

CCBE RESPONSE TO A PROPOSAL FOR A EUROPEAN PUBLIC PROSECUTOR

29/11/2013

1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 32 member countries and 12 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.

2. Preliminary and General Comments

The CCBE accepts that the task of creating a legislative framework for a European Public Prosecutor's Office proposes singular if not unique challenges. As is evident from the consultation process, and the significant changes that have been included in the current proposal, when viewed against earlier drafts, there is room for a broad range of opinion as to the most effective method to, on the one hand, achieve a uniform prosecution of serious offences compromising the financial interests of the European Union, and at the same time ensuring that the rights of accused persons are properly respected, and that no unintended disadvantage is created by virtue of the generation of a new system of prosecution.

The CCBE acknowledges its responsibility to engage constructively, albeit without compromising on core values affecting the integrity of the criminal process where ever it is conducted. The comments and reservations offered are proposed in that vein.

This document should be read in conjunction with our earlier observations of 7th February 2013, and are informed by the content of a detailed consultation held in Brussels on the 21st September 2013 where the Commission was represented by Mr. Peter Csonka.

The present proposal to transfer the immediate and exclusive jurisdiction over crimes affecting the financial interests of the European Union to the European Public Prosecutor's Office is an ambitious one. We question whether, particularly for a first step, it may be overly ambitious. There is undoubtedly going to be a considerable learning curve, firstly, in assessing how successful the exercise of a centralised prosecution system will be, and secondly in identifying and eradicating any unintended but undesirable consequences.

For that reason, we remain of the view that it will be preferable, in the initial phases at least, that the range of prosecutions actually undertaken by the new EPPO be limited.

We have identified three potential models where this could be achieved.

The first, which is already well established in International Law, is that the jurisdiction of the EPPO should be as a prosecutor of last resort. This, as set out for instance in the Rome Treaty establishing the International Criminal Court, would be to the effect that a EPPO would prosecute only where individual member State's prosecution services are unwilling or unable to prosecute.

A second alternative would be to introduce a minimum gravity test, which given that the offences that are being pursued are financial in nature, would logically be based on the value of the subject matter of the offence. This would have the attraction of selecting in the first instance, cases of significant worth which would be properly resourced and litigated with a view to establishing well thought out precedents for application in other cases, and perhaps at a later date in cases of lesser value.

The third alternative, which we believe would also be satisfactory, would be to confer on the EPPO the right to identify and take control of any particular prosecution that the EPPO wished to pursue, but without automatically assuming exclusive jurisdiction over all such crimes at the outset. While the present proposal does permit for the possibility of the EPPO releasing certain cases back to the national prosecutors, we believe it would be preferable if the process were reversed to require the EPPO (albeit having been fully briefed by the national prosecutors in line with the provisions in this draft) to make an active selection over those cases considered appropriate for prosecution by the EPPO.

In passing we would point out that the current proposal assumes for the EPPO jurisdiction, not merely over complex and transnational cases, but even over mundane and simple cases of a purely domestic nature provided they affect the financial interests of the Union. There must, in our view, be a serious danger that a EPPO would be swamped by the case load volume and that therefore a potentially worthy proposal would flounder on the practicalities of lack of resources.

We have also identified as a real concern, from the point of view of the integrity of the system of justice, the danger that vastly different trial outcomes could be obtained by virtue of the application of national law in the trial venue, even though the prosecution is being conducted in the name of the pan European EPPO. It would be inimical to the interests of justice if a citizen were to feel that the outcome of such a prosecution was affected by the decision on trial venue, if the choice of venue was that of EPPO alone and incapable of meaningful challenge. There is also of course the danger that a perception would be created that a EPPO engaged, or could engage to their advantage in forum shopping to achieve it's desired outcome.

In this and in every other instance of there being a concern about potential bias on the part of the EPPO or any delegates there must be the possibility of meaningful judicial review.

In our opinion there are a number of adjustments to the proposal which could address to a very considerable degree these concerns.

In the first instance, the decision of a EPPO as to trial venue should be capable of meaningful judicial review. It follows that given the significance of this choice it should be communicated to the suspect at the earliest opportunity in order that they might seek appropriate advice from the outset, In that context we do not believe that a review by the national court where the trial is intended to be held would be adequate. That court could not for instance be expected to lightly adjudicate their own system to be unfair to either party, on the facts of a given case. In fact failure to provide such a review is potentially in breach of Art 263 TFEU.. We recommend that jurisdiction for Judicial Review of this specific decision be transferred to the courts of the European Union themselves.

We see such a proposal as having a number of advantages. Indeed we note that this was the original intention in an earlier draft of the model rules.

In the first instance it would have the effect of facilitating harmonised and consistent rulings in relation to how the criteria for trial venue selection should be applied. When an adequate number of cases have come before the courts of the European Union the guidelines should become clear

and established as precedent, and at that point one would expect them to be followed with greater predictability by national courts, obviating the need for onward review by the courts of the European Union in the future.

Secondly, the general superintendence by the courts of the European Union of the activities of the European Public Prosecutor will lead to a raising of standards based on the greater expertise that the courts of the European Union would be likely to have, dealing with the issue regularly, as against expertise being developed piecemeal, and in isolation, by national courts,

A second safeguard which we believe could be accommodated without great difficulty would be to provide that evidence obtained in Country A could only be received in evidence in Country B, provided it complied with the admissibility laws in both countries. This system, known colloquially as the "double lock" would significantly reduce the concern that forum shopping was engaged in with a view to securing the admission of evidence that is otherwise inadmissible.

To the extent that the trial process is stated in the proposal to be governed "in accordance with national law" modifications will be required.

