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NOTE

From:	Presidency
To:	Council
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Articles 24, 25, 26, 27, 28, 28a, 29, 30, 31, 32, 33, 35

A. Background

The Luxembourgish Presidency of the Council has organised six working days in the COPEN Working Party (including two days in a Friends of Presidency setting) and one in CATS to discuss the European Public Prosecutor's Office. The discussions have built on the work of the previous Latvian Presidency and have focused on Articles 17-37¹ in the draft Regulation. The Presidency notes that all meetings have been held in a very constructive atmosphere and that important advances towards finding solutions on all outstanding issues have been made.

¹ As presented in doc 11045/15 EPPO 34 EUROJUST 147 CATS 75 FIN 525 COPEN 204 GAF 26.

B. State of Play

I. Articles 25, 26, 27 and 31

The rules in these key provisions (covering investigation measures, cross-border investigations and evidence) have been the object of repeated and constructive discussions throughout the last two years. Delegations have been close to an agreement for quite some time, although differences between national legal systems have in some cases rendered the discussions rather complex from a technical point of view.

The Luxembourgish Presidency notes that the said provisions are closely interlinked, and has therefore elaborated a compromise package covering the four Articles. The main objective of the Presidency was to strike a careful balance between the positions of delegations, while at the same time ensuring notably both the efficiency of the Office and the safeguard of the rights of the suspects and accused persons. An element of flexibility designed to make it possible to adapt the provisions to existing national legal systems has also been introduced.

The compromise package was presented to experts in September 2015 and was generally welcomed by delegations. It has since then been analysed in detail at expert level, whereby a number of adjustments to the text have been made in order meet concerns of delegations. Following these adjustments, the Presidency considers that the compromise, in its current form as presented in Annex I to this note, could be agreed upon by delegations.

II. Articles 24, 28, 28a, 29, 30, 32, 33 and 35

These provisions include important and partly technical rules on immunities, investigation, prosecution, confiscation and procedural safeguards. The rules have been analysed in detail at expert level. Following the very constructive discussions on these provisions during the last three months, the Presidency notes that delegations have reached an agreement on the content of all of these provisions.

III. Articles 17-23, 34, 36 and 37

Advances have been made also on these complex provisions (on competence and exercise of the competence of the Office, basic rules on investigations, transactions and judicial review). The discussions at expert level will continue in view of reaching an agreement on those Articles in the second half of the Luxemburgish Presidency.

C. Questions

As explained above, the Presidency considers that the time is now ripe for Council to agree on a partial general approach on the Articles mentioned in section B.I and B.II above and reproduced in Annex 1 and Annex 2 to this note. The partial general approach will be agreed upon on the understanding that the text will - in particular in order to ensure its coherence - be revisited once all Chapters of the Regulation have been agreed upon (following the maxim that nothing is agreed until everything is agreed) and that such partial general approach is without prejudice to any horizontal question.

Ministers are therefore invited to:

- **agree to a partial general approach on the package compromise on Articles 25, 26, 27 and 31 as presented in Annex 1 to this note;**
- **agree to a partial general approach on the provisions cited in Annex 2 to this note;**
- **take note of the general progress made under the Luxemburgish Presidency.**

Draft

COUNCIL REGULATION

on the establishment of the European Public Prosecutor's Office

[...]

SECTION 2

RULES ON INVESTIGATION MEASURES AND OTHER MEASURES

Article 25

Investigation measures and other measures

1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least four years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures:
 - a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
 - b) obtain the production of any relevant object or document either in original or in some other specified form;
 - bb) obtain the production of stored computer data, including banking account data, encrypted or decrypted, either in original or in some other specified form;
 - c) freeze instrumentalities or proceeds of crime, including freezing of assets, which are expected to be subject to confiscation by the trial Court and where there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation;
 - d) intercept electronic communications to and from the suspected or accused person, on any electronic communication connection that the suspected or accused person is using¹;
 - e) preserve traffic data in respect of electronic communications.

