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From: Presidency

To: Delegations

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

- Written comments from the German delegation

Delegates will find in Annex comments received from the German delegation on Articles 20 to 26a in the draft Regulation.

Comments by German Delegation on Articles 20 to 26a

• **Article 20 (Reporting, registration and verification of information):**

Para 1:

We cannot support several of the new changes made here and we do not see our concerns addressed which we have expressed on the previous version. As to the beginning of the sentence, we request to return to the previous version of the text: reference to national law should be to the provision of information and not only to the question whether an authority has a competence to provide information. The rest of the text preceding the two subparagraphs is OK.

As to the two subparagraphs, we do not believe that the new text fully clarifies the obligations.

Subparagraph a)

The information obligation in Article 20 is supposed to oblige any national authorities, e.g. administrative authorities in the field of agricultural markets, to provide information. This obligation to inform is thus not dependent on a criminal investigation having been opened by the national authorities. Therefore, the question here is not whether the “EPPO would be entitled to exercise its right of evocation in accordance with Article 21a”. If the intention with the wording of subparagraph a) is to avoid having to “duplicate” the text of Article 21a(3), it could be considered here to read: “where the EPPO could exercise its right of evocation in accordance with Article 21a(3). However, we have raised concerns before, whether one can really expect such administrative authorities to evaluate whether a case has “repercussions at Union level, which require an investigation to be conducted by the Office”. Thus, in our view, subparagraph a) should be limited to setting a threshold of 10.000 €(or whatever amount we finally agree on).

Subparagraph b)

In terms of drafting, we do not think it is useful to separate here the provision in subparagraph b) from the provision in paragraph 2. Why should this information not be provided “without delay” but only “not later than three months” (aside from the possibility offered by para 2)?

Para 3:

We wonder what the background and purpose of this new paragraph is? Why should the EPPO be informed of criminal (?) conduct (?) that is not within the competence of the EPPO? Similar to para 1, it is not sufficient here to refer to the competence of the national authority: the question will be whether such information (e.g. personal data) may be transmitted.

Para 4:

We welcome the revised text but we still do not agree with the text proposed text of a possible recital. As Article 20 does not apply if the national authorities have already opened their own investigation, the information could not be “automatically generated... from a MS case management system”. The text of this paragraph plus such a recital could make sense in Article 21a, where a law enforcement or prosecution authority provides information in accordance with para 1 of that article.

Para 5:

We do not believe it is appropriate here to refer only to para 1(a): Why should information provided under para 1(b) – at least if it is not only provided by way of a summary report – not be registered and verified? What – if anything – is the EPPO supposed to do with information provided under para 1(b)? Would the EPPO be “allowed” to exercise a competence in respect of information provided under para 1(b)? And why should the national authorities be motivated to provide such information if the EPPO is not supposed to “verify and register” this?

If the intention here really is to exclude a competence of the EPPO in cases where the damage is less than 10.000 €(which we would not support), we would need to foresee a provision whereby the EPPO shall refer such information to the competent national authorities (in particular where it had been received from other sources than a national authority) so that the competent national authority can take the necessary investigative measures (note: para 6 as currently worded would not be sufficient as that applies only after verification, whereas according to current para 5 the EPPO will do no verification if the damage is less than 10.000 €). Such a limitation of EPPO's competence would also mean that EPPO could not investigate a case – e.g. of (attempted) active corruption directed against a national official handling EU funds – where there is no “damage” incurred.

To sum up: We cannot agree to para 5. It does not make sense to require EU and national authorities to provide the EPPO with information without EPPO being able to do something with it. This, however, also puts in question the idea of allowing for “summary reports” as these would normally not be suitable to allow the EPPO to verify information received and open an investigation.

Para 6:

Along the same lines as before: We would like the words “where necessary, at their request” deleted. What is this supposed to mean: that the person receives the information, even where requested, only “where necessary”?

