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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Relations with third countries and international organisations

This paper deals with the issue of relations with third countries and international organisations. The Presidency draws the attention of delegations to the fact that prior discussions on the issue have been based on document 10831/16, whereby the following options for legal solutions of the issues at stake were presented:

- Declarations of participating Member States to third countries that EPPO shall be considered to be a competent judicial authority
- Union accession to international agreements for the purpose limited to cooperation between EPPO and Third countries
- Amendment of international agreements, and/or
- Cooperation with third countries on the basis of the "double hat" principle, i.e. that the European Delegated Prosecutors may act also as national prosecution authorities.

At expert level discussions focused on solutions based on the principle of succession¹ and on the so-called double hat model. In spite of some likely legal obstacles, the latter obtained a certain level of attention from some delegations.

In Annex I, delegations will find a descriptions of some legal and practical consequences of the above mentioned alternatives solutions, completed by some aspects pointed out during the discussion at expert level. Draft suggestions concerning the relevant provisions for EPPO Regulation are included in Annex II of this document.

Delegations are invited to consider the document carefully and to reflect on the following questions:

- 1. Do delegations agree on the introduction of a provision in Article 59 of the draft EPPO Regulation providing for a recognition and where applicable, a notification of EPPO as a competent (judicial) authority in existing international agreements on mutual assistance in criminal matters to which the Union is not a party? Do delegations consider that the same solution should be sought wherever possible, with respect to extradition treaties?**
- 2. Do delegations agree that where it is possible, the Union should accede to international agreements in mutual assistance in criminal matters and extradition pursuant to Article 218 TFEU?**
- 3. Do delegations agree that where notifications cannot produce legal effects, for example where third countries send counter-notifications or where it is not possible for the Union to accede to international agreements on mutual assistance or extradition, "reciprocity" should apply and if so, under which conditions?**

¹ Succession in the meaning of succession of the EPPO to competencies of a national prosecution services, not a succession of the EU within the meaning of Vienna Convention on Succession of States in respect of Treaties (1978)

**RELATIONS WITH THIRD COUNTRIES AND INTERNATIONAL
ORGANISATIONS**

**1. WORKING ARRANGEMENTS BETWEEN EPPO AND THIRD COUNTRIES'
AUTHORITIES/INTERNATIONAL ORGANISATIONS**

- Working or administrative arrangements between EPPO and third countries' authorities or international organisations cannot create rights and obligations on suspects such as those which usually stem from international agreements with regard to legal assistance in criminal matters and extradition. However, such arrangements may be concluded if they contain commitments of an administrative nature such as commitments on the exchange of strategic information.
- In the *France v. Commission* case C-327/91, the Court considered that "*Article 228 [now 218 TFEU] constitutes, as regards the conclusion of treaties, an autonomous general provision, in that it confers specific powers on the [Union] institutions*" (in this case the Council)² and even though the Commission has the power, internally, to take measures of application in a particular field which is covered by an agreement, that internal power is not such as to alter the allocation of powers between the Union institutions with regard to the conclusion of international agreements, which is determined by Article 218 TFEU³. Therefore, even though the Commission concluded a cooperation agreement on its behalf⁴ (and not on behalf of the Union) with a third country, in a field where the Commission had internal powers (application of competition law), that agreement was declared void by the Court⁵.

² Case C-327/91, *France v. Commission*, point 28.

³ Case C-327/91, point 41.

⁴ Case C-327/91, point 2.

⁵ Case C-327/91, point 43.

- If however, working/administrative arrangements for practical cooperation are concluded between a Union institution (e.g. the Commission) or a Union body - like EPPO - with the competent authorities of a third country or international organisation, then that Union institution or body may conclude such an instrument itself, by virtue of the principle of administrative autonomy as referred to in Article 335 TFEU. Naturally, in such case the working/administrative arrangements may only be concluded by the EU institution or body on its own behalf, and not on behalf of the EU and should relate to administrative cooperation.
- The Common Approach on decentralised agencies⁶ specifies that the agencies should "*operate within their mandate and the existing institutional framework, and that they are not seen as representing the EU position to an outside audience or as committing the EU to international obligations*".
- In the light of the above, EPPO may conclude working arrangements with respect to administrative cooperation with the competent authorities of third countries and international organisations. However, the only possibility to create legally binding commitments going beyond working arrangements and covering mutual legal assistance and extradition between EPPO and the competent authorities of third countries or international organisations, is through international agreements to be concluded between the Union and the third country or international organisation concerned, under the conditions set out below.

⁶ Annex to the Joint Statement of the European Parliament, the Council of the European Union and the European Commission on decentralised agencies signed on 19.7.2012.

2. INTERNATIONAL AGREEMENTS ON JUDICIAL COOPERATION BINDING EPPO WITH THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

2.1 Applying a "logic of succession" in existing treaties to which the Member States of the Union are contracting parties but the Union is not

a) Applying a "logic of succession" in existing treaties on mutual assistance in criminal matters?

