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from: General Secretariat of the Council

to: Delegations

Subject: MEETING OF THE CONSULTATIVE FORUM
OF PROSECUTORS GENERAL AND DIRECTORS OF PUBLIC
PROSECUTIONS OF THE MEMBER STATES OF THE EUROPEAN UNION
EUROJUST (THE HAGUE), 16 DECEMBER 2011
MAIN CONCLUSIONS

Delegations will find enclosed the main conclusions of the above mentioned meeting.

1. Introduction

A meeting of the *Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union* (“the Forum”) took place at Eurojust’s premises in The Hague on 16 December 2011. The meeting was convened by the Prosecutor General of Poland and organised with the support of Eurojust.

The main conclusions reached by the Forum on the three major topics discussed are summarised below.

2. Session I – Fight against crimes affecting the EU financial interests (PIF): challenges for investigation and prosecution in the Member States

Main outcome of general discussion and written contributions

The main outcome of the general discussion and the advance written contributions can be summarised as follows:

Problems faced by the national judicial authorities: the Forum expressed concerns in relation to the many challenges encountered both at EU and national levels. Major challenges for criminal investigations and prosecutions in the fight against crime affecting the EU financial interests are: the increasing complexity of investigations; the problem of disparities in the statute of limitations affecting cross-border cooperation; the lack of common definitions of crimes in this area, and different levels of sanctions; the difficulties arising in the use of evidence collected by means of administrative investigations; and difficulties linked to jurisdiction.

Possible legal measures to facilitate investigations and prosecutions: the need for modernising legal provisions and procedures to enhance effectiveness of prosecutions and investigations was emphasized. A majority of the Forum Members also expressed the need for further approximation of crime definitions (for instance swindling, fraud, VAT fraud, misappropriation, illegitimate obtaining of funds, and corruption) and penalties as well as of some procedural rules (e.g. status of witnesses, length of replies to letters of request).

Furthermore, due to their specificities and complexity, certain types of crimes such as manipulation of the market, price inflation and conflicts of interest would justify the adoption of specific legislative measures at EU level.

Other important means to respond to the challenges: first, recovery of assets obtained through illegal activities is important. Furthermore, inter-agency cooperation and cooperation between administrative and judicial authorities should be enhanced. Finally, an urgent need exists to provide practitioners with appropriate training in order to increase the number of investigators specialised in this area.

Cooperation with Eurojust and OLAF: the Forum Members highlighted the importance of the assistance currently provided by both Eurojust and OLAF. Several Forum Members emphasized the crucial role played by Eurojust in concrete cases, in particular by facilitating the prompt execution of rogatory letters and coordinating the steps to be taken in investigations and prosecutions. However, the Forum Members recommended that the roles of Eurojust and OLAF, and their interaction, should be further developed.

The way ahead: several Forum Members supported the creation of a European Public Prosecutor's Office as a possible solution to solve the existing difficulties.

3. Session II – Witness protection: judicial aspects and challenges

Main outcome of general discussion and written contributions

The main outcome of the general discussion and the advance written contributions can be summarised as follows:

Common views shared by Member States: all of the Forum Members agreed on the need to grant protection to collaborators of justice to establish the truth in criminal cases. The possibility of maintaining witness anonymity while giving evidence must be ensured, also through the use of technical means. Witness protection is particularly important in the following areas: cross-border organised crime cases and crimes affecting the EU financial interests.

Challenges to be addressed: the outcome of the questionnaire distributed by the Polish Presidency revealed patchy national frameworks. Witness protection schemes are fragmented amongst Member States. Even though some international instruments, such as the United Nations Convention against Transnational Organized Crime, refer to the need to protect witnesses, no common standards have so far been agreed on at EU level. Contributions received clearly indicate that Member States manage differently – and often on a bilateral case-by-case basis - the European relocation of key witnesses and family members as well as the protection (or not) of collaborators of justice and their close relatives. Moreover, witness protection is often costly, especially in cross-border cases. Finally, new technological tools, such as biometric and DNA data, might limit the travel possibilities, the use of certain insurance schemes, and, in general, the recourse to public and private possibilities for protected witnesses, especially for those who have changed identity.

