

CCBE statement on defence issues and procedural rights in EPPO proceedings

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers.

Summary

As the European Public Prosecutor's Office (EPPO) became operational, the CCBE considers it necessary to reflect on defence issues and procedural rights in EPPO proceedings. This statement touches upon the following four issues: lack of specific regulations of defence and procedural rights; impact on the rights of the suspect at the national level; foreseeable problems relating to access to the case file; possibilities of the EPPO's permanent Chamber to decide in which jurisdiction the case shall be investigated or indicted.

After the appointment of the European Chief Prosecutor Laura Codruța Kövesi in October 2019, as of June 2021 the EPPO has started its operations. The CCBE would like to use this opportunity to express the following views on defence issues and procedural rights in proceedings of the European Public Prosecutor's Office (EPPO).

As experience with international and hybrid tribunals has shown, when installing a completely new criminal procedure for a completely new institution, perfection is not achievable. The CCBE therefore appreciates that the EPPO, since its operative work has started, has been open to meet and exchange views with defence lawyers at several occasions.

Since the beginning of the year 2020, the EPPO has adopted several rules, guidelines and working arrangements, which build the ground - besides the Regulation - for the future work of the EPPO. The CCBE appreciates that all these documents are transparent and accessible through the EPPO website, and that all European Delegated Prosecutors (EDP) are visible on the EPPO website - this is a standard of transparency which is not the rule in all Member States and of course also serves the interests of the defence.

However, the Regulation and Rules published on the EPPO's website fail to take into due account the role and importance of the defence, and of procedural rights during EPPO proceedings. The CCBE has concerns that this situation may negatively affect the first EPPO proceedings, which may impact its general acceptance and, ultimately, legitimacy. To allow smooth operations of EPPO proceedings in full coherence with the Charter of the Fundamental Rights of the European Union, as intended by the EPPO (cf. Art. 5(1) of the EPPO Regulation), it is therefore of utmost importance to address the most pressing issues of the defence rather sooner than later.

The CCBE identifies four issues of major concern:

- (1) lack of specific regulations of defence and procedural rights,
- (2) impact on the rights of the suspect at the national level,
- (3) foreseeable problems relating to access to the case file,
- (4) possibilities of the EPPO's permanent Chamber to decide in which jurisdiction the case shall be investigated or indicted.

(1) Lack of specific regulations of defence and procedural rights

It is notable that defence rights of the suspects or accused are only mentioned in Recitals of the EPPO Regulation (cf. Recitals 80, 83-85) and very generally in Art. 41(1) of the Regulation, pursuant to which *“the activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence.”* However, due to the decentralised nature of EPPO proceedings, whether this promise can be kept will then depend largely on the specific procedural rules of the Member State in which the proceedings will take place. Although reference is made to the procedural rights directives of the European Union in Art. 41(2), these will only apply if and to the extent to which they have been transposed into national law.

Implementation reports of the Commission have alas shown that the Directives were not fully and coherently transposed in all EU Member States. Therefore, there are reasons for concern that EPPO proceedings will not be fairly conducted in all Member States, but that the standard of defence rights will instead largely depend on the standards present in the State in which the investigations will be carried out.

(2) No regression as regards the national level of the rights of the suspect

The application of the EPPO Regulation shall in no way lead to a reduction and regression of procedural rights standards in Member States. According to Recital 80 of Regulation 2017/1939 on the EPPO in line with *“respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems.”* However, in some Member States the application of the EPPO Regulation led to a double set of proceedings and of basic procedural standards, depending if the procedure is an EPPO procedure or a purely national procedure. In that regard, EPPO suspects were in some Member States stripped of the right to a court remedy against the investigation as such (in comparison with other suspects) and courts were prohibited to assess proportionality of measures requested by EPPO (in comparison with purely national criminal proceedings). Such anomalies should be corrected and in no way should the application of the EPPO Regulation be used to establish non-equal treatment of suspects in a Member States, or cause the lowering of basic national (constitutional) procedural standards, such as a court remedy against the investigation as such.

(3) Access to the case file

In the implementation report on Directive 2012/13¹, the Commission stated that “*the assessment has raised certain issues of compliance in several Member States, in particular as regards the Letter of Rights in criminal proceedings and European Arrest Warrant proceedings, the right to information about the accusation and the right of access to the materials of the case*”. Early access to case files is of crucial importance for the defence, and a very important element not only for the fairness of the trial, but also for speedy and effective investigations. The differing standards in different EPPO Member States with regards to access to the case file are the more concerning as EPPO proceedings encounter an additional difficulty in making sure that this basic defence right will be met: the parallel existence of the so-called Case-Management-System (CMS).

