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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union
- General approach

1. On 26 March 2018, the Court of Justice transmitted a request under Article 281 TFEU for an amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union, which had four principal components, consisting in i) the transfer to the General Court of the jurisdiction in principle to adjudicate, at first instance, on infringement proceedings based on Article 108(2) and Articles 258 and 259 TFEU ; ii) the conferral to the Court of Justice of responsibility to deal with actions for annulment linked to the failure properly to comply with a judgment delivered by the Court under Article 260 TFEU ; iii) the introduction, for certain categories of appeals, of a procedure whereby the Court of Justice will first determine whether certain appeals are allowed to proceed ; and iv) to harmonise terminology (document 7586/18).
2. The Working Party on the Court of Justice examined this proposal at its meetings on 20 April, 8 June and 18 July 2018. The Commission gave its opinion on the request by the Court of Justice of the European Union on 11 July 2018 (document 11076/18).

3. In the light of this exchange of views, the President of the Court of Justice sent a letter to the President of the Council of the European Union which stated that, although no particular difficulties have emerged with respect to components ii) to iv) of the request, the same cannot be said, however, on the transfer, to the General Court, of the jurisdiction to adjudicate, at first instance, on certain categories of infringement proceedings, which were reflected, notably, in the opinion of the European Commission of 11 July 2018. The Court of Justice also recognised the wishes of a number of parties to wait until the benefits of the reform of the structure of the courts of the European Union have been fully realised.
4. The Court thus invited the European Union legislature to postpone to a later stage the examination of the component of the request concerning the transfer to the General Court of the jurisdiction to adjudicate, at first instance, on certain categories of infringement proceedings, which might be the subject of further amendments proposed by the Court, and to prioritise dealing with the other three components of that request.
5. Against that background, the Court of Justice presented on 10 August 2018 a modified request which contained only those parts of the proposal which were unproblematic. This modified request was sent for written observations to Member States.
6. On 23 October 2018, the Commission gave a favourable opinion on the modified draft (document 13587/18).
7. It appears that, in the light of these recent exchanges, the text in the Annex to this document finds broad agreement among delegations.
8. The European Parliament's Legal Affairs Committee appointed Mr. Tiemo Wölken (S&D, Germany) as rapporteur. He presented his draft report to the Legal Affairs Committee on 22 October 2018.
9. In the light of the foregoing, the Permanent Representatives Committee is invited to endorse the text presented in the Annex to this document, with a view to reaching a general approach at the General Affairs Council on 12 November 2018.

REGULATION (EU, Euratom) 2018/... OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL

of...

amending Protocol No 3 on the Statute of the Court of Justice of the European Union

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 256(1) and the second paragraph of Article 281 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a(1) thereof,

Having regard to the request of the Court of Justice of ...¹,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Commission of ...²,

Acting in accordance with the ordinary legislative procedure³,

Whereas:

- (1) Further to the invitation contained in Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, the Court of Justice undertook, together with the General Court, an overall review of the jurisdiction exercised by them and considered whether, given the reform of the structure of the courts of the European Union operated by the aforementioned regulation, certain changes should be made to the distribution of jurisdiction between the Court of Justice and the General Court or to the manner in which appeals are dealt with by the Court of Justice.

¹ Request of 26 March 2018 (not yet published in the Official Journal), as amended on 10 August 2018.

² Opinion of 11 July 2018 (not yet published in the Official Journal) and of 23 October 2018.

³ Position of the European Parliament of ... (not yet published in the Official Journal) and decision of the Council of