The way ahead: room for action at EU level was underlined. The European Parliament could, for instance, give a follow-up to the Resolution of 24-27 October 2011 calling for the protection of court witnesses, informers, whistleblowers and their families. The Forum has been identified as an adequate platform for future reflection on this topic and, possibly, on future EU legislation in this area, as well as on EU financial support to the development of Member States' capabilities to protect witnesses in cross-border cases.

4. Session III – Access to a lawyer in criminal proceedings

*Main outcome of general discussion and following written consultation*¹

The Members of the Consultative Forum welcomed the opportunity to exchange views on the *Draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest* which they consider of particular relevance as the Directive will affect their daily practice as prosecutors. They asked the Prosecutor General of Poland, as Chair of the meeting, to bring the following remarks and concerns of the Consultative Forum to the attention of the relevant EU institutions:

¹ The main outcome results from the general discussion held during the meeting and the following written consultation of the Forum Members conducted in January 2012. The text has been agreed and sent to the relevant EU institutions.

1. Wider consultation with prosecutorial and police authorities at the early stage of the drafting of the Directive would have been beneficial. Further consultation shall remain possible in the following stages.
2. In general, the latest version of the draft Directive, as it stands in the Progress Report of 6 December 2011 (doc. 18215/11), seems to be better balanced compared to its initial version.
3. The general discussion showed that criminal justice systems vary considerably and the same concerns are not always shared by all the Members of the Consultative Forum.
4. For this reason, a flexible instrument is important to encompass the different national systems and allow for a correct balance between the effective conduct of criminal proceedings and the defendant's right to a fair trial. The public interest is important as well: crimes must be prosecuted and prosecutors are responsible for that role.
5. A significant number of Members of the Consultative Forum are seriously concerned by the draft Directive in its current version. They believe that the draft Directive does not sufficiently consider the need to safeguard the effectiveness of criminal investigations and proceedings and that the practical implications of the proposed measures have not been duly taken into account.

They observe that respect for the defendant's fundamental rights can be achieved by other means contemplated in the criminal justice systems, such as the presence of the investigating judge or the recording of interrogations in the absence of a lawyer. They consider the need to establish legal safeguards for investigations conducted in the absence of the lawyer where the latter was duly informed about the activities to be performed. They also note that the Directive may have a negative impact on the length of proceedings and therefore could entail breaches of the right to a fair trial.

Taking into account the specificities of the relevant criminal justice systems, one Member State proposed a clearer distinction between the investigation phase and the judicial phase of the proceedings, understanding that the provisions of the Directive should affect only the latter.

Finally, concerns were also expressed with regard to the costs of legal aid and the possibility in practice to ensure effective rights to all concerned persons. Some Members of the Consultative Forum were of the opinion that the separation of the issue of the access to a lawyer from legal aid may weaken the standards proposed by the draft Directive.

6. Other Members of the Consultative Forum, while noting that the Directive would have a minimum impact on their criminal justice system as the main provisions of the draft text are in accordance with their national criminal procedure, have expressed similar concerns (e.g. budgetary aspect, length of proceedings, limitations on the admissibility of evidence).

With respect to the linking of access to a lawyer under the Directive to subsequent admissibility of evidence by a national court at trial, some Members of the Consultative Forum questioned the necessity of including a prohibition on evidence in the draft Directive, indicating that it should be a matter for the trial court in the national jurisdiction depending on the nature and consequences of the breach, while others proposed a reference to the national laws of the Member States.

7. Several Members of the Consultative Forum stressed the need to better define and limit the scope of the Directive, which cannot encompass all possible criminal behaviours. In particular, derogations should be possible for minor offences.
8. Finally, some Members of the Consultative Forum pointed out that, although some provisions of the draft Directive reflect the case law of the European Court of Human Rights, some proposed solutions go beyond such case law – which is in constant evolution – and the current requirements of the European Convention on Human Rights.