/or introduce extensive possibilities to use written or silent procedures, could be considered

<sup>6</sup> The inclusion of the recital should be considered that during administrative establishment of the EPPO, or if necessary at the later stage, a European Prosecutor should in principle be appointed as a Chair of the Permanent Chamber if there are not enough Deputies.

<sup>7</sup> FI suggests to delete 'permanent'. FI stresses for the need of flexible structure of the chamber, taking into account the unknown workload. For the same reason, and taking into account the voting rights of the concerned EP, FI suggests replacing "two" by "one or more".

determined in accordance with the Internal Rules of Procedure. These shall ensure an equal distribution of workload on the basis of a system of random allocation of cases and shall, in exceptional cases, provide for procedures allowing, where necessary for the proper functioning of the Office, for deviations from the principle of random allocation upon decision by the European Chief Prosecutor.<sup>8</sup>

2. The Permanent Chambers shall monitor<sup>9</sup> and direct<sup>10</sup> the investigations and prosecutions conducted by the European Delegated Prosecutors in accordance with paragraphs 3 and 4 in this Article<sup>11</sup>. They shall also ensure the coordination of investigations and prosecutions in cross-border cases and the implementation of decisions taken by the College in accordance with Article 8(2).
- 3.<sup>12</sup> The Permanent Chambers shall take the following decisions in accordance with the conditions and procedures set out by this Regulation:
  - a) to initiate an investigation in accordance with the rules in Article 21(1) where no investigation has been initiated by an European Delegated Prosecutor<sup>13</sup>;
  - b) to evoke a case in accordance with Article 21a where the case has not been evoked by an European Delegated Prosecutor;
  - c) to refer to the College strategic matters or general issues arising from individual cases in accordance with Article 8(2);
  - d) to allocate a case in accordance with Article 21(2);

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<sup>8</sup> The introduction of the following recital should be considered: 'The allocation of cases should ensure distribution of cases in accordance with established consequence between the Permanent Chambers at the random pace as to ensure equal distribution of workload'.

<sup>9</sup> SI would like to delete 'monitor'.

<sup>10</sup> CZ is opposed to the inclusion of the words 'and direct'.

<sup>11</sup> COM advocates a solution where one of the Members of a Permanent Chamber - regardless of his or her nationality - will be selected to be Rapporteur of the case in order to ensure the neutrality of the Rapporteur. PT, CZ, SI would exclude that the Permanent Chamber shall have the right to intervene in individual cases, except in cases of inactivity or manifest delays.

<sup>12</sup> DE, FI, NL, SE believes that 9(3) should be finalized only after work on other Articles has been completed.

<sup>13</sup> CZ, NL, SK suggests to add the following words at the beginning of the point 'to instruct European Delegated Prosecutors to initiate investigations'.

PRES proposes to include a recital making clear that Permanent Chamber takes a decision to initiate the case or evoke a case, if European Delegated Prosecutor has not initiated an investigations or evoked the case. A reference to Article 23 (4a) should also be considered.

- e) to reallocate a case in accordance with Article 21(4) and 23(4a);
- f) to bring a case to judgment in accordance with Article 27(2)<sup>14</sup>;
- g) to dismiss a case in accordance with Article 28(1)<sup>15</sup>;
- h) to dismiss a case through a transaction in accordance with Article 29;
- i) to approve the decision of a European Prosecutor to conduct the investigation himself or herself in accordance with Article 23(5).

4. The competent Permanent Chamber may give instructions<sup>16</sup>, in compliance with applicable national law and through the European Prosecutor who is supervising<sup>17</sup> an investigation or a prosecution, in a specific case to the European Delegated Prosecutor handling the case, whenever necessary for the efficient<sup>18</sup> handling of the investigation or prosecution and in the interest of justice and<sup>19</sup> a coherent functioning of the European Public Prosecutor's Office.

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<sup>14</sup> CZ, NL, PT objects to the competence of the Permanent Chamber to decide whether to bring the case to judgment. In the opinion of CZ, this should be decided by the European Delegated Prosecutors.

<sup>15</sup> CZ prefers to give the Permanent Chamber a possibility to review why criminal proceedings were not initiated, why they were suspended, eventually why criminal prosecution was terminated, rather than to take the original decisions in this sense. CZ suggests to add following wording 'to review dismissal of cases, including the power to annul such dismissals and to decide on the continuation of criminal proceedings or instruct the competent EDPs to proceed'. PT does not agree with the competence of Permanent Chamber to dismiss a case for reasons related to the autonomy of the magistrates and efficiency of the procedure. PT advocates for an *ex post* intervention or a silent procedure mechanism of review.

