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NOTE

From: the Finnish Delegation
To: Delegations
Subject: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office
- Proposal from the Finnish Delegation on Article 26

The Finnish Delegations have proposed the following addition to Article 26, on the reasons indicated below: *“The EPPO [or the European Prosecutor] may issue, or request the delegated prosecutor, or the competent national authority, to issue a European Arrest Warrant, a European Investigation Order, or a Freezing Order, according to the relevant EU-instruments”*.

Reasons:

- 1) EAW and MLA-instruments (in future the EIO) contain rules for cross-border measures, concerning e.g. surrender of the suspected person to another MS for purposes of investigation, temporary transfer of a person in custody for confrontation or other evidential purposes, hearing a person via video- or telephone-link or other specific cross-border

investigative measures. Because of their cross-border character, there is no domestic legislation, which covers those measures. Therefore, if the regulation just regulates measures which have to be undertaken in one MS, that means that there are no rules for cross-border measures between MS. There is an obligation to respect fundamental rights and rule of law, which means that such measures simply cannot be just agreed between prosecutors without a legal basis (e.g. Article 52 of Charter of fundamental rights, which states that “Any limitation on the exercise of the rights and freedoms recognized by this Charter must be *provided for by law..*”). For example, if a person should be surrendered or temporarily transferred from Member State A to Member State B, this cannot be done solely according to Member State A’s national legislation, nor solely according to Member State B’s national legislation; in such situation a cross-border legal instrument is needed. And even in a purely domestic case it would not be possible to hear e.g. a suspected person via video-link without any legal basis to allow such hearing without personally appearance. In our view such cross-border measures should be available for the EPPO as well. This, however, would not be possible under the current text proposal (cross-border measures are also lacking from paragraphs 3 and 6 of the new draft Article 26).

- 2) Another reason is that if in a cross-border situation a reference is made only to the law of the MS where the measures are to be undertaken, this would mean a step backwards, since there would be no obligation to comply with such formalities and procedures, which should be followed under the law of the MS where the investigation or prosecution takes place. This could then hamper the whole procedure, if the evidence gained would therefore not be “valid” in the MS where such evidence is needed in criminal proceedings. For instance, if certain formalities should be followed before the evidence is “valid” in a MS, such formalities would not be followed under the current text proposal, since it would be only the law and formalities of the “executing State”, which would be applicable. In other words, the current text proposal does not offer any flexibility to take into account “procedural wishes” of the MS (or delegated prosecutor from that MS) where the trial takes place and where certain formalities might be required so that the evidence would be “valid”. The modern trend in judicial cooperation is to take into account also “forum regit actum” -principle, not only stick to the traditional “locus regit actum”, which the current text proposal would mean.

- 3) Furthermore, if no reference to mutual recognition instruments is made, it would mean a step backwards also in terms of grounds for refusal. In mutual recognition instruments the starting point is that the grounds for refusal are exhaustively listed and limited; the executing MS has a broad obligation to execute the measure requested, in some situations even if the execution would not be possible in a domestic situation. If the reference is only made to the law of the MS where the measures are to be undertaken, we would in practice get an extensive list of grounds for refusal, varying from one MS to another. As explained above in point 2, also in terms of grounds for refusal, if the reference is made only to the law of the MS where the investigative measure is taken, this would mean that there would be no obligation to take into account, not even consider, wishes of the MS (or the delegated prosecutor from that MS). In our view, in order to enable the delegated prosecutor in the other MS to proceed successfully with the case, such obligation should exist.

Finally, it should be kept in mind that Title V of the Lisbon Treaty already is about common area of freedom, security and justice. The EPPO should also be able to operate within such area without unnecessary limitations. Why should we try to create an artificial area for the EPPO? We have to face realities; the EPPO does not operate in one single MS, it has to be able to operate in different legal orders in all MS which take part in the EPPO. This requires a possibility to use also such investigative tools, which have been tailored to cross-border situations within the area of freedom, security and justice.