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From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office <i>- Partial general approach/Progress report</i>

A. Introduction

Building on the achievements of the previous Netherlands Presidency, the Presidency has chaired a considerable number of working days in the COPEN Working Party, in the Friends of Presidency setting and JHA Counsellors with a view of finding agreement in principle on the remaining outstanding issues in the draft Regulation.

The Presidency has focused on the rules on judicial review, on cooperation with third countries, cooperation with non-participating Member States and on relations with Eurojust, which were not included in the text of the Regulation presented for broad conceptual support by the previous Netherlands Presidency. Negotiations have advanced rapidly at technical level, and compromises on the said issues have in principle been reached, although there are still a few details that remain to be confirmed.

The corresponding provisions will be briefly explained below, and the proposed drafting will be presented in the Annex. The Presidency aims at achieving an agreement in principle by Ministers on these Articles in the October (JHA) Council.

B. Background to the Articles

- *Judicial review*

Article 36 on *Judicial review* has been discussed intensively in Council during the Luxembourg and Netherlands Presidencies. However, since no agreement could be found, the text was not presented to Ministers at the Council in December 2015.

The most topical issues in the latest discussions have focused in particular on legal certainty, the need to ensure the efficiency of the Office, the extent and the scope of the notion of 'procedural acts', the jurisdiction of the European Court of Justice to give preliminary rulings in accordance with Article 263(4) TFEU and the competence of the national courts.

It is in the light of these discussions that the Presidency has continued the examination of the text, in close consultation with the Council and Commission legal services, with a view to finding the most appropriate legal solution, while taking into account the positions expressed by Member States. This examination has led to the elaboration of a new draft version of Article 36, which appears to constitute a legally sound and balanced compromise between the positions of delegations.

In line with the description above, the Presidency submits the revised text of Article 36 in Annex for consideration. The Presidency considers this text to be a good and valuable compromise ensuring rule of law while giving flexibility and efficiency to the Office in its activities.

- *Cooperation with third countries and international organisations*

The issue of relations with third countries and international organisations has been repeatedly discussed. The main debate focused on solutions based on the notifications made by Member States that EPPO should be considered to be a competent judicial authority, on reciprocity and on the so-called double hat model.

- *Cooperation between EPPO and non-participating Member States*

The issue of cooperation between EPPO on the one hand and UK, IE and DK as non-participating Member States under Protocols No 21 and 22 on the other hand, focused on the necessity to introduce a specific provision to deal with the judicial cooperation in criminal matters between EPPO and the non-participating Member States.

Different possibilities to regulate the issue have been considered by the Presidency.

The Presidency is of the opinion that the text, as presented, offers an appropriate basis for the cooperation between EPPO and non-participating Member States on the basis of existing Union instruments.

- *Relations with Eurojust*

Article 57 on *Relations with Eurojust* has been discussed during the Dutch Presidency. A provisional version of the text was submitted to the Council (JHA) in June 2016¹. In that version, different suggestions and proposals made by the delegations were reflected in footnotes.

The main modification in relation to the Commission proposal concerned the limitation of operational co-operation between EPPO and Eurojust (paragraphs 2-3) and the scope of the technical and administrative support which Eurojust could or should provide to EPPO, depending on whether this is an obligation or a possibility (paragraph 5).

¹ Document 9799/16

Apart from this general question if, and to what extent, Eurojust could or should provide operational, technical and administrative assistance to the EPPO, the discussions focused on whether the text should include a (open) list of services to be provided by Eurojust to EPPO, or merely a general reference to such services.

The position of the majority of delegations, i.e. a "may" clause and a general reference to services to be provided by Eurojust to EPPO, is reflected in the text in Annex.

C. Questions to ministers

The Presidency considers that the Articles indicated in the Annex are now ready to be submitted to Council, with the aim to achieve *broad conceptual support* to the text.

The Ministers are invited to:

- express their support to the Articles indicated in the Annex.

Article 36

Judicial review²

1. Procedural acts of the European Public Prosecutor's Office which 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 in case of failures of the European Public Prosecutor's Office 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.

2. The Court of Justice of the European Union shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning:

a) the validity of ~~the~~ procedural acts of the European Public Prosecutor's Office, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;

b) the interpretation or the validity of provisions of Union law, including this Regulation;

c) ~~{the interpretation of Articles 17 and 20 of this Regulation in relation to any conflict of competence between the European Public Prosecutor's Office and the competent national authorities}~~³.

² DE and IT have presented an alternative wording of this Article, as presented in WK 470/2016. A few delegations have raised questions regarding the use of the term "procedural acts" in this document. HU has emitted a reservation on this article.

³ FI, SE, PL and NL would prefer to see point c) deleted. N.B. This Letter c) makes clear that, pursuant to Article 20(5), a national court or tribunal within the meaning of Article 267 TFEU should be designated at national level (~~including a trial court~~) to decide on conflicts of competence between the EPPO and national prosecution services.

3. By way of exception to paragraph 1, the decisions of the European Public Prosecutor's Office to dismiss a case, in so far as they are contested directly on the basis Union law, following decisions of the European Public Prosecutor's Office shall be subject to review before the Court of the Justice in accordance with the fourth paragraph of Article 263 TFEU⁴ ÷

~~a) decisions of the European Public Prosecutor's Office to dismiss a case, in so far as they are contested directly on the basis of Union law; and~~

~~b) decisions of the European Public Prosecutor's Office, which affect the data subjects' rights under Chapter VI.~~

4. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 268 of the Treaty in any dispute relating to compensation for damage caused by the European Public Prosecutor's Office.

5. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 272 of the Treaty in any dispute concerning arbitration clauses contained in contracts concluded by the European Public Prosecutor's Office.

6. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 270 of the Treaty in any dispute concerning staff-related matters ~~and the dismissal of the European Chief Prosecutor or European Prosecutors.~~

7. The Court of Justice of the European Union shall have jurisdiction on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively, with Articles 13(4) and 14(5) of this regulation⁵.

⁴ LU, HU, PL, SI have suggested that the list of measures below should be extended also to other decisions. Recital: "Decisions of the European Public Prosecutor's Office to reallocate the case to a European Delegated Prosecutor in another Member State and decisions of the European Public Prosecutor's Office to bring the case to prosecution in a different Member State may be subject to judicial review before the national courts, by way of an action or a plea in objection."

⁵ PT has requested that dismissals of European Delegated Prosecutors should be added to this provision, which would require a modification also of Article 15 in the draft Regulation.

8. This Article is without prejudice to judicial review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU of decisions of the European Public Prosecutor's Office which affect the data subjects' rights under Chapter VI and of decisions of the European Public Prosecutor's Office which are not procedural acts, such as decisions of the European Public Prosecutor's Office concerning the right of public access to documents⁶, or decisions dismissing European Delegated Prosecutors adopted pursuant to Article 15(3) of this Regulation or any other administrative decisions.

Article 57

Relations with Eurojust

1. The European Public Prosecutor's Office shall establish and maintain a close relationship with Eurojust based on mutual cooperation within their respective mandates and the development of operational, administrative and management links between them as defined below⁷. To this end, the European Chief Prosecutor and the President of Eurojust shall meet on a regular basis to discuss issues of common concern.
2. In operational matters, the European Public Prosecutor's Office may associate Eurojust with its activities concerning cross-border cases, including by:
 - a) sharing information, including personal data, on its investigations in accordance with the relevant provisions in this Regulation;
 - b) inviting Eurojust or its competent national member(s) to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, States members of Eurojust but not taking part in the establishment of the European Public Prosecutor's Office or third countries.

⁶ AT and LV would prefer to see this provision deleted.

⁷ Paragraph 1 to be reviewed after finalisation of paragraphs 3-5 in this Article, including on the possibility of concluding agreements between EPPO and Eurojust.

3. The European Public Prosecutor's Office shall have indirect access on the basis of a hit/no-hit system to information in Eurojust's case management system. Whenever a match is found between data entered into the case management system by the European Public Prosecutor's Office and data held by Eurojust, the fact that there is a match will be communicated to both Eurojust and the European Public Prosecutor's Office, as well as the Member State which provided the data to Eurojust. ~~In cases where the data was provided by a third country, Eurojust⁸ will only inform that third country of the match found with the consent of the European Public Prosecutor's Office.~~
- {5. The European Public Prosecutor's Office ~~may/shall~~ rely on the support and resources of the administration of Eurojust. To this end, Eurojust may provide services of common interest to the European Public Prosecutor's Office. The details ~~of this arrangement~~ shall be regulated by an Agreement Arrangement. ~~/shall provide [any of] the following services to the European Public Prosecutor's Office⁹:~~
- a) ~~technical support in the preparation of the annual budget, the programming document containing the annual and multi-annual programming, and the management plan;~~
 - b) ~~technical support in staff recruitment and career management;~~
 - e) ~~security services;~~
 - d) ~~Information Technology services;~~
 - e) ~~financial management, accounting and audit services;~~
 - f) ~~any other services of common interest.¹⁰]"~~

⁸ Obligations of Eurojust will be addressed in the context of the Eurojust Regulation.

⁹ ~~The details of this arrangement shall be regulated by an Agreement. FR, supported by DE and LU, suggested that Eurojust should provide 'services of common interest' to EPPO, and that the provision should provide that 'The details of this arrangement shall be regulated by an Agreement'.~~

¹⁰ ~~The content of the list is to be determined later.~~

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 or to which the Union has acceded 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).~~

4. Where the Union has not concluded international agreements in accordance with Article 218 of the Treaty with respect to matters falling within the competence of the European Public Prosecutor's Office, the Member States shall take all appropriate steps to enable the European Public Prosecutor's Office concerning the criminal offences within its material competence, to exercise its functions on the basis of international agreements on legal assistance in criminal matters and extradition concluded by them, when the European Public Prosecutor's Office assumes its tasks in accordance with Article 75(2). In this regard, 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 those international agreements, including, where necessary, by way of an amendment to those agreements.

[5. Where the European Public Prosecutor's Office cannot exercise its functions on the basis of a relevant international agreement referred to in paragraph 3 or 4 and where the European Delegated Prosecutor handling the case also exercises functions as a national prosecutor in accordance with Article 12(3), such a European Delegated Prosecutor may request legal assistance in criminal matters from authorities of third countries, where applicable, through the competent national authorities. In that case, the European Delegated Prosecutor shall inform the authorities of third countries that the evidence collected on that basis will be used by the European Public Prosecutor's Office for the purposes of this Regulation.]

Where the European Public Prosecutor's Office cannot exercise its functions on the basis of a relevant international agreement referred to in paragraph 3 or 4, the European Public Prosecutor's Office may also request legal assistance in criminal matters from authorities of third countries in a particular case and within the limits of its material competence. The European Public Prosecutor's Office shall comply with the conditions which may be set by those authorities concerning the use of the information which has been provided on that basis.

Article 59a

Relations with Member States which are not bound by this Regulation

1. The working arrangements referred to in Article 56(2a) with the authorities of Member States which are not bound by this Regulation 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 the Member States which are not bound by this Regulation in order to facilitate cooperation in line with the European Public Prosecutor's needs.
3. 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 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.
