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'A' ITEM NOTE

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| From: | Presidency |
| To: | Council |
| No. prev. doc.: | 5048/17 |
| Subject: | Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - General approach |

I. INTRODUCTION

1. In July 2013, the Commission presented its proposal for a Regulation on the establishment of the European Public Prosecutor's Office. At the outset, the positions of Member States in relation to the proposal varied considerably, and compromises have been sought and elaborated on many issues throughout the last three years. The proposal has in particular been discussed by Ministers at thirteen (13) meetings of the Council (JHA), and more than 60 days of meetings in the competent working party (COPEN) have been organised, as well as several meetings of JHA Counsellors.

2. The United Kingdom and Ireland have made no notification under Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, and therefore do not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
3. In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, Denmark does not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
4. The draft Regulation is subject to a special legislative procedure based on Article 86 TFEU (Council acting unanimously after obtaining the consent of the European Parliament).
5. The second subparagraph of Article 86(1) TFEU provides that in the absence of unanimity in the Council, a group of a least nine Member States may request that the draft Regulation be referred to the European Council.

II. STATE OF PLAY

6. A broadly agreed consolidated draft text of the full Regulation had been established by the second half of 2016. This draft received broad conceptual support in the Council (JHA) on 13 October 2016. Some issues however remained open. The Slovak Presidency held different meetings at working party and Coreper level and also organised intensive bilateral contacts with all delegations in order to seek possible convergence on these issues throughout its semester of presidency.
7. During its meeting on 8 December 2016, the Council (JHA) concluded that there was broad support for the Regulation as set out in document 15200/16. Further, it was concluded that the text, for the large majority of Member States, could be a good basis for the establishment of the Office. Several delegations underlined that they felt that the best possible outcome had been reached and that they could agree to the text as it stood, although a few Member States marked that they still had reservations on a few issues. One Member State (Sweden) mentioned that it would not, in any case, take part in the adoption of the European Public Prosecutor's Office.

8. In the period following the Council of 8 December 2016, the Slovak Presidency continued the efforts to seek compromise on the few remaining open issues by means of amendments to the text. In particular, focus was put on the following issues:

- The wording of the provision on the material competence of the Office (Article 17). The wording in doc. 15200/16 was the result of very detailed discussions at expert level throughout 2014 - 15, but some delegations had still raised questions as regards the exact scope of the Office's competence. The latest discussions made it possible to solve those questions and to find a compromise.
- The provision on cross-border investigations (Article 26), on which one Member State raised serious concerns. Substantial efforts had been made to meet these concerns already in 2014-15, and these efforts were continued in the latter part of 2016, in close consultation with all delegations, as well as at the JHA Counsellors meeting of 12 January 2017. However, at the end of this process, a large majority of delegations considered the suggestions made by this Member State as being unacceptable. The appreciation of the Presidency remained that the wording of doc. 15200/16 best reflected the general view among a large majority of delegations.
- A number of minor clarifications and corrections were added to the text, in particular with a view to ensuring coherence with the text of the draft PIF Directive for which agreement with the European Parliament was found (as confirmed in the meeting of the LIBE and CONT committees on 12 January 2017).

Substantial advances towards a generally accepted compromise have been made since the Council meeting of 8 December 2016, and important issues have been clarified and/or solved. On the basis of these advances, the Presidency, on 22 December 2016, issued a new version, with a number of amendments, to the full text of the draft Regulation ¹, and concluded that an agreement on the full text was now within reach.

¹ Doc 15760/16 COR 1.

9. The Maltese Presidency has continued the work of the precedent Slovak Presidency. On 12 January 2017, the Presidency convened a JHA Counsellors meeting where it presented the updated consolidated draft Regulation and noted that all possible efforts to reach unanimity or at least to bring together the greatest possible number of Member States and to find solutions to the issues on which delegations had noted reservations had now been made. During the said JHA Counsellors' meeting, the Presidency noted that Sweden confirmed its position that it would not participate in the Regulation and that all efforts have been made since 2013 to actively seek a generally acceptable solution on the draft Regulation.
10. In the light of the outcome of discussions with the Member States, the Presidency submitted the draft to Coreper.
11. At the Coreper meeting of 19 January 2017, at least one Member State (Sweden) again confirmed that it would not participate in the adoption of the Regulation. Coreper thereupon noted that absence of unanimity and submitted the draft to the Council.

III. CONCLUSIONS

12. Against this background, Council is invited to register the absence of unanimity, within the meaning of the second subparagraph of Article 86(1) TFEU, on the draft Regulation as set out in document 5766/17.