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From:	Presidency
To:	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 revised drafting following the meeting of JHA Counsellors on 7 October will be presented in a clean version 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 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 with accompanying recitals 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.

¹ Document 9799/16

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).

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 36²

Judicial review³

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 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 authorities⁴.

² New recitals, preliminary numbered 78-80, should be added to accompany this provision, as presented at the end of this document.

³ 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. CZ and HU has emitted a reservation on this article.

⁴ FI, PL and NL would prefer to see point c) deleted. N.B. 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 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, shall be subject to review before the Court of the Justice in accordance with the fourth paragraph of Article 263 TFEU⁵.
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.
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 regulation⁶.

⁵ 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."

⁶ 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 documents⁷, 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 below⁸. 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.

⁷ AT would prefer to see this provision deleted.

⁸ 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, Eurojust⁹ will only inform that third country of the match found with the consent of the European Public Prosecutor's Office.

4. The European Public Prosecutor's Office may 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 shall be regulated by an Arrangement.

⁹ Obligations of Eurojust will be addressed in the context of the Eurojust Regulation.

Relations with third countries and international organisations

1. The working arrangements referred to in Article 56(2a) with the authorities of third countries and international organisations may, in particular, concern the exchange of strategic information and the secondment of liaison officers to the European Public Prosecutor's Office.

¹⁰ The following accompanying recital should be considered: 'Where the College identifies an operational need for cooperation with a third country or an international organisation, it should be able to suggest to the Council that the latter draw the attention of the Commission to the need for an adequacy decision or for a recommendation for the opening of negotiations on an international agreement.'

Pending the conclusion of new international agreements by the Union or the accession by the Union to international agreements already concluded by one or more Member States on legal assistance in criminal matters and extradition, the Member States should facilitate the exercise by the European Public Prosecutor's Office of its functions pursuant to the principle of sincere cooperation enshrined in Article 4(3) of the TEU. If permitted under the relevant international agreement and subject to the third country's acceptance, the Member States should 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. This may entail, in certain cases an amendment to those agreements but the renegotiation of such agreements should not be regarded as a mandatory step, since it may not always be possible, in particular for bilateral agreements between Member States and third countries.

Indeed in the case of certain extradition agreements, where other authorities than national prosecutors could be competent authorities for the purposes of those agreements, the European Public Prosecutor's Office could not be notified as another competent authority. In that case, the European Public Prosecutor's Office, in the same way as a national prosecutor, should only trigger the extradition procedure provided for in national law with the competent national authority (such as a court or a ministry) which would then transmit requests to the competent authorities of third countries. Therefore, where the notification of the European Public Prosecutor's Office as a competent authority for the purposes of international agreements already concluded by one or more Member States with third countries is not possible or is not accepted by the third country and pending the Union accession to those international agreements, European Delegated Prosecutors who have to be national prosecutors may use this function toward third countries, provided that they are transparent on the fact that they will use the evidence collected from third countries on the basis of those international agreements, in investigations and prosecutions carried out by the European Public Prosecutor's Office. The Member States may also notify the European Public Prosecutor's Office as a competent authority for the purpose of the implementation of other international agreements on legal assistance in criminal matters concluded by them, including, by way of an amendment to those agreements. Where this mechanism is not possible, in particular where the third country opposes the subsequent use of evidence by the European Public Prosecutor's Office, the latter should be able to rely on reciprocity or international comity vis a vis the authorities of third countries. This should however be carried out on a case by case basis, within the limits of the European Public Prosecutor's Office material competence and subject to possible conditions set by the authorities of the third countries.

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 in areas falling under the competence of the European Public Prosecutor's Office, such as international agreements concerning cooperation in criminal matters between the European Public Prosecutor's Office and these third countries, shall be binding on the European Public Prosecutor's Office.
4. In the absence of agreement pursuant to paragraph 3, the Member States shall, if permitted under the relevant multilateral international agreement and subject to the third country's acceptance, recognise and, where applicable, notify the European Public Prosecutor's Office as a competent authority for the purpose of the implementation of multilateral international agreements on legal assistance in criminal matters concluded by them, including, where necessary and possible, by way of an amendment to those agreements¹¹.

The Member States may also notify the European Public Prosecutor's Office as a competent authority for the purpose of the implementation of other international agreements on legal assistance in criminal matters concluded by them, including, by way of an amendment to those agreements.

¹¹ AT is of the opinion that the legal consequences of the notification is unclear, particularly taking into account the view of a third State. It can be assumed that third States would be more willing to grant mutual legal assistance if the Regulation spells out the legal consequences, particularly that the concept of the single office of the EPPO shall not apply and the EPPO shall be bound by the territoriality principle of the respective MS. This will not hinder that in a given case the third State, after having transmitted the evidence, may be asked to agree that the evidence may be used in court proceedings in another MS.

