

Termination of investigations.

Prosecution before national courts and admissibility of evidence.

Rules on dismissal and transfer of proceedings.

A short introduction on the occasion of Case Study No. 5

By *Nicholas Franssen* and *Sebastian Trautmann*

Trier, Februar 7, 2020

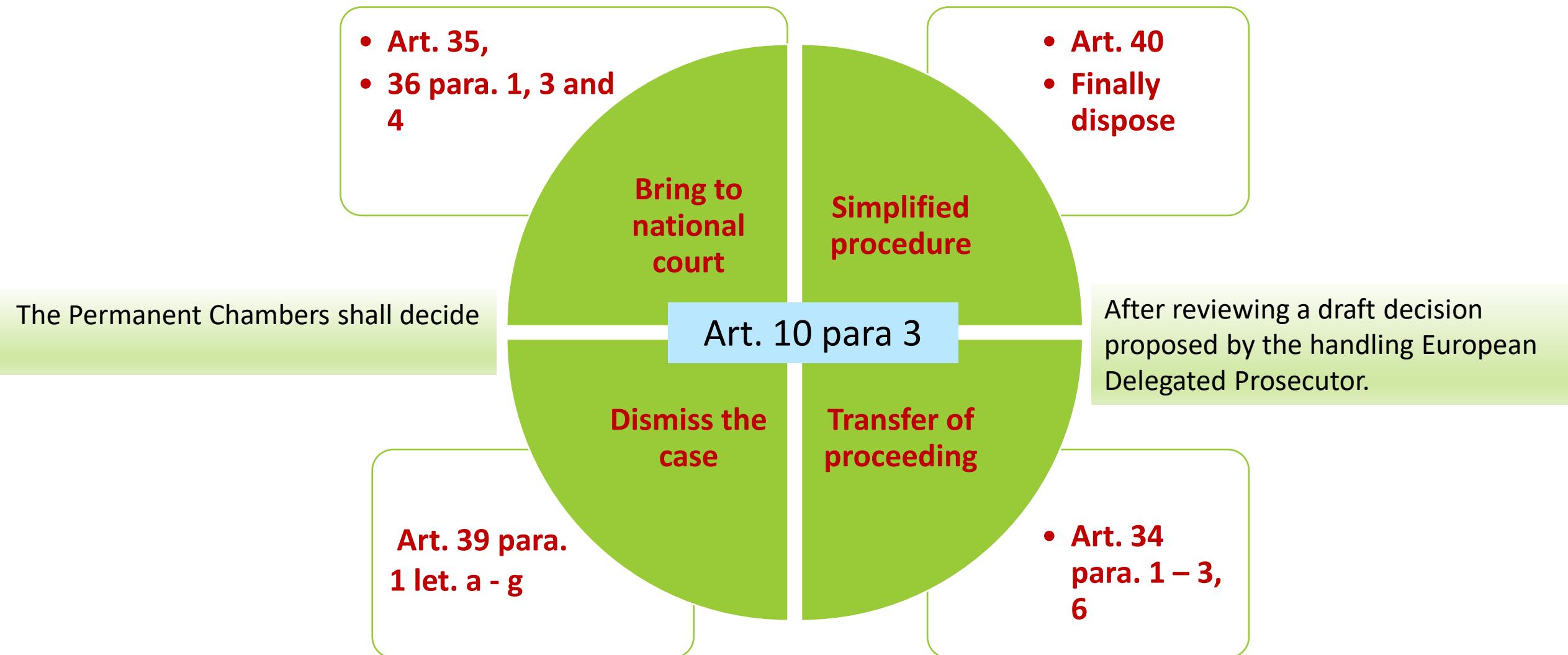


Co-funded by the Justice Programme of the European Union 2014-2020

Overview

- Available types of concluding investigations (Article 10(3))
- Termination of the investigation (Article 35)
- Prosecution before national courts (Article 36)
- Choice of forum for prosecution (Article 36 para 3).
- Admissibility of evidence (Article 37)
- Dismissal of a case (Article 39)
- Simplified prosecution procedures (Article 40)
- Referrals and transfers to national authorities (Article 34).

Ways to conclude the investigation



Article 35 - Terminating the investigation

Article 35(1): “When the **handling European Delegated Prosecutor** considers the investigation to be completed, he/she shall submit a report to the supervising European Prosecutor, containing a summary of the case and a **draft decision** whether **to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure** in accordance with Article 34, 39 or 40.”.

- considers the investigation to be completed
- report to the supervising European Prosecutor / summary of the case / draft decision

Legality principle (Recital 66: “[T]he investigation and prosecution activities of the EPPO should be guided by the legality principle, whereby the EPPO applies strictly the rules laid down in this Regulation relating in particular to competence and its exercise, the initiation of investigations, the termination of investigations, the referral of a case, the dismissal of the case and simplified prosecution procedures.”)