- For existing international agreements on mutual assistance in criminal matters to which the Union is not a party, for example, the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its Protocols (the "1959 MLA Convention") or any bilateral agreement between the Member States of the Union and third countries, the Member States of the Union should, where permitted under those international agreements, notify the other contracting parties that EPPO is the competent (judicial) authority which will substitute the national (judicial) authority with respect to certain PIF offences for which EPPO is competent under the EPPO Regulation. It should be noted that as regards bilateral agreements, such a notification will not affect the geographical scope of those bilateral agreements. For example, if the geographical scope of a bilateral agreement is the territory of one Member State of the Union, the geographical scope will remain the same after the notification and will not extend to the Union as a whole.

- Indeed 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). For the purposes of those international agreements and in relation to PIF offences for which EPPO is competent, EPPO should therefore be deemed to be a judicial authority exercising competences which the Member States participating in the EPPO have transmitted to the European Union, since the EPPO will substitute national prosecutors in the competent courts of the Member States in cases where EPPO is competent. Article 59(4) of the Commission Proposal already foresees this possibility of EPPO recognised as a competent authority. This could for example be the case under Article 24 of the 1959 MLA Convention as amended by its Second Additional Protocol⁷. Furthermore, the Member States participating in EPPO should also notify to the Secretary General of the Council of Europe, the declaration provided for in Article 15(6) of the 1959 MLA Convention whereby requests for mutual assistance may be addressed directly between the judicial authorities (including EPPO notified as a competent judicial authority) without transiting through the Ministries of Justice.

⁷ Article 24 of the 1959 MLA Convention as amended by its Second Additional Protocol provides that "*any State shall at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities. It subsequently may, at any time and in the same manner, change the terms of its declaration*".

b) Applying a "logic of succession" in existing treaties on extradition?

- As regards the 1957 Council of Europe Convention on Extradition (the "Extradition Convention"), it should be noted that its Fourth Additional Protocol which allows States to designate another competent authority than the Ministry of Justice for the submission of extradition requests⁸, has only been ratified by 4 States. Prior to notifying EPPO as a competent authority for extradition requests, the full ratification of this Fourth Additional Protocol would be required. This would also entail political and legal consequences on the way extradition is dealt with at national level.
- In general, for extradition treaties, the logic of succession would be difficult to apply in practice. Indeed, this would not currently apply to the Extradition Convention, since its Fourth Additional Protocol has not been fully ratified and a notification of EPPO to third countries under bilateral agreements may probably result in counter-notifications by those third countries.

⁸ Article 12(1) of the Extradition Convention as amended by its Fourth Additional Protocol provides: "*the request shall be in writing. It shall be submitted by the Ministry of Justice or other competent authority of the requested Party. A State wishing to designate another competent authority than the Ministry of Justice shall notify the Secretary General of the Council of Europe of its competent authority at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, as well as of any subsequent changes relating to its competent authority*".

2.2 Possible alternatives to a logic of succession for mutual assistance and extradition treaties

- the Union as a party to international agreements on mutual assistance and/or extradition?

- In the event that third countries which are contracting parties to those international agreements (mutual assistance or extradition) notified counter-declarations disagreeing to the declarations of participating Member States about EPPO as a competent judicial authority (this could be particularly the case for bilateral agreements), another solution would be necessary for obtaining EPPO's recognition by the other contracting parties. This would entail amending the agreements, on the initiative of the participating Member States or ensuring that the Union accedes to those international agreements for the purpose limited to cooperation between EPPO and third countries. Such an accession should be authorised by the Council on the basis of Articles 218 and 86 TFEU (Protocols 21 and 22 would then apply). As regards the accession by the Union to the Extradition Convention, this would require common accord in the Council of Europe, the ratification of its Fourth Additional Protocol and the adaptation of national laws on extradition.
- For existing international agreements to which the Union is a party for matters falling within the Union's competence, such as the United Nations Convention against corruption ("UNCAC")⁹ which contains provisions notably on asset freezing and mutual legal assistance, EPPO should be considered as a competent authority with regard to matters falling within the competence of EPPO. A notification should be made by the Union to the Secretary General of the United Nations to that effect¹⁰. As regards the provisions on extradition contained in those Conventions to which the Union has acceded, the same problem of requests which currently must transit through Ministries of Justice as the one outlined for the Council of Europe Extradition Convention, would arise.

⁹ Council Decision 2008/801/EC of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption, OJ L 287 p. 1 of 29.10.2008.

¹⁰ See e.g. Articles 46(13) and 67(3) of UNCAC.

