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NOTE

From:	Presidency
To:	CATS
Subject:	European Public Prosecutor's Office (EPPO) - Financial issues - Contributions from delegations

Following the invitation of the Presidency to delegations to written comments on the issue of the financing of the EPPO, the Polish, Swedish and UK delegations have made the contributions in Annex.

Poland**Comments on the model of financing of European Public Prosecutor's Office
in the context of specificity of enhanced cooperation****What is wrong with Making Available Regulation?**

According to art. 49 par. 5 of the *Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office*¹ expenditures of the EPPO shall be borne by the Member States which participate in the enhanced cooperation. This provision refers to the model set out in art. 11 of the Council Regulation No 609/2014, which provides for the reimbursement for opt-out Member States, adequate to their contributions to EU budget.

In our view this model raises significant legal doubts.

- 1) The reasoning behind this model, as expressed by the Commission, is the alleged similarity of the enhanced cooperation to the opt-out mechanism. In our view such comparison is legally misleading. According to art. 20 par. 4 of the TUE acts adopted in the framework of enhanced cooperation shall bind only participating Member States. Moreover they shall not be regarded as part of the *acquis*. Such principle is a logical consequence of the limited applicability of the instruments adopted in the framework of enhanced cooperation procedure. For example, in the case of EPPO the jurisdiction will be exercised over certain group of Member States. For this reason EPPO Regulation cannot be considered as fully-fledged element of common EU policy. It is an opposite situation to the one when a Member State decides not to opt-in to the relevant instrument, because such decision does not, by any means, influence the legal character of that act or limits its position in the EU legal system.

¹ ST 8750/17.

It is then justified - in reference to the notions of the EU acquis and common EU policy - to make a clear distinction between the acts adopted without “opt-out Member States” and acts adopted without non-participating Member States. Instrument adopted without the participation of the “opt-out countries” remain a part of the acquis and constitutes an integral part of the legal and institutional EU environment with all consequences, including financing of the expenditures by EU budget.

EPPO, as an act adopted in the enhanced cooperation procedure, does not have the features of such instrument and as such cannot be analogically governed by the opt-out legal mechanisms (*Making Available Regulation*).

- 2) In the context of abovementioned distinction we are convinced that the burden of any initiative undertaken in the framework of enhanced cooperation should lay exclusively on the participating Member States. This principle is reflected both in art. 326 and art. 332 of the TFUE. Thus, not only expenditures, but also the financial risks of such initiatives should be borne by participating Member States. Nonetheless, the reference to art. 11 of the Regulation 609/2014 clearly implies that EU budget becomes an exclusive guarantor of the EPPO funding, irrespectively of the potential financial setbacks. In our view this solution is not line with the requirements stemming from the Treaty as it makes non-participating Member States involved in the process of financing of EPPO.
- 3) The model presented by the Commission does not provide for sufficient financial clarity as it hinders the control of the expenditures of both participating and non-participating Member States. Moreover, it has not been clarified yet what are the potential implications of the establishment of EPPO for other expenditures of EU budget.
- 4) This model sets a dangerous precedent for the future possible enhanced cooperation. One cannot avoid the question whether this solutions would be adopted if, for instance, only 9 Member States decided to cooperate, or if the budgetary implications of such initiative were incomparably higher than in the case of EPPO. Since it is likely that in such cases this model would not have be chosen we are of the opinion that limited applicability of this solution confirms its legal flaws.

Aside from substantial legal concerns, we believe that from the procedural point of view the Commission's disregard for the crucial role of the Budget Committee within the field of financial regulations has not contributed to the legal certainty of the relevant provisions. Up to today the Commission has not provided any information on the financing. This leaves Member States with no overview of the alternative financial models (with their pros and cons) nor any detailed information about the final costs of EPPO (and potential consequences for other EU budget expenditures i.e. Eurojust).

Alternative models

Therefore we would like to propose an alternative financial models that could apply to the European Public Prosecutor's Office.

- 1) Participating Member States pay contributions as **external assigned revenues** of the EU budget (accordingly to art. 21(2) lit. b of the Financial Regulation), dedicated directly to EPPO. Such revenues are then assigned to relevant expenditure positions. Potential surplus is subsequently forwarded for the next years to the corresponding budgetary line. At the end of the MFF such surplus is brought back to the participating Member States. Such solution will be regulated by both EPPO regulation and all relevant legal procedures concerning EU funds and budgetary rules described in the Financial Regulation.
- 2) Participating Member States create an **independent fund based on the intergovernmental agreement**. The provisions of such agreement may describe the obligations of the Commission in reference to EPPO i.e. the supervision of the contribution process and the expenditures of EPPO. *European Stability Mechanism* shows this model could serve as effective and unambiguous solution.

Review clause and the Statement of the Council

If Member States are not willing to adopt alternative models of financing of EPPO, but tend to agree that, for various reasons, substantial or procedural, the legislative process within the enhanced cooperation procedure has showed the need for complex and legally sound solutions adaptable to any kind of legal institutions established in such procedure, we would like to draw your attention to the idea of:

- 1) Modification of the **review clause** (Art. 74) by inserting a reference to the need of revision of the financing model in the view of discussions on future Multiannual Financial Framework).
- 2) **Council Statement** adopted along with EPPO Regulation. Such declaration, aside from general remarks on the importance of the EPPO, could include statement of the following nature:

In the light of the unique character of the legislative procedure in which EPPO has been adopted, the Council states that the financial model chosen in this regulation does not set a precedent for the future initiatives undertaken within the procedure of enhanced cooperation. Furthermore, the Council calls the Commission to present, in the context of the next Multiannual Financial Framework, propositions of the horizontal model financial rules for the future legislative acts adopted in the procedure of enhanced cooperation.

Sweden

We would like to follow-up with a concrete text-proposal which reflects the SE position.

- We see some need for clarification/explanation in the text of article 49(6). Importantly, the below text-proposal is not meant to change the substance of the article.
- The concrete aim of the proposal is to 1) link together the Treaty's provision for enhanced cooperation with the financing of EPPO, 2) clarifying that non-participating MS are not part of the EPPO's financing and 3) clarifying that the method provided for in the art 11 is applicable to all MS which do not take part in the financing of EPPO.

6. **In accordance with article 332 of the Treaty on the Functioning of the European Union,**

~~t~~The expenditure of the European Public Prosecutor's Office referred to in paragraphs 4 and 5, shall be borne by the Member States which participate in enhanced cooperation on the establishment of the European Public Prosecutor's Office. ~~To that end,~~ **Member States which do not participate in enhanced cooperation on the establishment of the European Public Prosecutor's Office and its financing, shall be entitled to an adjustment, calculated in accordance with the method outlined in article** ~~Article~~ 11 of Council Regulation No 609/2014 **which** shall apply **to all Member States which do not participate in the enhanced cooperation**.

UK written response on Article 49

The UK would like to thank the Presidency for the opportunity to comment on the latest version of the EPPO text.

The UK welcomes the Commission's recent clarification in Budcom on 28th April that non-participating Member States' liability for administrative expenses incurred by the institutions does not include the EPPO since 'institutions' in this context must be read consistently with the Treaties.

The UK would also like clarification from the Commission on the expected level of funding the EPPO will initially require, and on where these appropriations are expected to be redeployed from in the budget.

We also suggest that Article 49(7) is removed, since it does not add to the content of Article 332 TFEU of the Treaties.
