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Subject: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office  
*- Discussion paper on cooperation between EPPO and non-participating Member States*

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This paper deals with the issue of cooperation between EPPO on the one hand and UK, IE and DK as non-participating Member States under Protocols No 21 and 22. Two possible legal bases have been discussed at this stage. i.e. Article 325(4) TFEU and the possibility to apply a logic of "succession".

This paper does not discuss the issue of non-participating Member States in the framework of a hypothetical enhanced cooperation.

Delegations are invited to reflect on the questions highlighted in the document.

## **1. A new Regulation based on Article 325(4) TFEU?**

- Article 325(4) TFEU is a legal basis which applies in the fields of the prevention of and fight against fraud affecting the financial interests of the Union. It provides for the ordinary legislative procedure, after consulting the Court of Auditors. It applies the qualified majority voting rule within the Council with all Member States participating. Indeed Protocols No 21 and 22 do not apply to this legal basis which is outside the scope of Chapter 4 of Title V on judicial cooperation in criminal matters.
- The Council<sup>1</sup> has taken the view that Article 325(4) TFEU is not a legal basis for the approximation of PIF criminal offences and sanctions for the reasons set out in the CLS opinion<sup>2</sup>. By analogy, it has been argued that the same reasoning applies as regards judicial cooperation in criminal matters and that the *Taricco* judgment<sup>3</sup> has not changed this conclusion, since the Court did not deal with the specific issue of the legal basis of Article 325(4) TFEU as regards the approximation of criminal law or judicial cooperation in criminal matters in the area of PIF offences.
- The legal basis for judicial cooperation with respect to the mutual recognition of judicial orders on evidence or arrest warrants is Article 82(1)(a) TFEU which was used in particular for the adoption of the EIO Directive 2014/41/EU. As regards the rules of procedure applicable to EPPO activities as well as those governing the admissibility of evidence with regard to EPPO, the legal basis is Article 86 TFEU. It has thus been argued that these are *lex specialis* legal bases which apply to "*criminal matters*" in general (for Article 82(1)(a) TFEU) and to "*crimes affecting the financial interests of the Union*" (for Article 86 TFEU). However, the Commission has argued that Article 325(4) TFEU could be the appropriate legal basis and that the issue of the legal basis of mutual recognition of EPPO acts would be distinct from the issue of the legal basis of the approximation of criminal law like in the PIF Directive.

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<sup>1</sup> General approach, doc. 10729/13.

<sup>2</sup> Doc. 15309/12.

<sup>3</sup> Case C-105/14.

## QUESTION 1:

**Do delegations think that Article 325(4) is or is not the appropriate legal basis for regulating the judicial cooperation in criminal matters between on the one hand, EPPO and, on the other hand the UK, IE and DK as non-participating Member States in EPPO?**

## **2. EPPO as the legal successor of national judicial authorities in relation to PIF offences within the remit of EPPO?**

- EPPO is a Union body which "*...exercises the functions of prosecutor in the competent courts of the Member States in relation to such offences*" (Article 86 TFEU). The EPPO Regulation could therefore expressly specify that for the purposes of Union acts on mutual legal assistance, freezing of assets and arrest warrants in relation to non-participating Member States, EPPO should be considered as a judicial authority of the Member States participating in EPPO. This results from the fact that EPPO is the legal successor of national prosecutors in the competent courts of the participating Member States where EPPO has exercised its competence.
- The *effet utile* of the acquis on judicial cooperation in criminal matters in which the UK, IE and DK take part, would be compromised if such a cooperation between the UK, IE and DK on the one hand and participating Member States in EPPO on the other hand, could not take place simply because EPPO has taken over the functions of national prosecutors for certain PIF criminal offences. Furthermore, the obligation of sincere

cooperation, including the obligation to facilitate the achievement of the Union's tasks under Article 4(3) TEU<sup>4</sup>, would not be respected, if Member States not bound by EPPO but bound by the relevant *acquis* in the field of judicial cooperation in criminal matters, would refuse to recognize EPPO as the legal successor of national prosecutors for PIF offences.