Article 36 – Prosecution before national courts

Article 36(1): “When the **European Delegated Prosecutor** submits a **draft decision proposing to bring a case to judgment**, the Permanent Chamber shall, following the procedures set out in Article 35, decide on this draft within 21 days. The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment.”

Article 13(1): “The **European Delegated Prosecutors** shall act **on behalf of the EPPO** in their respective Member States and shall have the **same powers as national prosecutors** in respect of investigations, **prosecutions** and **bringing cases to judgment**, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in this Regulation. ...”

Recital 81: “Taking into account the **legality principle**, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is **sufficient evidence and no legal ground bars prosecution**, or where no simplified prosecution procedure has been applied....”

Article 36 - Choice of forum for prosecution

- **Principle** (Art. 36(3)): “Where more than one Member State has jurisdiction over the case, the Permanent Chamber shall in principle decide to bring the case to prosecution in the **Member State of the handling European Delegated Prosecutor**.”
- **Deviation** (Art. 36(3)): “However, the Permanent Chamber may, taking into account the report provided in accordance with Article 35(1), decide to bring the case to prosecution in a **different Member State**, if there are sufficiently justified grounds to do so, taking into account the **criteria set out in Article 26(4) and (5)**, and instruct a European Delegated Prosecutor of that Member State accordingly.”
- **Possible joining of cases** for prosecution in a single MS (Art. 36(4), recitals 67, 68)
- **Judicial Review** (article 42): “Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review **by the competent national courts** in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation.”.

Article 37 - Admissibility of evidence

*Art. 37,,(1) Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the **mere ground** that the evidence was gathered in another Member State or in accordance with the law of another Member State.*

(2) The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.”

Rec. 80: “The evidence presented by the EPPO in court should not be denied admission (...) provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person’s rights of defence under the Charter.”

Article 39 – Dismissal of a Case

Article 39(1): “Where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case against a person on account of any of the following grounds:

- (a) the death of the suspect or accused person or winding up of a suspect or accused legal person;
- (b) the insanity of the suspect or accused person;
- (c) amnesty granted to the suspect or accused person;
- (d) immunity granted to the suspect or accused person, unless it has been lifted;
- (e) expiry of the national statutory limitation to prosecute;
- (f) the suspect’s or accused person’s case has already been finally disposed of in relation to the same acts;
- (g) the lack of relevant evidence.”

Recital 81: “... The grounds for dismissal of a case are exhaustively laid down in this Regulation.”

Article 40 – Simplified Prosecution Procedures

Article 40(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 Article 10(3) and Article 35(1), propose to the competent Permanent Chamber to apply that procedure in accordance with the conditions provided for in national law.”

- **applicable national law** provides for a **simplified prosecution procedure**
- aiming at the **final disposal**
- on the basis / upon fulfilment of the **terms agreed with the suspect**
- **conditions provided for in national law**

Article 40(2): „The Permanent Chamber shall decide on the proposal of the handling European Delegated Prosecutor taking into account the following grounds:

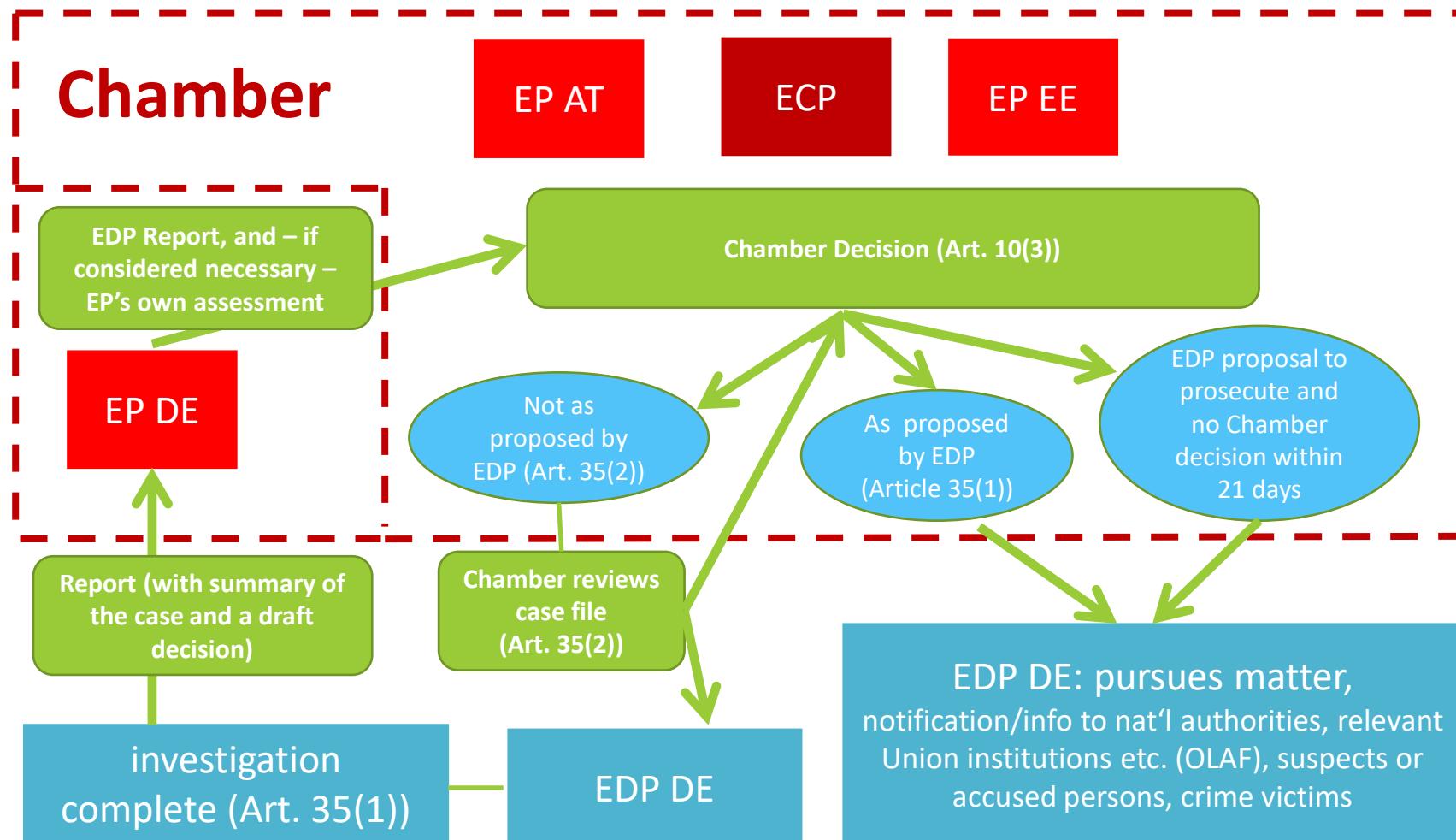
- (a) the **seriousness of the offence**, based on **in particular the damage** caused;
- (b) the **willingness** of the suspected offender **to repair the damage** caused by the illegal conduct;
- (c) the use of the procedure would be in accordance with the **general objectives and basic principles of the EPPO** as set out in this Regulation. ...”