Para 7:

We request to return to the previous version of (previous para 2). It is not acceptable here to state the EPPO “may request” as that would – presumably – be interpreted to mean that the requested person/body would have to provide all requested information. That would go too far. This has been discussed intensively in the past and was the reason to change the original wording to “collects”. Also, the newly inserted second sentence should be deleted as it is – at best – unnecessary at least if the first sentence of para 7 is returned to its original place as para 2.

In summary: we by-and-large request to return to the previous version of Article 20 (the version included in the December 2014 Council document) and use that as a basis for some limited modifications.

- **Article 21 (Initiation of investigations and allocation of competences within EPPO)**

Para 1:

The insertion of “this Regulation and the” should be undone. Such a wording would only make sense if the Regulation would provide any kind of yardstick for verifying whether there are “reasonable grounds to believe”. But the text does not. What would “in accordance” refer to in respect of “this Regulation”?

We also want to point out – again – that the simple reference here to Article 9(3)(a) would not sufficiently address the situation where a case is initiated by a chamber. Para 2 in the previous as well as in the revised version “fits” only the situation that an investigation is opened by an EDP. If the Chamber is supposed to be able to initiate an investigation, it would have to be clarified at what in time they could so (when information is received by the Central Office?, or only where an EDP has decided, in accordance with Article 20(6), not to do so?). Also, the Chamber, before being able to decide on the initiation would have to determine which EDP or rather which MS would be responsible as para 1 – rightly so – refers to the applicable national law. And it would have to be clarified, which procedure would apply for the preparation of the Chamber decision (there is no supervising EP who could provide a “summary report” (Article 11(1) on the basis of which the Chamber is to take its decision (Article 9(5)). As to para 2: the first alternative here would not work in situations where a chamber opens a case, because it applies only where an investigation had already been opened by (another) EDP; the second alternative also does not work because here the text – rightly so – uses the term “may” and it foresees that the Chamber may allocate the case to “an EDP of another MS”. This is the appropriate wording for the situation where a case is initiated in accordance with para 1 by an EDP. However, if the Chamber should initiate a case, it would have to allocate the case – applying the criteria of para 3 – to an EDP, not to an EDP “of another MS”. Thus, if the Chambers are supposed to be able to initiate an investigation, para 2 would need to describe a third alternative.

Further on para 2 – the revised version is not convincing. We would like to return to the text of the previous version (7070/15) with two exceptions: that text should read at the beginning: “Upon entry of the information on an initiation of a case in the CMS, the Central Office shall...”. Also, at the end of that para, instead of “allocate the case...”: “decide which EDP shall be responsible for the case in accordance with Article 12(1).”

Reason: The revised text may “sound simpler”. However: the sequence of the two scenarios has been changed – the “normal” case will, however, be that no case had previously been opened. Also, the changes in the sentence structure (the conditioning “if” now appearing at the end) make the text more difficult to understand. And in the second case, this sentence order would not be fully correct grammatically as the “if” clause would appear to refer to the previous “which” clause. Moreover – and most importantly: it is absolutely unclear what the relationship between the newly worded first subparagraph (describing the two situations) and the second subparagraph is supposed to be. The latter has been retained from the previous text and describes the same situation as in the first alternative described in the first subparagraph.

Para 3:

We are not sure about the interpretation of the newly inserted text. If it is intended to address a point which we have made in the past, we would suggest to reword as follows: “... may deviate from that principle on sufficiently justified grounds and allocate the case to an EDP of another Member State, which has jurisdiction over the case, taking into account...”.

Para 4:

For purpose of clarification of what “concerning” means, the text should be amended as follows: “... concerning the jurisdiction of more than ...”. Moreover, in the second-to-last line, the word “general” should be deleted (what would that qualifier supposedly imply?).