- The relevant *acquis* generally provides for a notification obligation<sup>5</sup> whereby Member States unilaterally notify their competent (judicial) authorities to the Secretary General of the Council, without the possibility for executing Member States to refuse to recognize such a notification.

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<sup>4</sup> Article 4(3) TEU provides not only that "... *the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*" (subparagraph 1) but also that "*the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*" (subparagraph 3).

<sup>5</sup> See e.g. Article 33(1)(a) of Directive 2014/41/EU (EIO Directive), Article 6(3) of Council Framework Decision 2002/584/JHA (European Arrest Warrant), Article 2(1) of the Council Framework Decision 2005/214/JHA (mutual recognition of financial penalties) and Article 6(1) of Council Framework Decision 2009/829/JHA (mutual recognition of decisions of supervision measures), providing for notification obligations of competent (judicial) authorities to the Secretariat General of the Council. However in Article 4 of Council Framework Decision 2003/577/JHA (freezing order) provides: " 1. *A freezing order within the meaning of this Framework Decision, together with the certificate provided for in Article 9, shall be transmitted by the judicial authority which issued it directly to the competent judicial authority for execution by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. 2. The United Kingdom and Ireland, respectively, may, before the date referred to in Article 14(1), state in a declaration that the freezing order together with the certificate must be sent via a central authority or authorities specified by it in the declaration. Any such declaration may be modified by a further declaration or withdrawn any time. Any declaration or withdrawal shall be deposited with the General Secretariat of the Council and notified to the Commission. These Member States may at any time by a further declaration limit the scope of such a declaration for the purpose of giving greater effect to paragraph 1. They shall do so when the provisions on mutual assistance of the Convention implementing the Schengen Agreement are put into effect for them.*". It should be noted that "Schengen" has been put into effect for the UK but not for IE.

- A provision in the EPPO Regulation based on Article 86 TFEU on the cooperation with non-participating Member States would not be binding upon the UK, IE and DK as non-participating Member States. However, if those non-participating Member States are bound by some parts of the acquis in annex and participating Member States are required in a new provision of the EPPO Regulation to recognise and where applicable, notify EPPO to the SG of the Council as the competent (judicial) authority, non-participating Member States could not refuse to recognise EPPO as the legal successor of participating Member States' prosecutors for PIF offences.
- In the light of the above, creating legally binding commitments regarding mutual legal assistance or arrest warrant - between on the one hand EPPO and on the other hand UK, IE and DK would be through the existing acquis in which these three Member States participate and the inclusion of a provision in the EPPO Regulation obliging the participating Member States to recognise EPPO as a (judicial) competent authority for the purpose of cooperation with non-participating Member States (see Annex 2). It should be noted that each of those three Member States is bound by different instruments in the acquis. That is why there are three different lists in Annex 1.

## QUESTION 2:

**Do delegations agree that a specific provision should be introduced in the EPPO Regulation to deal with the judicial cooperation in criminal matters between EPPO and the non-participating Member States bound by Protocols No 21 and 22? If so, is the suggested new Article 59a in Annex 2 acceptable to delegations? If not, what other solutions do they suggest?**

### **3. Working arrangements between EPPO and the prosecution services of non-participating Member States?**

- Practical working arrangements between the prosecuting services of non-participating Member States and the EPPO so long as they are limited to administrative matters, could provide for example for the exchange of strategic information. However, for the reasons set out in the paper on relations with third countries<sup>6</sup>, those working arrangements may not contain provisions on mutual legal assistance and extradition (see Annex 2).

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<sup>6</sup> Doc. 12340/16.

**RELEVANT LEGAL ACTS IN THE FIELD OF JUDICIAL COOPERATION IN  
CRIMINAL MATTERS IN WHICH DK, UK AND IE TAKE PART**

**1. Relevant legal acts in the field of judicial cooperation in criminal matters in which DK takes part**

1. Convention implementing the Schengen Agreement of 14 June 1985<sup>7</sup>, in particular Articles 48 to 52 on mutual assistance in criminal matters.
2. Council of Europe Convention on mutual assistance in criminal matters.
3. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).
4. Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.6.2002, p. 1).
5. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16) [relevant if transactions are in the EPPO Regulation].
6. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003), as regards freezing orders for the purposes of subsequent confiscation of property.

