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From:	Presidency
To:	Delegations
No. prev. doc.:	8750/17
Subject:	Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Outstanding issues

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At the meeting of COPEN on 12 May 2017, delegations were asked to indicate all concerns they have with the current Council draft. The annex to this note enumerates all the issues thereby indicated, on which agreement could not be reached. The Presidency considers that there is agreement in principle on the rest of the text, with the exception of the two key issues not discussed on 12 May, namely the issue of the financing of the EPPO (Article 49(6) and (7)) and the wording of Article 17(1).

The following conclusions were also drawn at the meeting:

- The word 'even' will be deleted in Article 20(3a).
- The wording of the review clause in Article 74(2) will be maintained.
- The provision in Article 57(6) will be deleted.

Delegations are invited to consider the open issues mentioned in the Annex and indicate their positions in the morning session of the COPEN meeting of 18 May.

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**1. Recitals 49a, 49b and 51b**

The discussions in COPEN on 12 May led to agreement on the text of Articles 19 and 20, following the deletion of the word 'even' in Article 20(3a). The discussions were also concluded by the deletion of recital 49c in the old text and the decision to redraft recitals 49a, 49b and 51b in view of reflecting the discussions. It is in the light of these discussion that the Presidency would propose the following new wording of the said three recitals:

"(49a) The EPPO should have the right to exercise competence over instrumental offences which are ancillary in nature but inextricably linked to offences that affect the financial interests of the Union. ~~The notion of instrumental offences should cover in particular~~ with regard to offences which have been committed for the main purpose of creating the conditions to commit the offence that affect the financial interests of the Union, such as offences strictly aimed at ensuring the material or legal means to commit the offence that affect the financial interests of the Union, or to ensure the profit or product thereof.

(49b) Where offences are inextricably linked and the offence that affects the Union's financial interests is preponderant, the EPPO should have the right to exercise competence ~~of the EPPO should be exercised after consultation with the competent authorities of the Member State concerned.~~ Preponderance should be established primarily on the basis of the seriousness of the offence concerned, as reflected in the sanction that could be imposed, ~~unless the inextricably linked offence has been instrumental to commit the offence affecting the Union's financial interests.~~

[...]

(51b) Where the EPPO cannot exercise its competence in a particular case because there is reason to assume that the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused, or likely to be caused, to another victim, the EPPO should nevertheless be able to exercise its competence provided that it would be better placed to investigate or prosecute than the authorities of the respective Member State(s). EPPO could appear to be better placed, inter alia, where the would be more effective to let the EPPO investigate and prosecute the respective

criminal offence due to its transnational nature and scale, where the offence involves a criminal organisation, or where ~~at~~ the specific type of offence could be a serious threat to the Union's financial interests or the Union institutions' credit and Union citizen' confidence. In such a case the EPPO should be able to exercise its competence with the consent given by the competent national authorities of the Member State(s), where damage to such other victim(s) occurred."

The Presidency invites delegations to confirm this text.

## **2. Article 59a(3)**

The proposal of the European Parliament to add a new paragraph 3 met with very mixed reactions from delegations. The Presidency has taken good note of concerns of delegations, but also considers it necessary to at least partly find a compromise with the Parliament on this issue, in view of the future consent procedure. It is in this light that the Presidency would - subject to a legal analysis to be undertaken - suggest the compromise wording of the said paragraph here below, which should remove the most pressing concerns of delegations. The Presidency thereby suggests to leave recital 102aa unchanged, whilst amending the proposed Article 59a(3) in such a manner:

"3. Concerning the criminal offences within its material competence, the Member States shall recognise and, where applicable and subject to the acceptance of a Member State which does not participate in the establishment of the EPPO, 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).~~"

The Presidency invites delegations to consider this proposal.

## **3. Competence for criminal offences in respect of national direct taxes.**

At least one delegation questions whether the words 'including offences inextricably linked thereto' should be maintained in Article 17(3).

The Presidency invites delegations to indicate their positions in this sense.

#### 4. The wording of Article 34

One delegation has insisted that the wording of Article 34(1) and (2) should be modified in line with the text confirmed by ministers in Council December 2016. This would give the following text:

- "1. If the applicable national law provides for a simplified prosecution procedure aiming at the final disposal of a case on the basis of terms agreed with the suspect, the handling European Delegated Prosecutor may, in accordance with Articles 9(3) and 29(1), propose to the competent Permanent Chamber to apply this procedure in accordance with the conditions provided for in national law.

Where the EPPO exercises a competence in respect of offences referred to in Article 3 (2) (a) and (b) of Directive 2017/xx/EU and where the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused or likely to be caused to another victim, the handling European Delegated Prosecutor shall receive prior consent from ~~consult~~ national prosecution authorities before proposing to apply a simplified prosecution procedure.

2. The Permanent Chamber shall decide on the proposal of the handling European Delegated Prosecutor handling the case taking into account the following grounds:
  - (a) the seriousness of the offence, based on in particular the damage caused ~~to the financial interests of the Union,~~

[...]"

The Presidency invites delegations to consider whether the suggested new text could be accepted.

## 5. The date on which the EPPO shall assume its tasks

Delegations are invited to indicate if they agree with the deadline of 'not earlier than two years' suggested in Article 75(3) third subparagraph in the text annexed to document 8750/17.

## 6. Remarks of lawyer linguists

The Presidency invites delegations to provide comments in writing on all suggestions made by lawyer linguists, as indicated in document 8750/17, by **22 May 15:00**. Comments should be sent to michael.carlin@consilium.europa.eu and anne-marie.cuschieri@gov.mt.

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