Pursuant to Art. 45(1) of the Regulation, the case file shall contain all the information and evidence available to the European Delegated Prosecutor that relates to the investigation or prosecution by the EPPO. And based on Art. 45(3) of the Regulation, the handling European Delegated Prosecutor shall ensure that the content of information in the CMS reflects at all times the case file.

However, there is still the risk of error, possibly triggered by nothing more than work overload, that (e.g. exonerating) information that may be relevant for the defence will stay too long in the CMS before being integrated into the case file, and vice versa. As the Permanent Chamber, which makes crucial decisions such as if, when and where to indict, only sees the information contained in the CMS, there remains the risk that it will make such decisions not on a fully informed basis, and disregard important aspects of the defence that did not make their way into the CMS.

The CCBE is concerned that there are no safeguards in place to ensure that the content of information in the CMS always adequately reflects the case file, and that all information present in the CMS and relevant to the case will always be timely integrated into the case file. The CCBE considers it necessary to install a controlling mechanism to make sure that Art. 45(3) is always and in a timely manner complied with, and, to this end, introduce time limits to ensure that both files are regularly synchronised. Depending on the national evidence rules, failure of timely synchronisation may lead to inadmissibility of the relevant evidence in court.

Moreover, the CCBE recalls that endeavours on e-justice must respect and ensure fundamental rights and principles, as they are recognised by the EU Charter of Fundamental Rights and the European Convention on Human rights. The CCBE stresses that e-justice systems need to be secure and support an “electronic equality of arms” and “access to justice”.²

If a European Delegated Prosecutor has his/her own personal digital access to a specific case-file, a logic implementation of the “equality of arms-principle” should suggest that the defence-lawyer who is properly delegated by a client accused in an EPPO-proceeding has the same access. In this regard, the use of e-CODEX in this context should be envisaged.

Giving an effective, certified, checked and traceable digital access to all and updated materials of the case for any individual defence lawyer involved in an EPPO-proceeding would be:

- an effective and visible safeguard for the overall fairness of the proceedings (investigation and trial), including all of the issues addressed in this statement ;

¹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (COM/2018/858 final).

² CCBE comments on the Communication on Digitalisation of justice in the European Union, available [here](#).

- a strong statement from EPPO that enhances the general acceptance and legitimacy of their proceedings ;
- setting a standard for all EU Member States to do so as well in their national criminal proceedings ;
- a pragmatic solution to organise/ensure a proper defence in this new kind of cross-border proceedings.

(4) Jurisdictional issues

The CCBE recognises that the concerns regarding “forum shopping” raised by the CCBE during the drafting phase of the EPPO Regulation³ were considered, and that the Regulation that was eventually adopted on 12 October 2017 was more balanced than the original Commission Proposal of 2013 in that aspect. However, jurisdictional questions remain, and continue to be virulent in light of the deferring procedural rights standards in the Member States (see supra (1)).

The CCBE welcomes that, as a rule, clear guidelines have been set in Art. 26 of the Regulation where an investigation shall start, i.e. either in the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, in the Member State where the bulk of the offences has been committed. The CCBE also recognises that a deviation from this rule is only possible “*if duly justified, taking into account*” a set of specific criteria listed in Art. 26(4) of the Regulation, including as criteria the place of residence of the suspect or accused and his or her nationality.

However, in light of this clear guidance, the CCBE identifies a weakness in the Regulation as the Permanent Chamber shall still be authorised to re-allocate a case to a European Delegated Prosecutor in another Member State “*if such decisions are in the general interest of justice*” (Art. 26(5)). As the general interest of justice is no further defined in the Regulation, there is no legal certainty as to how this term will be interpreted by the Permanent Chamber. Similarly, once investigations are concluded, the Permanent Chamber can still decide to bring the case to prosecution in a different Member State, “*if there are sufficiently justified grounds to do so, taking into account the criteria set out in Article 26(4) and (5)*”, so that again, a jurisdictional change is possible if this is considered “*in the general interest of justice*” (always, of course, provided that the other criteria of Art. 26(4) have been taken into account as well). In light of this uncertainty, the CCBE invites the EPPO to provide clearer guidance as to how it will interpret the general interest of justice, in this context.

This problem becomes more virulent as the Regulation foresees explicitly neither a right of the accused to be heard before such a jurisdictional change, nor a right for the accused to apply for a jurisdictional change. As both rights are inherent in the rule of law and the right to a fair trial, they surely should exist at the national level. However, given that these are “EPPO particularities”, the CCBE invites EPPO to take a stand on them and regulate them explicitly, to increase legal certainty and remove any potential doubts.

³ Cf. CCBE Comments on the text from Member States (dated 2 March 2015) regarding the creation of a European Public Prosecutors Office, 27.04.2015.