- Since Article 216(2) TFEU provides that "*agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*" and EPPO is a body of the Union having legal personality, a specific provision should be introduced in the EPPO Regulation - following the model of Article 61(1)(b) of the Commission Proposal as regards international agreements on the transfer of personal data - with a view to making international agreements containing provisions on mutual legal assistance and extradition which would be concluded by the Union binding upon EPPO. For these purposes, Article 59(3) of the Commission Proposal should be redrafted as follows: "*3. International agreements concluded by the Union in accordance with Article 218 of the Treaty with one or more third countries regarding the cooperation between the European Public Prosecutor's Office and the competent authorities of these third countries with regard to legal assistance in criminal matters and extradition in cases falling under the competence of the European Public Prosecutor's Office, shall be binding on the latter*".
- Furthermore, it should be noted that only the Commission may submit recommendations to the Council for the negotiation of international agreements pursuant to Article 218(3) TFEU. Since this power is provided for in primary law, it should not be repeated in the EPPO Regulation.
- Finally, EPPO, depending on its operational needs, could suggest the Commission to submit recommendations for the negotiation of international agreements. However, such a suggestion cannot be introduced as a compulsory step in the procedure for the negotiation of international agreements, since only the Commission under Article 218(3) TFEU has the power to submit a recommendation to the Council in this regard. Instead, a Recital with no binding effect and referring to this possibility for EPPO to express its operational needs could be introduced drawing inspiration from Recital 35 of the Europol Regulation¹¹.

¹¹ Recital 35 of Europol Regulation (EU) 2016/794: "*...Where the Management Board identifies an operational need for cooperation with a third country or an international organisation, it should be able to suggest to the Council that the latter draw the attention of the Commission to the need for an adequacy decision or for a recommendation for the opening of negotiations on an international agreement as referred to above.*"

- "Double hat" principle?

- Allowing European Delegated Prosecutors ("EDPs") to cooperate with third countries on the basis of the "double hat" principle¹² and therefore to exercise their powers as national prosecutors under national law, would raise some difficulties. First of all, it would not always be feasible since Article 12(3) of the draft EPPO Regulation does not require that all EDPs should be national prosecutors. Furthermore, even if all EDPs had such a "double hat", it would create legal risks which might ultimately affect the validity of the acts of assistance and of the evidence collected. Indeed, EDPs act on behalf of EPPO which is a Union body having legal personality, applying the EPPO Regulation and national law. Procedural measures adopted by EDPs on behalf of EPPO are thus clearly distinct from procedural measures adopted by national prosecutors acting in accordance with national law. Third countries execute requests on the basis of Member States' notifications of judicial/competent authorities which have been made pursuant to the relevant international agreements. Suspects are subject to national prosecutions carried out by a national prosecutor on the basis of national law. It is therefore doubtful that an EDP could collect evidence from a third country as a national prosecutor (as initially notified by the Member State) and then, without any new declaration by Member States whereby it is notified to third countries that EPPO is the legal successor of national prosecutors, validly use that evidence in the framework of a prosecution by EPPO.

¹² Article 12(3) of the draft EPPO Regulation provides: "*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. The European Prosecutor may propose to the Permanent Chamber to reallocate the case in accordance with Article 23(3) and (4).*"

- However, the double hat principle could be envisaged under strict conditions. It should firstly be a temporary solution and secondly, the EDPs should act in a transparent manner toward both the suspect and the third country which would have to agree on the use of the "double hat".
- Cooperation between EPPO and third countries on the basis of reciprocity?

In the absence of relevant international agreements between the Union and a third country, EPPO could cooperate on the basis of reciprocity within the limits of its competences under the EPPO Regulation. This would be difficult in practice for EPPO to grant assurances of reciprocity toward third countries, precisely because of the limits of its competences. The data protection rules which would apply to the transfer of personal data from EPPO to those third countries in those cases, would be those laid down in Articles 43a to 43e of the EPPO Regulation.

RELEVANT PROVISIONS OF THE DRAFT EPPO REGULATION

Article 59

Relations with third countries and international organisations

1. ~~The European Public Prosecutor's Office may establish~~ working arrangements with the entities referred to in Article 56(2a) with the authorities of third countries and international organisations may. ~~Such working arrangements 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 third countries in order to facilitate cooperation in line with the European Public Prosecutor's operational needs.
3. International agreements concluded by the Union in accordance with Article 218 of the Treaty [...] with one or more third countries regarding the cooperation between the European Public Prosecutor's Office and the competent authorities of these third countries with regard to legal assistance in criminal matters and extradition in cases falling under the competence of the European Public Prosecutor's Office, shall be binding on the latter.
4. 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 their international agreements on legal assistance in criminal matters and extradition. In any case, the Member States shall alter those international agreements or the Union shall accede to such agreements with respect to matters falling within its competence, in order to ensure in either case that the European Public Prosecutor's Office can exercise its functions on the basis of such agreements when it assumes its tasks in accordance with Article 75(2).

New Recital

"Where the College identifies an operational need for cooperation with a third country or an international organisation, it should be able to suggest to the Council that the latter draw the attention of the Commission to the need for an adequacy decision or for a recommendation for the opening of negotiations on an international agreement."