¹ MT wishes to see this point deleted.

- 1a. Without prejudice to Article 24, the investigation measures set out in paragraph 1 may be subject to conditions in accordance with the applicable national law if the latter are explicitly foreseen for specific categories of persons or professionals legally bound by an obligation of confidentiality.
- 1b. The investigation measures set out in paragraph 1(bb), (d) and (e) may be subject to further conditions foreseen by the applicable national law.
2. The European Delegated Prosecutors shall, in addition to the measures referred to in paragraph 1, be entitled to request or to order any other measures in their Member State which are available² to prosecutors under national law in similar national cases.
3. The European Delegated Prosecutors may only order the measures referred to in paragraphs 1 and 2 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and modalities for taking the measures shall be governed by the applicable national law.

Article 26

Cross-border investigations

1. The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the European Delegated Prosecutor handling the case, the latter shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where that measure needs to be carried out.

² A recital similar to recital 10 in the EIO directive could give an explanation of the term "*available*".

2. The European Delegated Prosecutor handling the case may assign any measures, which are available to him or her in accordance with Article 25. The adoption and justification of such measures shall be governed by the law of the Member States of the European Delegated Prosecutor handling the case. Where the European Delegated Prosecutor handling the case assigns an investigation measure to one or several European Delegated Prosecutors of another Member State, he shall at the same time inform his supervising European Prosecutor.
4. If a judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor such authorisation shall be obtained by the latter in accordance with the law of that Member State.

If judicial authorisation for the assigned measure is refused³, the European Delegated Prosecutor handling the case shall withdraw the assignment.

However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the European Delegated Prosecutor handling the case requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.

5. The assisting European Delegated Prosecutor shall undertake the assigned measure, or instruct the competent national authority to do so.
6. Where the assisting European Delegated Prosecutor considers that:
 - a) the assignment is incomplete or contains a manifest relevant error,
 - b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons,
 - c) an alternative but less intrusive measure would achieve the same results as the measure assigned, or
 - d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his or her Member State,

he or she shall inform his supervising European Prosecutor and consult with the European Delegated Prosecutor handling the case in order to resolve the matter bilaterally.

³ With 'refused' here is understood the final refusal, i.e. the refusal after all legal remedies have been exhausted. This will be clarified in a recital.

- 6a. If the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments.⁴
7. If the European Delegated Prosecutors cannot resolve the matter within 7 working days and the assignment is maintained, the matter shall be referred to the competent Permanent Chamber. The same applies where the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time.
8. The competent Permanent Chamber shall to the extent necessary hear the European Delegated Prosecutors concerned by the case and then decide, in accordance with applicable national law as well as this Regulation, without undue delay whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision through the competent European Prosecutor.

Article 27

Enforcement of assigned measures

The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.

[...]

⁴ The following recital will be inserted in the Preamble: *The possibility to have recourse to legal instruments on mutual recognition or cross-border cooperation is not meant to replace the provision on cross-border investigations under this Regulation. It rather supplements it to ensure that cross-border measures which don't exist in national law for a purely domestic situation can be used in accordance with national law implementing the relevant instrument, when conducting the investigation or prosecution.*

Article 31

Evidence⁵

1. Evidence presented by the prosecutors of the European Public Prosecutor's Office 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.

Where the law of the Member State of the trial Court requires that the latter examines the admissibility of evidence, it shall ensure it is satisfied that its admission would not be incompatible with Member States obligations to respect the fairness of the procedure, the rights of defence, or other rights as enshrined in the Charter, in accordance with Article 6 TEU.

2. The power of the trial Court to freely assess the evidence presented by the defendant or the prosecutors of the European Public Prosecutor's Office shall not be affected by this Regulation.

⁵ A recital inspired by recital 39 in the EIO Directive will be inserted in the preamble, with the following tentative wording: *'This Regulation respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application. In line with these principles, and in respecting the different legal systems and traditions of the Member States as provided in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the trial Court from applying fundamental principles of national law on fairness of the procedure as they apply in common law systems such as in the framework of a trial by jury'*.

