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NOTE

From: Presidency
To: Delegations

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Subject: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office
- *State of play: judicial review*

At the meeting of Friends of Presidency (EPPO) on 23 June 2016, a new draft text of Article 36 (judicial review) was presented (document 10266/16) and discussed in detail. A number of suggestions and comments were thereby made by delegations. The Presidency concluded the meeting by noting that the new text would be redrafted in view of taking into account the substance of the discussions.

The Presidency has now redrafted the Article in the light of the said discussions, and has thereby sought to strike a balanced compromise between the positions expressed by delegations. The new text, including footnotes which indicate substantive concerns expressed by delegations, is annexed to this note. Changes in relation to document 10266/16 are indicated in underlined or ~~striketrough~~.

The Presidency feels that the annexed text reflects the outcome of the discussion in the Friends of the Presidency meeting on 23 June and should form a good basis for further discussion on the Article under the incoming Slovak Presidency of the Council so as to allow for its conclusion.

Article 36

Judicial review¹

1. ~~Acts of investigation~~Procedural acts² of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis ~~private-third parties~~ or a failures of the European Public Prosecutor's Office to adopt a-procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation³, 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~~ such a question of validity is raised before any court or tribunal of a Member State ~~contested in a national court~~ directly on the basis of Union law⁴;

¹ IT has entered a general scrutiny reservation on this Article, as explained mainly in WK 459/2016.

² Recital: This provision seeks to ensure that the ~~investigative-procedural~~ acts (including investigation measures) of the European Public Prosecutor's Office adopted before the indictment and intended to produce legal effects vis-à-vis ~~private-third parties~~ (a category which includes the suspect, the victim, and other interested persons such as public bodies 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-third 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: Judicial action for failure of the European Public Prosecutor's Office to act is contingent on the Office being under a legal obligation to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties.

⁴ 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. They may not refer questions on the validity of the procedural 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; this is however without prejudice to preliminary rulings concerning the interpretation or validity of provisions of Union law, including this Regulation and applicable Directives. In

- 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;
- 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 authorities⁵.]

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, where such proceedings are instituted by any natural or legal person referred to in the fourth paragraph of Article 263 TFEU⁶:

- 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)⁷.

This provision is 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.

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.

⁵ 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 to make that clear, for example by adding the word 'judicial' between 'national' and 'authorities' in Article 20(5).

⁶ DE, FR, IT, LU, HU, PL, SI have suggested that the list of measures below should be extended also to other decisions. COM does not agree with that suggestion

⁷ AT, FI, LV and SE would prefer to see point c) in this provision deleted.

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 (Article 69).
 5. The Court of Justice of the European Union shall have jurisdiction in accordance with Article ~~268-272~~ of the Treaty in any dispute concerning arbitration clauses contained in contracts concluded by the European Public Prosecutor's Office (Article 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)⁸.
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⁸ PT has requested that dismissals of European Delegated Prosecutors should be added to this provision, which would also require a modification of Article 15 in the draft Regulation.