The third modification which we propose, is in the area of procedural safeguards. The present proposal acknowledges that there are certain procedural safeguards, some of them derived from European measures which must be respected in all circumstances. Unfortunately the current text makes reference again to "in accordance with National Law". 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 that we have earlier addressed. We see no reason in principle why prosecution powers are spelled out in great detail but defence rights are not. We believe the document 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.

While there are other issues of detail which we would wish to make submissions on, it is to us clear that the foregoing concerns, if addressed, would ameliorate considerably the concern that practitioners have in relation to the operation of the EPPO.

SPECIFIC ISSUES

Observations arising from the explanatory memorandum

3.3.4 While it is clear that the intention is to provide additional protections to a suspect or an accused person, the language could be strengthened to emphasise that all powers are "subject to the rights guaranteed or to be guaranteed, pursuant to European Law".

3.3.5. The proposal that EPPO should not be subject to the courts of the European Union should be modified to ensure that the decision as to trial venue should be so subject and that in the conduct of the trial itself national courts should have regard to applicable principles of European Union Law, especially where the rights of the accused are concerned.

Rules for the conduct of EPPO trials should promote best practice, by for instance departing from national courts traditions if they violate the principles of natural justice e.g. prosecutors retiring with judges during their deliberations.

RECITALS

18. While it is clear that EPPO are expected to seek out evidence that may also exculpate the accused, it should be spelled out that EPPO must do so at the request of the accused or their advisers in addition to being expected to act of their own motion.

20. We believe it to be unwise that, in the first instance, not only should a EPPO have exclusive jurisdiction over all crimes affecting the financial interests of the union, but that it is also unrealistic to impose an obligation of mandatory prosecution in respect of all of those crimes. The resource implications (even if as per the present draft be the day-to-day managing of the cases is delegated) would be enormous.

30. It is naturally acknowledged that there are cases where an individual may have misconducted their affairs in a fashion that falls short of criminality, but where compensation to an injured party (in this case the European Union) would be appropriate. However this is an area of extreme sensitivity and a proposal whereby a person, originally treated as a suspect in a criminal case, can secure the dismissal of the prosecution in return for entering into a financial arrangement with the prosecutor must be viewed with the greatest caution. Any perception that there is one form of justice for a person who can enter into a financial transaction, and a wholly different outcome for a person who cannot, must be avoided at all costs. Every aspect of the transaction should be surrounded with the greatest of transparency, and we would suggest should be reviewed by a body independent of the prosecutor.

Linked to this is a concern that parties that are wholly innocent of any wrongdoing will feel obliged to seek to agree to a transaction rather than face the potentially ruinous costs of a prolonged and complex prosecution ranging around a number of jurisdictions, including the venue of trial and the venue of evidence gathering. In this context it is absolutely essential that a proper and comprehensive scheme of legal aid is included in the measure in order to ensure that no party will be forced into an unfair position simply by virtue of their being unable to afford to defend themselves. While it is accepted that a measure on legal aid is currently under discussion we believe it preferable that a stand alone reference be incorporated in this proposal rather than awaiting the outcome of as yet uncertain negotiations on Measure C2.

We are strongly of the view that the difficulties that will be encountered by a suspect in dealing with a prosecution conducted by the EPPO will be unusually significant, and potentially overwhelming. While legal aid is not in itself the sole answer to such difficulties it would go a long way to minimising the disadvantage that a suspect would be under.

The principle of *ne bis in idem* must be strongly stated to ensure a suspect is never subjected to further process arising from the same facts either by EPPO in another MS, or by any national prosecutor.

Furthermore, a person acquitted must have an effective remedy against a EPPO on account of their loss by virtue of the prosecution, including a jurisdiction for punitive damages where appropriate.

32. This we believe would be an appropriate place to emphasise the importance of the double lock safeguard.

37. We appreciate that it would be unworkable in practise if every decision of a national court was subject to automatic review to a court of the European Union. However issues potentially determinative of the entire proceedings such as choice of trial venue and application of pan European procedural safeguards should be capable of such review.

42. We have concerns that the EPPO is not the appropriate person to decide on the EPPO's entitlement to retain personal data.

ARTICLES

10 and 11 (appointment and dismissal of the European Delegated Prosecutors/Basic principles of the activities of the European Public Prosecutor's Office) – Neither Article 10 or Article 11 include provisions regarding sanctions that can be imposed on the EPPO for non-compliance with their activities. Sanctions need to exist, for example, in the event of violations by the EPPO of the rules of procedure, in the event of a violation of impartiality and in the event of an abuse of authority.

11.1. The use of the term "respect" is considerably short of preferable formulations such as "subject to" or "enforce".

11.4 For the reasons set out above we do not believe that it is desirable for a EPPO to have exclusive jurisdiction from the outset over all such crime.

15.1. We believe that this article constitutes a suitable vehicle to give EPPO all the information it may need to make an informed selection over which cases it would be prepared to prosecute. This imperative is carried through in Article 15.2.

29.1. Our concerns in relation to *transaction* have already been set out.

30. The double lock should be introduced to this proposal.

32. The safeguards that attach to suspected persons should be amplified in this article making it clear that they are entitled to the benefit of European guaranteed rights, without any national qualification, and that they will become entitled to further rights as and when they are identified and developed. To avail of safeguards effectively the suspect should be provided with legal assistance in every MS that he requires it, to counterbalance the pan-Union remit of a EPPO.

42. An independent review of data retention should be introduced.

GENERAL

We believe that it would be important that a non-regression clause be introduced to ensure that no party could find themselves at a loss of rights previously enjoyed by virtue of the introduction of this measure.