- College shall adopt **guidelines** on the application of those grounds

Article 34 – Referrals and transfers to national authorities

- The EPPO shall **refer** the case to national authorities, if
 - no criminal offence in accordance with Articles 22 and 23
 - conditions for exercise of EPPO competence (Articles 25(2) and (3) are not met
 - EPPO considers a dismissal of a case where the EPPO exercised an ancillary competence in accordance with Article 22(3) or where the Union's damage does not exceed damage caused to another victim
- The College may issue guidelines, allowing the Permanent Chamber to **transfer** a case to the national authorities
 - if the damage to the EU is less than 100,000 € and where in accordance with the guidelines set by the College the seriousness of the offence or the complexity of the case does not require an investigation at EU level
- Procedures in case of offences outside EPPO competence
 - Article 34(5): if national authority does not accept to take over the case (within 30 days), the EPPO remains competent (except where in accordance with Article 22 and 23 the EPPO has no competence).
 - Article 34(7), (8): **transfer** of file to nat'l authority, no further EPPO investigative or prosecutorial measures, close the case, **notification/info** to nat'l authorities, relevant Union institutions etc. (OLAF), suspects or accused persons, crime victims

Decision processes when terminating the investigation



Decisions to be taken under national law

Article 5(3): “The investigations and prosecutions on behalf of the EPPO shall be governed by **this Regulation**. **National law shall apply to the extent that a matter is not regulated by this Regulation**. Unless otherwise specified in this Regulation, the applicable national law shall be **the law of the Member State whose European Delegated Prosecutor is handling the case** in accordance with Article 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.”

Article 13(1): “**The European Delegated Prosecutors shall act on behalf of the EPPO in their respective Member States** and shall have the **same powers as national prosecutors** in respect of investigations, **prosecutions** and **bringing cases to judgment**, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in this Regulation.

The European Delegated Prosecutors shall be responsible for those investigations and **prosecutions that they have initiated**, that have been **allocated to them** or that they have taken over using their right of **evocation**.

The European Delegated Prosecutors shall also be responsible for **bringing a case to judgment**, in particular have the power to **present trial pleas**, participate in **taking evidence** and exercise the **available remedies in accordance with national law**.”

Court Proceedings / Trial Phase

Article 86 TFEU: “(2) [EPPO] shall exercise the functions of prosecutor in the competent courts of the Member States ...

(3) The regulations referred to in paragraph 1 shall determine the general rules applicable to [EPPO], the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.”

Article 5(3): “... National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.”

Article 13(1): “... The European Delegated Prosecutors shall also be responsible for bringing a case to judgment, in particular have the power to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law.

- Court proceedings / trial phase governed by national law
- see also Art. 36(5) (competence of national court), Art. 37(2) (assessment of evidence),
Art. 40(1) (procedure in accordance with the conditions provided for in national law),
Art. 42(1) (judicial review by national court), Art. 45(2) (case file)