5. In the absence of an agreement pursuant to paragraph 3 or a recognition pursuant to paragraph 4, the European Delegated Prosecutor handling the case may, in accordance with Article 12(1), have recourse to the powers of a national prosecutor of his/her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities. In that case, the European Delegated Prosecutor shall inform and where appropriate shall endeavour to obtain consent from 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. In any case, the third country will be duly informed that the final recipient of the reply to the request is the European Public Prosecutor's Office¹².

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.

6. Subject to other provisions of this Regulation, the European Prosecutor's Office may, upon request, provide the competent authorities of third countries or international organisations, for the purpose of investigations or use as evidence in criminal investigations, with information or evidence which is already in the possession of the European Public Prosecutor's Office. After consulting the Permanent Chamber, the European Delegated Prosecutor handling the case shall decide on any such transfer of information or evidence in accordance with the national law of his/her Member State and this Regulation.

¹² AT finds the last two sentences of subparagraph 1 unclear (why "endeavour to obtain" on the one hand and "inform" on the other hand) and would prefer to delete the last sentence or at least clarify in which cases it would be appropriate to endeavour to obtain the consent of the third country and in which cases it is sufficient only to inform the third State.

7. Where it is necessary to request the extradition of a person the European Delegated Prosecutor handling the case may request the competent authority of his/her Member State to issue an extradition request in accordance with applicable treaties and/or national law.

Article 59a¹³¹⁴

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 Office's needs.

¹³ The following recital should be considered: 'The Commission should if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the European Public Prosecutor's Office and Member States which are not bound by this Regulation. This should in particular concern the rules relating to legal assistance in criminal matters and surrender, fully respecting the Union acquis in this field'. IE and NL have suggested that this language should be revised with a view to give the Commission a stronger obligation to act in this sense.

¹⁴ BE, ES, FI, IT would like to reintroduce the old paragraph 3 of this provision, including a clear precise definition of the obligations on loyal cooperation and protection of the Union's financial interests, as set out in the Treaty.

RECITALS ACCOMPANYING ARTICLE 36

(78) According to Article 86(2) of the Treaty the European Public Prosecutor's Office exercises its functions of prosecutor before the competent courts of the Member States. Acts undertaken by the European Public Prosecutor's Office in the course of its investigations are closely related to the prosecution which may result therefrom and have effects in the legal order of the Member States. In many cases they will be carried out by national law enforcement authorities acting under the instructions of European Public Prosecutor's Office, sometimes after having obtained the authorisation of a national court. It is therefore appropriate to consider that procedural acts of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties should be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. This should ensure that the procedural acts of the European Public Prosecutor's Office adopted before the indictment and intended to produce legal effects vis-à-vis third 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. Procedural acts relating to the choice of the Member State whose courts will be competent to hear the prosecution, which is to be determined on the basis of the criteria laid down in this Regulation, produce legal effects vis-a-vis third parties and should therefore be subject to judicial review before national courts at the latest at the trial stage. Actions before competent national courts for failures of the European Public Prosecutor's Office to act are those regarding procedural acts which the Office is under a legal obligation to adopt and which are intended to produce legal effects vis-à-vis third parties. Where national law provides for judicial review concerning procedural acts other than those concerning acts which do not produce legal effects vis-à-vis third parties or for legal actions concerning other failures to act, this Regulation should not be interpreted as affecting such legal provisions. In addition, Member States should not be required to provide for judicial review by the competent national courts concerning procedural acts which do not produce legal effects vis a vis third parties, such as the appointment of experts or the reimbursement of witness costs. Finally, the provisions of this Regulation do not concern the powers of the national trial court.

(79) The legality of procedural acts of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties should be subject to judicial review before national courts. In this regard, effective remedies should be ensured in accordance with the second paragraph of Article 19(1) TEU. Furthermore, in accordance with the case law of the Court of Justice, the national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).

When national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by this Regulation. In accordance with the case law of the Court of Justice, national courts should always refer to it preliminary questions when they entertain doubts about the validity of those acts vis-à-vis Union law. However, they may not refer to the Court of Justice preliminary questions on the validity of the procedural acts 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. This is however without prejudice to preliminary references concerning the interpretation of any provision of primary law, including the Treaty and the Charter of Fundamental Rights of the European Union, or the interpretation and validity of any provision of Union secondary law, including this Regulation and applicable Directives. In addition, this Regulation does not exclude the possibility for national courts to review the validity of the procedural acts of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law.

(80) The provision of this Regulation on judicial review does not alter the powers of the Court of Justice to review administrative decisions of that Office, i.e. decisions which are not taken in the performance of its functions of investigating, prosecuting or bringing to judgment and which have legal effects vis-à-vis third parties. This Regulation is also without prejudice to the possibility for a Member State, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with the second paragraph of Article 263 TFEU and to the first paragraph of Article 265 TFEU, and to infringement proceedings under Articles 258 and 259 TFEU.