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From:	Presidency
To:	Delegations
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Subject:	Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - <i>Judicial review</i>

The issue of judicial review of actions taken by the EPPO has been discussed repeatedly at expert level. Draft compromise texts were in particular discussed during the Luxembourg Presidency, and important advances were made¹. However, since no agreement could be found on the text, the draft was not presented to Ministers at the Council in December 2015.

On the basis of these previous discussions, the Presidency has during the last month again examined the issue in depth, in close consultation with the Commission and the Council Legal Service. Following these consultations, the Presidency would now propose a new draft text of Article 36, which is Annexed to this note. The new draft does, in the view of the Presidency, take into account all positions and legal concerns previously expressed by delegations and strike a balanced compromise between these positions. It will be examined in the FoP meeting on 23 June 2016.

¹ See Article 36 in document 15100/15.

It should be noted that the preliminarily suggested drafting of Article 36(2)(c) in the annex would imply a minor modification also of Article 20(5). The latter provision will be examined in the general review of the full text of the draft Regulation which will take place at a later point in time.

Article 36

Judicial review

1. Acts of investigation² of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis private parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.
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 acts of the European Public Prosecutor's Office referred to in paragraph 1, in so far as they are contested in a national court directly on the basis of Union law³;
 - b) the interpretation or the validity of provisions of Union law, including this Regulation, which are relevant for the judicial review by the competent national courts of the acts of the European Public Prosecutor's Office referred to in paragraph 1;

² Recital: This provision seeks to ensure that the investigative acts of the European Public Prosecutor's Office adopted before the indictment and intended to produce legal effects vis-à-vis private parties (a category which includes the suspect, the victim, and other interested persons whose rights may be adversely affected by such acts) are subject to judicial review by national courts. Where national law provides for judicial review concerning procedural acts other than those which relate to the investigation or concerning acts which do not produce legal effects vis-à-vis private parties, this Regulation should not be interpreted as replacing or amending such legal provisions. This provision does not affect the powers of the national trial court.

³ Recital: The legality of acts of the European Public Prosecutor's Office may be contested before national courts in accordance with paragraph 1. When national courts review the legality of such acts, they may do so in respect of Union law, including this Regulation, and of national law which applies to the extent that a matter is not dealt with by this Regulation. National courts may review compliance with both and should refer to the Court of Justice preliminary questions when they entertain doubts about the validity of those acts vis-à-vis Union law. However, they may not refer questions on the validity of the acts of investigation of the European Public Prosecutor's Office with regard to national procedural law or to national measures transposing Directives, even if this Regulation refers to them. In addition, this Regulation does not exclude the possibility for national courts to review the validity of such acts with regard to the principle of proportionality enshrined in national law.

- c) [the interpretation of Articles 17(1a), 17(2), 20(2) or 20(3) in relation to any conflict of competence between the European Public Prosecutor's Office and the competent national authorities⁴.]
3. By way of exception to paragraph 1, only the following acts of the European Public Prosecutor's Office shall be subject to review before the Court of the Justice in accordance with Article 263 TFEU:
- 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 (Article 33);
 - b) decisions of the European Public Prosecutor's Office to limit the data subject's right of access (Article 37(i));
 - c) decisions of the European Public Prosecutor's Office concerning the right of public access to documents (Article 65).
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 (Art 69).
5. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 268 of the Treaty in any dispute concerning arbitration clauses contained in contracts concluded by the European Public Prosecutor's Office (Art 69).
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 (Article 54) and the dismissal of the European Chief Prosecutor (Article 13) or European Prosecutors (Article 14).
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⁴ N.B. This presupposes that, pursuant to Article 20(5), a national court or tribunal within the meaning of Article 267 TFEU should be designated at national level to decide on conflicts of competence between the EPPO and national prosecution services. In order to achieve this, Article 20(5) and recital 64, as presented in document 15100/15, would need to be modified, for example by adding the word 'judicial' between 'national' and 'authorities' in Article 20(5).