<sup>16</sup> CZ, NL, PT have suggested that the notion of monitoring should be explained as follows in a recital: 'The monitoring role of the Permanent Chamber refers to a general oversight, in which instructions may be given against inactivity or manifest delays in pending criminal proceedings. However, Permanent Chambers should not be entitled to give specific operational instructions'. RO, with support from some delegations, have suggested that a recital with the following wording (or similar) should be considered: "The European Delegated Prosecutors should be bound to follow instructions coming from the Central Office. They will however have the right to ask for a review by the Permanent Chamber of an instruction, if it is not compliant with the Regulation or the applicable national law". CZ, with support in principle of SI, would like to add the following words in the body of the text 'EP or the EDP may refuse instructions given by the Permanent Chamber if they are in conflict with this Regulation, applicable national law or because of the diverging written reasoned legal opinion of the EP or the EDP'.

<sup>17</sup> SI suggests to replace 'supervising' by 'directing'. The same applies for the subsequent paragraphs of Article 9 and subsequent Articles.

<sup>18</sup> NL and SK has requested the deletion of the reference to efficiency here, and to leave only the reference to interests of justice and a coherent functioning of the EPPO.

<sup>19</sup> COM has emitted a reservation with relation to the cumulative criteria of 'the interest of justice and a coherent function of the EPPO'.

5. The Permanent Chamber shall take decisions by simple majority. The Chamber shall vote at the request of any of its Members. Each Member shall have one vote. The Chair shall have a casting vote in the event of a tie vote. The decisions shall be taken in deliberation in meetings of the Chambers on the basis, where applicable, of a summary report presented to the Chamber by the competent European Prosecutor<sup>20</sup>. All case material shall at request be accessible to the competent Permanent Chamber in view of the preparation of the decisions.<sup>21</sup> The Permanent Chambers may delegate their decision-making power under paragraph 3 g) to the European Prosecutor supervising the case in situations referred to in Article 28(1)(a)<sup>22</sup>. The Internal Rules of Procedure may authorise the Chambers, where appropriate, to take decisions by means of a written procedure to be laid down in detail in the internal Rules of Procedure. All decisions taken and instructions given in accordance with paragraphs 3 and 4 shall be recorded in writing and become part of the case file.
6. In addition to the permanent Members, the European Prosecutor who is supervising an investigation or a prosecution in accordance with Article 11(1) shall participate in the deliberations of the Permanent Chamber, with a right to vote<sup>23</sup>. A Permanent Chamber may also, either at the request of a European Prosecutor or a European Delegated Prosecutor or at its own initiative, invite other European Prosecutors or European Delegated Prosecutors who are concerned by a case to attend their meetings without a right to vote.
7. The Chairs of the Permanent Chambers shall, in accordance with Internal Rules of Procedure, keep the College informed of the decisions taken pursuant to this Article, in order to enable the College to fulfill its role in accordance with Article 8(2).

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<sup>20</sup> NL would like to add the words "and, where applicable, proposals for decisions to be taken by the said Chamber, on the basis of draft decisions prepared by the European Delegated Prosecutors" here.

<sup>21</sup> A recital with the following wording should be considered: 'The work of the EPPO should in principle be ensured in electronic form'.

<sup>22</sup> AT, BE, BG, NL, PL and COM have emitted various reservations on the delegation-making power, whereby in particular PL has advocated broader delegation possibilities.

<sup>23</sup> COM and AT, RO, IT, BG, BE, DE, FR, ES have voiced concern as regards the voting-right for the supervising European Prosecutor; in their view the voting rights in the chamber should be limited to 'neutral' members and it would not be appropriate to give a voting right only to one of potentially several European Prosecutors who are concerned by the case. FI would delete the words "In addition to the permanent Members".

## Article 10

### **The European Chief Prosecutor and the Deputies**

1. The European Chief Prosecutor shall be the head of the European Public Prosecutor's Office. The European Chief Prosecutor shall organise the work of the Office, direct its activities, and take decisions in accordance with this Regulation and the Internal Rules of Procedure.
2. [Two] Deputies shall be appointed to assist the European Chief Prosecutor in the discharge of his/her duties and act as replacement when he/she is absent or is prevented from attending to his/her duties.
3. The European Chief Prosecutor shall represent the European Public Prosecutor's Office towards the institutions of the Union and of the Member States, and third parties. The European Chief Prosecutor may delegate his/her tasks relating to representation to one of the Deputies or to a European Prosecutor.

## Article 11

### **The European Prosecutors<sup>24</sup>**

1. The European Prosecutors shall, on behalf of the Permanent Chamber<sup>25</sup> and in compliance with any instructions<sup>26</sup> it has given in accordance with Article 9(3) and 9(4), supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible<sup>27</sup>. The European Prosecutors shall present summaries of the cases under his or her supervision and, where applicable, proposals for decisions to be taken by the said Chamber, on the basis of draft decisions

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<sup>24</sup> FI, MT would keep the old version of paragraph 3, under which the European Prosecutors could be allowed to fulfill other tasks than those of European Prosecutors.

<sup>25</sup> CZ, PT are opposed to the idea that the EPs shall supervise investigations and prosecutions on behalf of the Permanent Chamber.

<sup>26</sup> CZ would like to include a sentence providing that the instructions of the EP maybe refused by the EDP.