Proposal for new Para 5:

In order to address the legitimate interests of administrative authorities, we would like to propose a new paragraph on collateral proceedings:

“To the extent that recovery or collection procedures under administrative law are deferred as a result of decisions taken by the European Public Prosecutor’s Office or by national prosecution authorities in connection with investigations or prosecutions to protect the financial interests of the European Union, any financial shortfalls that may occur shall not be borne by the national budget of the respective Member State.”

The reasons for that are set out in more detail in the written proposal circulated in advance.

- **Article 21a (Right of evocation and transfer of proceedings to EPPO)**

Para 1:

OK, except that we still believe that the deadline of 14 or now 10 days should refer to the EPPO informing the national authority and not only to taking the decision. This is particularly important in view of the possible prolongation now foreseen.

Para 2 and 2a:

We request to return to the previous text (before 7070/15). We do not see what the purpose of splitting up the previous para 2 is supposed to be. The second sentence of the new para 2a has nothing to do with the first sentence of that subparagraph. The way the text is worded now, it gives the impression that the second one applies only when a consultation in accordance with the first sentence has been done. Also, with the separation of the two articles the reference to “judicial or law enforcement authorities” becomes unclear (which ones?). In the previous text (before 7070/15) it was clear that this phrase referred to the authority that has initiated an investigation.

We also have concerns about the new wording inserted in what is now para 2: It should - at least - be revised to read "... to exercise the right of evocation" in order to clarify that the EPPO also in this case cannot simply initiate a new case but would have to evoke the existing national case. On the other hand, the reference to the time periods of paragraph 1 cannot apply here: the information received ("becomes otherwise aware") may be far too vague to be able to decide on evocation. This is another reason why the previous version of para 2 (without splitting into two paragraphs) would be more clear: if the EPPO "becomes otherwise aware", it will always have to first consult with the competent national authority.

Para 3:

We have concerns about the last subparagraph, which had been inserted with the document 7070/15: The relationship between the consultation obligation described here and the one in subpara 2a is unclear.

Para 4 and 5:

OK

Para 6:

Text of para 6 is OK – except for the last sentence. We are still not convinced that the Chamber itself should exercise the right of evocation but would prefer that this text here foresees that the Chamber may instruct the EDP to exercise this right. If the idea of the Chamber exercising such a right is to be retained, the text here should be reworded to read: "... exercise the right of evocation". Reason: it is not a "right" of the Chamber but a right of the EPPO to evoke a case. Also, the text in Article 9(3)(b) should be amended to refer to "Article 21a(6)" in order to clarify that the Chamber can exercise the right of evocation only in the situation described in this paragraph and not at any time in parallel to an EDP considering evocation.

- **Article 23 (Conducting the investigation)**

Para 1:

We still believe that the text should read “the investigation” and the words “and other measures” should be deleted. Reason “other measures” is an alternative to “investigative measures” but not to “the investigation” as a description of all activities in Chapter IV Section I. At the end of the second sentence, the term “allocate” does not seem appropriate – we should return to the previous term “assigned”.

Para 4a:

We agree with the principle described here. However, such a reallocation to an EDP of the same MS will also – and more often – be necessary in other cases than a “refusal” to follow instructions. Other cases would be e.g. where the handling EDP resigns, or he/she is dismissed, or where that EDP has too many cases to deal with and thus “cannot perform the investigation” (as described in para 5, which would, however, only allow to reallocate the case to the EP; it should primarily be possible to reallocate to another EDP). Other examples would be where in a larger MS the EDPs each have a territorial competence and it turns out that it would be more appropriate to have a different EDP handling the case than the one who had originally initiated the case. The text in para 4a thus needs to allow for other situations as well. Perhaps these situations could be addressed by amending para 5 (inserting in the chapeau of that paragraph, after “himself/herself” the words: “or to relocate the case to another EDP of the same MS....”).

Para 5:

Aside from the proposal to amend in light of the above, we believe that in the second paragraph (beginning with “When a EP....”) the words “and obligations” should be inserted after “powers”.