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<sup>7</sup> OJ 22.9.2000, p. 19

7. Joint Action 96/277/JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (OJ L 105, 27.4.1996, p. 1).
8. Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption (OJ L 301, 12.11.2008, p. 38).
9. Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130).
10. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20).
11. Existing Eurojust Decision 2002/187/JHA as amended.



## **2. Relevant legal acts in the field of judicial cooperation in criminal matters in which UK takes part**

1. Directive 2014/41/EU regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 14) ("EIO").
2. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).
3. Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.6.2002, p. 1).
4. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16) [relevant if transactions are in the EPPO Regulation].
5. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003), as regards freezing orders for the purposes of subsequent confiscation of property.
6. Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130).
7. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20).
8. Existing Eurojust Decision 2002/187/JHA as amended.

### **3. Relevant legal acts in the field of judicial cooperation in criminal matters in which IE takes part**

1. Council of Europe Convention on mutual assistance in criminal matters.
2. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).
3. Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.6.2002, p. 1).
4. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16) [relevant if transactions are in the EPPO Regulation].
5. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003), as regards freezing orders for the purposes of subsequent confiscation of property.
6. Joint Action 96/277/JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (OJ L 105, 27.4.1996, p. 1).
7. Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption (OJ L 301, 12.11.2008, p. 38).

8. Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130).
  9. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20).
  10. New Europol Regulation No 2016/794 (IE has opted in).
  11. Existing Eurojust Decision 2002/187/JHA as amended.
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**SUGGESTION FOR NEW PROVISIONS (ARTICLES 59a AND 56) WHICH COULD BE INCLUDED IN THE EPPO REGULATION**

*Article 59a*

**Relations with Member States which are not bound by this Regulation**

1. The working arrangements referred to in Article 56(2a) with the authorities of Member States which are not bound by this Regulation may in particular, concern the exchange of strategic information and the secondment of liaison officers to the European Public Prosecutor's Office.
2. The European Public Prosecutor's Office may designate, in agreement with the competent authorities concerned, contact points in the Member States which are not bound by this Regulation in order to facilitate cooperation in line with the European Public Prosecutor's needs.
3. Concerning the criminal offences within its material competence, the Member States shall recognise and, where applicable, notify the European Public Prosecutor's Office as a competent authority for the purpose of the implementation of the applicable Union acts on judicial cooperation in criminal matters in their relations to Member States which are not bound by this Regulation, in order to ensure that the European Public Prosecutor's Office can exercise its functions on the basis of such acts vis a vis the Member States which are not bound by this Regulation, when it assumes its tasks in accordance with Article 75(2).

## Article 56

### Common provisions

1. In so far as necessary for the performance of its tasks, the European Public Prosecutor's Office may establish and maintain cooperative relations with Union institutions, bodies, offices or agencies in accordance with their respective objectives, and with the authorities of Member States which are not bound by this Regulation or of third countries and international organisations<sup>8</sup>.
2. In so far as relevant to the performance of its tasks, the European Public Prosecutor's Office may, in accordance with Article 67 directly exchange all information, with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in this Regulation.
- 2a. For the purposes set out in paragraphs 1 and 2, the European Public Prosecutor's Office may conclude working arrangements with the entities referred to in paragraph 1. Those working arrangements shall be of a technical and/or operational nature, and ~~shall~~ in particular aim at facilitating the cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data, nor have legally binding effects on~~for~~ the Union or its Member States.

#### 1. Background

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<sup>8</sup> ~~It should be clarified in a recital that Interpol would be covered by the notion of international organisation for the purpose of this Regulation. This could also be clarified in Article 2 in the Regulation under definitions (similar to what has been done in the Eurojust Regulation).~~