<sup>27</sup> COM and BG oppose the addition of the word 'in their Member State of origin'. CZ is of the view that one EP alone will not be able to carry out the supervision role efficiently, especially in Member States with many complicated PIF cases. DE agrees with the principle set out in this paragraph but considers it appropriate to foresee that the Internal Rules of Procedure may allow for deviations from this principle.

prepared by the European Delegated Prosecutors. The Internal Rules of Procedure shall, without prejudice to Article 14(7)<sup>28</sup>, provide for a mechanism of substitution between European Prosecutors in case the supervising European Prosecutor is temporarily<sup>29</sup> absent from his/her duties or for other reasons not available to carry out the functions of the European Prosecutors. The substitute European Prosecutor may fulfill any task of a European Prosecutor, except the possibility to conduct an investigation as foreseen under Article 23(5).

2. The supervising European Prosecutors, in compliance with applicable national law and in compliance with the instructions<sup>30</sup> given by the competent Permanent Chamber, may give instructions to the European Delegated Prosecutor handling the case, whenever necessary for the efficient handling of the investigation or prosecution and in the interest of justice<sup>31</sup> and a coherent functioning of the European Public Prosecutor's Office.
3. The European Prosecutors shall function as liaisons and channels of information between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin and shall monitor the implementation of the tasks of the Office in their respective Member States, in close consultation with the European Delegated Prosecutors. The European Prosecutors shall ensure, in accordance with this Regulation and the Internal Rules of Procedure that all relevant information from the Central Office is provided to European Delegated Prosecutors and vice versa.

## *Article 12*

### **The European Delegated Prosecutors**

1. The European Delegated Prosecutors shall act on behalf of the European Public Prosecutor's Office in their respective Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them and under the conditions provided for in this Regulation.

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<sup>28</sup> DE has a reservation on the insertion of the words 'without prejudice to Article 14(7)', due to the need of finalization of Article 14.

<sup>29</sup> The inclusion of a recital may be considered 'The substitution mechanism should be used in principle in cases when European Prosecutor briefly unable to fulfil his/her duties, for example, due to vacation or illness.'

<sup>30</sup> SI would like to clarify that this only refers to instructions on the basis of Article 9(3).

<sup>31</sup> SI believes that 'in the interest of justice' is too general; further clarification is required.

The European Delegated Prosecutors shall be responsible for the investigations and prosecutions which they have initiated, which have been allocated to them or which they have taken over using their right of evocation. The European Delegated Prosecutors shall follow the direction and instructions of the Permanent Chamber in charge of a case as well as the instructions from the supervising European Prosecutor.<sup>32</sup> The European Delegated Prosecutors shall also be responsible for bringing a case to judgment, in particular have the power to present trial pleas, participate in evidence taking and exercise the available remedies in accordance with national law.

2. There shall be two<sup>33</sup> or more European Delegated Prosecutors in each Member State. The European Chief Prosecutor shall, after consulting and reaching an agreement with the relevant Member State's authorities, approve<sup>34</sup> the number<sup>35</sup> of the European Delegated Prosecutors, as well as the functional and territorial division of competences between the European Delegated Prosecutors in each Member State.

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<sup>32</sup> CZ would like to provide for a possibility to refuse instructions of the Permanent Chamber and/or EP.

<sup>33</sup> BE and CY are of the opinion that as minimum there should be one European Delegated Prosecutor in each Member State. COM notes that that this provision is without prejudice to future discussions, in the context of the administrative provisions in the second half of the Regulation, about the number of full-time equivalent EDP positions to be financed by the EU budget.

<sup>34</sup> The inclusion of the following recital may be considered 'When the European Chief Prosecutor is consulting with relevant Member State on the number of the EDP and the functional and territorial division of competences between the EDP in each Member State, due account should be taken of the organisation of the national prosecution system. The notion of function could thereby refer to the possibility of Member States to create vertical structures among the EDP's'.

<sup>35</sup> DE questions the appropriateness of referring here to the 'number of EDPs' and considers that the text in paragraph 2 will need to be reviewed again in the context of the provisions of the formal status of the EDPs ('special advisors') and the financial provisions.

3. The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation. They shall inform the supervising European Prosecutor of such functions. In the event that a European Delegated Prosecutor at any given moment is unable to fulfil his/her tasks as European Delegated Prosecutors because of such other commitments, he/she shall notify the supervising European Prosecutor, who shall consult with the competent national prosecution authorities in order to determine whether priority should be given to their functions deriving from this Regulation<sup>36</sup>. The European Prosecutor may propose to the Permanent Chamber to reallocate the case in accordance with Article 23(5)<sup>37</sup>.



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<sup>36</sup> Various opinions have been expressed as regards the wording and content of this provision. In particular, clear rules on conflict of interest have been called for. COM has suggested that the reallocation of a case could also be done to an EDP in another Member State. Some Member States would prefer to delete the last sentence of the Article. PT considers that the decision to determine the priority should belong to the national authorities in consultation with the EP, since a Permanent Chamber has always the possibility to reallocate the case.

<sup>37</sup> HU would find it useful to let the EP to propose the reallocation of the case also to another EDP from the same Member State.