Draft

COUNCIL REGULATION

on the establishment of the European Public Prosecutor's Office

[...]

Article 24

Lifting privileges or immunities

1. Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under national law, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting in accordance with the procedures laid down by that national law.
2. Where the investigations of the European Public Prosecutor's Office involve persons protected by privileges or immunities under the law of the European Union, in particular the Protocol on the privileges and immunities of the European Union, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting in accordance with the procedures laid down by Union law.

[...]

Article 28¹

Pre-trial arrest and cross-border surrender

1. The European Delegated Prosecutor handling the case may order or request the arrest or pre-trial detention of the suspected or accused person in accordance with national law applicable in similar domestic cases.
2. Where the arrest and surrender of a person who is not present in the Member State in which the European Delegated Prosecutor handling the case is located is necessary, the latter shall issue or request the competent authority of that Member State to issue a European Arrest Warrant² in accordance with Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States.

Article 28a³

Referrals and transfers of proceedings to the national authorities

1. Where an investigation conducted by the European Public Prosecutor's Office reveals that the facts subject to investigation do not constitute a criminal offence for which it has a competence in accordance with Articles 17 and 18, the competent Permanent Chamber shall decide⁴ to refer⁵ the case without undue delay to the competent national authorities.

¹ The Presidency suggests to include the following recital: "*Article 28 is without prejudice to the specific procedures in Member States where judicial authorisation is not required for the initial arrest of a suspect*".

² A recital indicating that a procedure equivalent to a European Arrest Warrant may also be used will be considered. NL has suggested that it should be indicated in a recital that the EPPO will only be entitled to issue or request Arrest Warrants within its area of competence.
³ Ex Article 21.

⁴ It is the understanding of the Presidency that the decision-making power of the chamber referred to in paragraph 1 needs to be inserted in the Article dealing with the decision-making powers of the chamber (currently Article 9(3)).

⁵ A recital should be added explaining that in case of a referral by the EPPO national authorities shall preserve full prerogatives under national law to open, continue or to dismiss the investigation.

2. Where an investigation conducted by the European Public Prosecutor's Office reveals that the specific conditions for the exercise of its competence set out in Article 20(6) are no longer met, the competent Permanent Chamber shall decide to refer the case to the competent national authorities without delay and before initiating prosecution before national Courts.
- [2a.⁶ *Where the Permanent Chamber considers that there is no interest to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it may refer the case to the competent national authorities*⁷.
- 2b. *The Permanent Chamber shall communicate any decisions to refer a case to national authorities on the basis of paragraph 2a to the European Chief Prosecutor. On reception of this information, the European Chief Prosecutor may within three days request the Permanent Chamber to review its decision if she or he considers that the interest to ensure the coherence of the referral policy of the Office so requires. If the European Chief Prosecutor is a Member of the relevant Permanent Chamber, one of his/her Deputies shall exercise the right to request the said review.*
- 2c. *Where the competent national authorities do not accept to take over the case in accordance with paragraph 2a, the European Public Prosecutor's Office shall remain competent to prosecute or dismiss the case according to the rules laid down in this Regulation.]*
3. Where the European Public Prosecutor's Office considers a dismissal in accordance with Article 33(3), and if the national authority so requires, the Permanent Chamber shall refer the case without delay to the latter.

⁶ Paragraphs 2a, 2b and 2c are not part of the partial general approach. These paragraphs will be further discussed in particular to align them to Article 9. Such an aligned text could read as follows : *Where, with regard to an offence which caused or is likely to cause damage to the financial interests of the Union of less than EUR 100.000., the Permanent Chamber considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no interest to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it may refer the case to the competent national authorities.*

⁷ COM has emitted a reservation on this paragraph.

