

Comments from the Council of the Bars and Law Societies of the European Union (CCBE) regarding the establishment of a European Public Prosecutor's Office

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The Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers, would like to express the following views on the establishment of a European Public Prosecutor's Office (EPPO) for the protection of the Community's financial interests.

On 12 March 2014 the European Parliament confirmed its support for the Commission's proposal for a European Public Prosecutor's Office (EPPO). Members of the European Parliament backed the proposal in a plenary vote with 487 votes for, 161 against and 30 abstentions. In its Resolution the Parliament recognised the need to ensure **union-wide robust and sound procedural rights** of suspects who will be faced with investigations by the European Public Prosecutor's Office.

In its Resolution of 12 March the Parliament:

"6. Calls on the Council, furthermore, stressing the need for the utmost respect for fundamental principles such as that of a fair trial, to which defence safeguards in criminal trials are directly connected, to take account of the following recommendations and act accordingly:

- (i) all the activities of the European Public Prosecutor's Office should ensure a high protection of the rights of defence, particularly considering that the Union could become an area in which the European Public Prosecutor's Office could act, at operating speed, without having to resort to instruments of mutual legal assistance; in this regard, the respect of EU minimum standards in the field of the rights of individuals in criminal procedure in all Member States is a key element for the adequate functioning of the EPPO.*

It should be noted in this respect that the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, adopted by the Council on 30 November 2009, has not yet been completed and that the proposal merely refers to the national legal systems for all issues relating to the right to remain silent, the presumption of innocence, the right to legal aid and to investigations for the defence; therefore, to respect the principle of equality of arms, the law applicable to the suspects or accused persons involved in the proceedings of the European Public Prosecutor's Office should also apply to the procedural safeguards against the latter's investigative or prosecutorial acts, without prejudice to any additional or higher standards of procedural safeguards granted by Union law;

- (ii) after expiry of the relevant transposition period, non-transposition or wrong transposition into national law of one of the procedural rights acts of Union law should never be*

interpreted against an individual subject to investigation or prosecution, and their application will always be in accordance with the case law of the Court of Justice and the European Court of Human Rights;

(iii) compliance with the ne bis in idem principle should be ensured;

(iv) The prosecution should comply with Article 6 of the Treaty on the European Union, Article 16 of the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union and the applicable EU legislation on the protection of personal data; particular attention should be paid to the rights of the data subject where personal data are transferred to third countries or international organisations;”

The CCBE understands that the EPPO proposal which is being discussed by the Council is very different from that proposed by the Commission. The CCBE understands that the LIBE Committee will hold an exchange of views with the Italian presidency and the Commission on the state of play of the negotiations of the EPPO

The CCBE would like to convey the following to the Parliament in advance of the exchange of views:

Defendants’ rights in an EPPO procedure

Should an EPPO come into existence, the importance of defendants’ rights cannot be stressed enough. We believe that fundamental safeguards should be viewed, and applied, on a standard uniform basis for the benefit of the accused. For example, issues such as the right to silence, or the availability of legal aid, vary dramatically between Member States and applying those safeguards solely “*in accordance with National Law*”, creates the risk that the choice of trial venue could dramatically affect the outcome of the prosecution, raising exactly the difficulty concerning fears of forum shopping. We see no reason in principle why prosecution powers are spelled out in great detail but defence rights are not. We believe the EPPO proposal should set out in a comprehensive, but non-exhaustive manner, these important procedural safeguards. Failure to do so is to squander an opportunity to promote harmonisation of real benefit to citizens.

In this regard, and as a minimum the following should apply:

1. It is essential that the principle of equality of arms exists with regard to the EPPO. This is a key requirement to balance the functioning and resources of an EPPO with the rights and needs of the defense.
2. Rights of the accused and defence rights must be guaranteed as soon as the decision is taken to launch a criminal prosecution and to start investigating an accused person; these rights must not depend on the communication of such a decision or any other type of formality.
3. The accused person must be informed of his rights orally as well as in writing, by providing him with a letter of rights prior to the first examination of the matter in question, regardless of the fact whether the accused is provisionally detained or not.