- **Article 25 (EPPO's authority to investigate)**

We can basically agree with the present text. However, if Article 25 is supposed to regulate only measures to be taken in his/her own MS, this should be clarified in the title of that article. We agree with the insertion of “or request” in the first sentence. We are not happy with the wording of the second sentence: The two conditions mentioned here presumably are also contained in national law. Perhaps one could simply begin the sentence with “Such measures may only be ordered where....”.

As to the deleted para 2, we reiterate our position that we do not see any reason – nor a possibility – to require MS to make available certain investigative measures (such as the list in Article 26) without setting certain common minimum standards, inter alia on the need for judicial authorization.

- **Article 26 (Investigation and other measures)**

We cannot agree to the current version of this Article. It is unclear what the purpose of the list of measures is supposed to be. The fact that Article 26a(2) refers to measure “in accordance with this Regulation or with national law” seems to suggest that EDPs can take measures listed in Article 26 even where the national law does not foresee such measure. That would be absolutely unacceptable. If on the other hand measures can only be taken when the national law does foresee such measure and under the conditions prescribed therein, the possible purpose of such a list could at best be to require MS to amend their legislation if it currently does not foresee one or more of the measures mentioned in the list. Thus if the list contains only measures which all MS already have, the list serves no purpose whatsoever. This could be different only where the Article would also set certain standards, inter alia in terms of judicial authorisation. On the other hand, the threshold foreseen in the chapeau of this Article would not be acceptable. The listed measures are too diverse to apply such general rule on a threshold. Also, the question would arise what the relationship between this threshold and the conditions specified in national law would be; in particular where national law does not differentiate on the basis of such thresholds.

If there is to be a list, it would have to be limited to investigative measures: the fact that the title is extended to “other measures” does not address our concern.

- **Article 26a (Cross-border investigations)**

The current concept of Article 26a is not convincing and needs further revision to be acceptable.

We will need a workable and efficient system that will function at least as good as cross-border cooperation on the basis of MLA and mutual recognition procedures. As explained in the past: we believe we should establish a system that uses the concept of mutual recognition (the EIO) as a starting point and make adjustments where this is suitable to address the “single office” idea.

To point out just a few main issues: The text of Article 26a will need to be clear about who takes the decision to order a measure or to request a measure to be ordered by a court and what is the applicable law for ordering/requesting such measures. The current text seems to leave that question open or, perhaps even give the handling EDP a choice: the term “assign” in para 1 does not clarify who is the one who takes the decision to order a measure. Para 2 then apparently is intended to leave a choice whether to apply the law of the handling EDP or that of the assisting EDP although there seems to be a contradiction between the first and the second sentence (first sentence: “assign any measure in accordance with the law of his/her MS”; second sentence: “adoption shall be governed by the law of the MS where the adoption takes place...”). The clarification of this issue is also necessary to know where the suspect could subsequently challenge the ordering of the measure – e.g. a house search – in court. If the EPPO is supposed to be considered a national authority for the purpose of judicial review: the national authority of the MS of the handling EDP or of the assisting EDP?

Furthermore – as pointed out in the context of Article 26: we cannot accept the wording in para 2 where it refers to “this Regulation or with national law”. The competence can be based only on national law – unless the Regulation would provide for harmonized rules on conditions/procedures for ordering measures.

Former para 3: based on our principle position on Article 26a, we do not agree with the total deletion of para 3.

Para 5: The revised version of para 5 is not acceptable to us: it leaves open the question what happens if the law of both MS require a judicial authorization. Even in such a case it would be necessary that a court in the MS of the assisting EDP can or must be requested by the assisting EDP to confirm the decision of the court in the MS of the handling EDP. Furthermore, the text does not seem address adequately the different concepts found in MS procedural law, where either a court would order a measure on request of the prosecutor or where a court needs to confirm the order made by the EDP.

Para 9: as stated before: we would need to clarify the criteria to be applied by the Chamber in taking such decisions. In our view, the Chamber would also need to observe para 7 letters c) and d).
