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From: Presidency

To: Delegations

Subject: Proposal for a Council Regulation on the establishment of the European
Public Prosecutor's Office

- Written comments from the Austrian and German delegations

Delegates will find in Annex comments received from the Austrian and German delegation on
Article 26a in the draft Regulation.

The Austrian Delegation would like to submit the joint **German and Austrian** proposal for cross border measures:

Article 26a – Cross-border measures

1. The European Delegated Prosecutors shall assist each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter shall order the measure in accordance with the law of the Member State of the handling European Delegated Prosecutor and, where necessary, shall apply for a judicial authorisation thereof, or shall request a court order for the measure. The handling European Delegated Prosecutor shall submit the order and, where applicable, the accompanying judicial authorisation to the assisting European Delegated Prosecutor.
2. Prior to submitting the order the handling European Delegated Prosecutor shall, where appropriate ¹, consult with the assisting European Delegated Prosecutor in order to determine if it would be possible to comply with the order.
3. The order shall set out, in particular, a description of the measure needed, including the evidence to be obtained, and where necessary any specific formalities that have to be complied with, the description of the facts and the legal qualification of the criminal act conduct which is the subject of the investigation. The handling European Delegated Prosecutor may call for the measure to be undertaken within a given time.
4. The assisting European Delegated Prosecutor shall recognise the measure without any further formality.
5. Where the law of the Member State of the assisting European Delegated Prosecutor requires a judicial authorisation or a court order for recognition of the measure, he/she shall submit the order and, where applicable, the accompanying judicial authorisation to the competent judicial authority of his/her Member State for recognition.

¹ It could be clarified in a Recital that in general, consultation will not be necessary for simple investigative measures, which presumably will be available under the law of the assisting EDP, e.g. statement of a witness or accused. In cases of more complex investigative measure, however, it might be appropriate to establish the (procedural) prerequisites for a measure under the law of the assisting EDP to avoid non-recognition.

6. The recognition in accordance with paragraph (4) or (5) may only be refused where
- a) the measure does not exist under the law of the Member State of the assisting European Delegated Prosecutor or it would not be available in a similar domestic case;
 - b) a less intrusive measure would achieve the same results as the measure ordered by the handling European Delegated Prosecutor or authorised by the court competent in accordance of the law of the Member State of the handling European Delegated Prosecutor.²
 - c) the order and/or judicial authorisation is incomplete or contains a manifest relevant error;
 - d) the measure cannot be undertaken within the time limit set out for justified and objective reasons;
7. Where the assisting European Delegated Prosecutor considers to refuse recognition in accordance with paragraph (6) he or she shall consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally. This consultation shall take into consideration the nature and urgency of the ordered measure and shall in any event conclude within 5 working days. If the European Delegated Prosecutors cannot resolve the matter it shall be referred to the competent Permanent Chamber. The same applies where the measure is not undertaken within the time limit set out or within a reasonable time³.
8. The competent Permanent Chamber shall decide without undue delay – taking into account the applicable national law as well as the provisions of this Regulation – whether and by when the ordered measure, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision through the competent European Prosecutor.
9. Where in accordance with paragraph (5) a court in the Member State of the assisting European Delegated Prosecutor is requested to recognise the order, the court in its decision shall take due account of the criteria set out in paragraph (6). Where it considers to refuse recognition in accordance with paragraph (6) it shall consult with the handling European Delegated Prosecutor⁴. It shall not review the substantive reasons for ordering the measure. Where the court denies recognition its decision shall be binding on the European Public Prosecutor’s Office.

² A Recital could clarify that the consultation (between handling EDP and assisting EDP/court could also have the result that the less intrusive measure will be executed instead.

³ The respective Recital should clarify that the PC is bound by the Regulation and applicable national law which includes not only the procedural aspects but also organisational aspects, i.e. the PC is not in control of the police or other national law enforcement authorities

⁴ A Recital could clarify that in course of the consultation the handling EDP might supply further information or submit a revised order etc. which could then be executed under the law of the MS of the assisting EDP.

Article 26aa – Enforcement/Execution of a recognised measure

1. The enforcement of the recognised measures shall be governed by the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law⁵ of the Member State of the assisting European Delegated Prosecutor.
2. The handling European Delegated Prosecutor may request that one or more authorities of his/her Member State assist in the execution of the measure in support to the competent authorities of the Member State of the assisting European Delegated Prosecutor to the extent that these authorities would be able to assist in the execution of the measures in a similar domestic case. The authorities of the Member State of the handling European Delegated Prosecutor shall be bound by the law of the Member State of the assisting European Delegated Prosecutor during the execution of the measure. They shall not have any law enforcement powers in the territory of the Member State of the assisting European Delegated Prosecutor, unless the execution of such powers is in accordance with the law of the Member State of the assisting European Delegated Prosecutor and to the extent agreed between the European Delegated Prosecutors.

Article 26ab – Legal remedies

1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to cross-border measures of the European Public Prosecution Office.
2. The grounds, justifications or substantive reasons for ordering the measure may only be challenged brought in the Member State of the handling European Delegated Prosecutor.

⁵ See Art. 9 para. 2 of the Directive 2014/41/EU (EIO).