4. If, following a referral in accordance with paragraphs (1), (2) or (2a), the national authority decides to open an investigation, the European Public Prosecutor's Office shall transfer the file to that national authority, refrain from taking further investigative or prosecutorial measures and close the case.
5. If a file is transferred in accordance with paragraph (1), (2) or (2a), the European Public Prosecutor's Office shall inform the relevant Union institutions, bodies and agencies, as well as, where appropriate in accordance with national law, suspects or accused persons and the crime victims, thereof. The cases dismissed may also be referred to OLAF or to competent national administrative or judicial authorities for recovery or other administrative follow-up.

SECTION 3⁸

RULES ON PROSECUTION

Article 29

Termination of the investigation

1. When the European Delegated Prosecutor handling the case 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, a dismissal or a transaction in accordance with Article 28a, 33 or [34]. The supervising European Prosecutor shall forward those documents to the competent Permanent Chamber accompanied, if he/she considers it necessary, by his/her own assessment. When the Permanent Chamber, in accordance with Article 9(3), takes the decision as proposed by the European Delegated Prosecutor, he/she shall pursue the matter accordingly⁹.
2. If the Permanent Chamber, based on the reports received, considers not to take the decision as proposed by the European Delegated Prosecutor, it shall, where necessary, undertake its own review of the case file before taking a final decision or giving further instructions to the European Delegated Prosecutor.
3. Where applicable, the report of the European Delegated Prosecutor shall also provide sufficient reasoning for bringing the case to judgment either at a Court of the Member State where he/she is located, or, in accordance with Article 23(3) at a Court of a different Member State which has jurisdiction over the case.

⁸ PT and SI have emitted reservations on several provisions in sections 3 and 4, with reference to constitutional concerns.

⁹ A recital clarifying that the European Prosecutor will, in the context of this provision, retain all the powers to give specific instructions to the European Delegated Prosecutor provided for in Article 11(2) will be added to the preamble.

Article 30

Prosecution before national Courts

1. When the competent Permanent Chamber takes a decision to prosecute following the procedures set out in Article 29, the European Delegated Prosecutor shall bring the case to judgment at a competent Court of his/her Member State.
2. When 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 European Delegated Prosecutor handling the case. The Permanent Chamber may, taking into account the report provided in accordance with Article 29(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 [22(3)] and [22(4)], and instruct a European Delegated Prosecutor of that Member State accordingly.
3. Before deciding to bring a case to judgment, the competent Permanent Chamber may, on the proposal of the European Delegated Prosecutor handling the case, decide to join several cases, where investigations have been conducted by different European Delegated Prosecutors against the same person(s) with a view to prosecution of these cases at the Court of one Member State which, in accordance with its law, has jurisdiction for each of these cases.
4. Once a decision on the Member State in which the prosecution shall be brought has been taken, the competent national Court within that Member State shall be determined on the basis of national law.
5. Where necessary for the purposes of recovery, administrative follow-up or monitoring, the Central Office shall notify the competent national authorities, the interested persons and the relevant Union institutions, bodies and agencies of the decision to prosecute.

6. Where, following a judgment of the Court, the prosecution has to decide whether to lodge an appeal, the European Delegated Prosecutor shall submit a report including a draft decision to the competent Permanent Chamber and await its instructions. Should this be impossible within the deadline set by national law, the European Delegated Prosecutor shall be entitled to lodge the appeal without prior instructions of the Permanent Chamber, and shall subsequently submit the report to the Permanent Chamber without delay. The Permanent Chamber shall then instruct the European Delegated Prosecutor to either maintain or withdraw the appeal. The same procedure shall apply when, in the course of the Court proceedings and in accordance with applicable national law, the European Delegated Prosecutor handling the case would take a position which would lead to the dismissal of the case.¹⁰

[...]

Article 32

Disposition of the confiscated assets

Where, in accordance with the requirements and procedures laid down by national law including the national law implementing Directive 2014/42 of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, the competent national Court has decided by a final ruling to confiscate any property related to, or proceeds derived from, an offence within the competence of the European Public Prosecutor's Office, such assets or proceeds shall be disposed of in accordance with applicable national law. This disposition shall not negatively affect the rights of the Union or other victims to be compensated for their damage¹¹.