- (2) As is stated in the report that it submitted to the European Parliament, the Council and the Commission on 14 December 2017, the Court of Justice considers that there is no need, at this stage, to propose changes with respect to the manner of dealing with questions that are referred to it for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). References for a preliminary ruling constitute the keystone of the judicial system of the European Union and are dealt with expeditiously and consequently a transfer to the General Court of jurisdiction to hear and determine questions referred for a preliminary ruling, in specific areas laid down by the Statute of the Court of Justice of the European Union, is at present not necessary.
- (3) The review undertaken by the Court of Justice and the General Court nonetheless brought to light the fact that, when adjudicating on an action for annulment brought by a Member State against an act of the Commission relating to a failure properly to comply with a judgment delivered by the Court of Justice under Article 260(2) or (3) TFEU, the General Court may encounter serious difficulties where the Commission and the Member State concerned disagree on the adequacy of the measures adopted by that State to comply with the judgment of the Court of Justice. On those grounds, it appears necessary to reserve exclusively to the Court of Justice litigation concerning a lump sum or a penalty payment imposed on a Member State pursuant to the said provisions of the TFEU.
- (4) It is, moreover, clear from the review undertaken by the Court of Justice and the General Court that many appeals are brought in cases which have already been considered twice, initially by an independent administrative authority, then by the General Court, and that many of those appeals are dismissed by the Court of Justice because they are patently unfounded or on the ground that they are manifestly inadmissible. In order to enable the Court of Justice to concentrate on the cases that require its full attention, it is necessary, in the interests of the proper administration of justice, to introduce, for appeals relating to such cases, a mechanism whereby the Court of Justice allows an appeal to proceed, wholly or in part, only where it raises an issue that is significant with respect to the unity, consistency or development of Union law.
- (5) Consequently, it is necessary to amend Protocol No 3 on the Statute of the Court of Justice of the European Union whilst ensuring, at the same time, that the terminology of the provisions of that Protocol and that of the corresponding provisions of the TFEU are fully aligned, and to establish appropriate transitional provisions with respect to the outcome of cases that are pending on the date when this Regulation enters into force,

HAVE ADOPTED THIS REGULATION:

Article 1

Protocol No 3 is amended as follows:

(1) Article 51 is replaced by the following:

‘Article 51

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice:

(a) in actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union that are brought by a Member State against:

- (i) a legislative act, an act of the European Parliament, of the **European Council** or of the Council, or against a failure to act by one or more of those institutions, except for:
 - decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;
 - acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;
 - acts of the Council by which the Council exercises implementing powers in accordance with Article 291(2) of the Treaty on the Functioning of the European Union;
- (ii) an act of or a failure to act by the Commission under Article 331(1) of the Treaty on the Functioning of the European Union;

(b) in actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union that are brought by an institution of the Union against a legislative act, an act of the European Parliament, of the **European Council**, of the Council, of the Commission or of the European Central Bank, or against a failure to act by one or more of those institutions;

(c) in actions referred to in Article 263 of the Treaty on the Functioning of the European Union that are brought by a Member State against an act of the Commission relating to a failure properly to comply with a judgment delivered by the Court under the second subparagraph of Article 260(2) or the second subparagraph of Article 260(3) of the Treaty on the Functioning of the European Union.’

(2) The following Article is inserted:

‘Article 58a

An appeal brought against a decision of the General Court concerning a decision of a board of appeal of one of the following offices and agencies shall not proceed unless the Court of Justice first decides that it should be allowed to do so :

- (a) the European Union Intellectual Property Office;
- (b) the Community Plant Variety Office;
- (c) the European Chemicals Agency;
- (d) the European Union Aviation Safety Agency.

An appeal shall be allowed to proceed, wholly or in part, in accordance with the detailed rules set out in the Rules of Procedure, where it raises an issue that is significant with respect to the unity, consistency or development of Union law.

The decision as to whether the appeal should be allowed to proceed shall be reasoned and published.’

Article 2

Cases which fall within the jurisdiction of the Court of Justice under Protocol No 3 as amended by this Regulation, of which the General Court is seised on ... [date of entry into force of this amending Regulation] but in respect of which the written part of the procedure has yet to be closed as at that date, shall be assigned to the Court of Justice.

Article 3

The procedure referred to in Article 58a of Protocol No 3 shall not be applicable to appeals of which the Court of Justice is seised on ... [date of entry into force of this amending Regulation].

Article 4

This Regulation shall enter into force on the first day of the month following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ..., ...

For the European Parliament

For the Council

The President

The President