These rights must include:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation,
- (d) the right to interpretation and translation;
- (e) the right to remain silent.
- (f) the right of access to the materials of the case;

- (g) the right to have consular authorities and one person informed;
 - (h) the right of access to urgent medical assistance; and
 - (i) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.
4. The accused person's absolute right to remain silent must be guaranteed comprehensively and there must be no coercion to make self-incriminating statements. No adverse inferences should be drawn from an accused person's choice to remain silent.
 5. The accused person's access to a defence lawyer of his choice must be guaranteed comprehensively, regardless of the fact whether the accused is provisionally detained or not. If the accused wishes to consult a defence lawyer, this wish must be granted immediately and the examination of the accused must not be continued. The right of consultation includes the right to a personal and confidential meeting with the lawyer. Where the persons means require, representation by an appropriately qualified and experienced lawyer must be provided at public expense.
 6. The accused person or his defence lawyer has the right to inspect and take copies of the files of the European Public Prosecutor's Office. Where investigation is still underway, this right can only be limited for compelling reasons and only insofar as this is absolutely necessary. If the accused person is detained provisionally or under arrest, unrestricted inspection of files must in principle be granted.
 7. Translation of all relevant documents into the defendant's language has to be provided. This means that not only court decisions, but also the minutes of relevant hearings of witnesses and documents be translated in order to guarantee that the defendant is able to understand the content of the files.
 8. As far as the documents are recorded electronically by the EPPO the defendant who is in pre-trial custody has the right to use the necessary electronic devices to read the files and has to be provided with the necessary electronic devices on EU costs.
 9. In order to ensure the equality of arms the defendant has the right to ask for evidence gathering by the state authorities or have his defence lawyer carry out investigations. As far as coercive measures are concerned the defendant has the right to file a request to the EPPO (with the possibility of review by the European Court). As far as non-coercive measures are concerned the defendant's lawyer has the right to question witnesses, commission experts and carry out other investigations he deems to be necessary on a legal aid basis.
 10. The defence lawyer has a right to remain silent regarding anything that has come to his knowledge in his capacity as a defence lawyer, in the core area of his professional activity, irrespective of his client. The defence lawyer himself as well as his offices must not be searched for defence documents, nor must such documents be seized. The protection of the confidential relationship between the accused person and his lawyer is absolute and there are no exceptions.
 11. Communication between the accused person and his defence lawyer must not be monitored in any circumstances.
 12. As early as possible, and in any event prior to the commencement of any questioning, the suspected person must have clarity as to the Member State and the national law he will be accountable to. This is the only way to ensure effective defence in pre-trial investigations.
 13. If the suspected person is detained in pre-trial custody he has the right to appeal against the arrest warrant and a right to get a decision within a short notice.
 14. The defendant has the right to appeal against all other coercive measures as soon as he becomes aware of them. This includes the right to appeal against a coercive measure after it has been carried out in order to receive a decision on its correctness with hindsight.
 15. A legal framework and, if necessary, an institutional framework has to be established for the defence in proceedings conducted by a European Public Prosecutor's Office.
 16. Each of the rights identified above must be capable of enforcement through an effective interlocutory remedy. If that remedy is to be obtained only in the Court at Luxembourg, significant additional resources in terms of judges, court staff, infrastructure and training (including for defence lawyers) will have to be put in place in advance of establishment.

- equality of the legal position of defence lawyers from all European Member States on the basis of the principle of mutual recognition,
 - a 24-hours/7-days-a-week emergency service of defence lawyers who are qualified to defend in proceedings conducted by the European Public Prosecutor's Office; this service is to be established at the cost of and in every Member State participating in the Enhanced Cooperation;
17. In addition, the principle of a free legal profession that is independent from State interference must be upheld in proceedings conducted by a European Public Prosecutor's Office.