¹⁰ A recital clarifying that the European Prosecutor should, in the context of this provision, be consulted and retain all the powers to give specific instructions to the European Delegated Prosecutor provided for in Article 11(2) will be added to the preamble.

¹¹ A recital will be considered to clarify the relation between this provision and compensation of the EU budget on the basis of administrative recovery.

SECTION 4
RULES ON ALTERNATIVES TO PROSECUTION

Article 33

Dismissal of the case¹²

1. The Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 29(1), decide to dismiss the case against a person where prosecution has become impossible, pursuant to the law of the Member State of the European Delegated Prosecutor handling the case, on account of any of the following grounds¹³:
 - a) death of the suspect or accused person or winding up of a suspect or accused legal person;
 - aa) insanity of the suspect or accused person;
 - b) amnesty granted to the suspect or accused person;
 - c) immunity granted to the suspect or accused person, unless it has been lifted;
 - d) expiry of the national statutory limitation to prosecute;
 - e) the case has already been finally disposed of in relation to the acts;
 - f) lack of relevant evidence¹⁴.
2. A decision in accordance with paragraph 1 shall not bar further investigations on the basis of new facts which were not known to the European Public Prosecutor's Office at the time of the decision, and which become known thereafter. The decision to reopen investigations on the basis of such new facts shall be taken by the competent Permanent Chamber¹⁵.
3. Where the European Public Prosecutor's Office is competent in accordance with Article [17(2)], it shall dismiss a case only after consultation with the national authorities of the Member State referred to in Article [17(3)]. If applicable, the Permanent Chamber shall refer the case to the competent national authorities in accordance with Article 28a (3) to (5).

¹² PT considers that this provision does not respect the principle of subsidiarity.

¹³ CZ has emitted a general reservation on the list of grounds.

¹⁴ MT has emitted a reservation on this provision.

¹⁵ It is the understanding of the Presidency that the decision-making power of the chamber referred to in paragraph 2 needs to be inserted in the Article dealing with the decision-making powers of the chamber (currently Article 9(3)).

4. Where a case has been dismissed, the European Public Prosecutor's Office shall officially notify the competent national authorities and shall inform the relevant Union institutions, bodies and agencies, as well as, where appropriate in accordance with national law, suspects or accused persons and the crime victims, thereof¹⁶. The dismissed cases may also be referred to OLAF or to competent national administrative or judicial authorities for recovery or other administrative follow-up.

[...]

CHAPTER V

PROCEDURAL SAFEGUARDS

Article 35¹⁷

Scope of the rights of the suspects and accused persons

1. The activities of the European Public Prosecutor's Office shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the rights of defence.
2. Any suspect and accused person in the criminal proceedings of the European Public Prosecutor's Office shall, as a minimum, have the procedural rights as they are provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, such as:
 - (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to translation and interpretation in criminal proceedings,

¹⁶ This provision is without prejudice to further information obligations according to national law.

¹⁷ Commission has emitted a general reservation on this provision.

- (b)¹⁸ the right to information and access to the case materials, as provided for in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings,
 - (c) the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention, as provided for in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,
 - (d) the right to remain silent and the right to be presumed innocent as provided for in Directive 201x/xx/EU of the European Parliament and of the Council to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings,
 - (e) the right to legal aid as provided for in Directive 201x/xx/EU of the European Parliament and of the Council on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant.
3. Without prejudice to the rights provided in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the European Public Prosecutor's Office shall have all the procedural rights available to them under the applicable national law.

[...]

¹⁸ AT and DE raised a general question on the right to access to information and access to the case material by the suspects and accused persons. The Presidency considers that this matter should be addressed in the section concerning processing of information (Articles 20 to 24 of the Commission's initial proposal).