



## **CORNERSTONES FOR A DRAFT REGULATION ON THE ESTABLISHMENT OF A EUROPEAN PUBLIC PROSECUTOR'S OFFICE ("EPPO") IN ACCORDANCE WITH ART. 86 PAR. 1-3 TFEU**

### **I. The European Criminal Bar Association**

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its legal development sub-committee the association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practise. Through the networking opportunities available with membership, members establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We were members of the EU Justice Forum and we continue to participate in several EU-projects (e.g. training events for defence lawyers held jointly with ERA; networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant; translation and interpretation; European Investigation Order) and we have been regularly invited to many EU experts' meetings concerning criminal law issues. Further information on the ECBA can be found at our website: [www.ecba.org](http://www.ecba.org).

### **II. Introduction and legal background**

The ECBA follows certain EU proposals for legislation in the area of criminal justice to ensure that the rights of all citizens, including the fundamental rights of persons under investigation, suspects, accused and convicted persons are considered and respected. From March to June 2012 the European Commission (EC) carried out a public consultation on "protecting the EU's financial interests and enhancing prosecutions". Since June 2012 the results of an EU funded project on the potential establishment of a European Public Prosecutor's Office (EPPO) have been introduced to the public ([www.eppo-project.eu](http://www.eppo-project.eu)). The research for this project relied on existing research in this field, in particular the Corpus Juris Study (2000), the "Structures and Perspectives of European Criminal Justice" and the "EuroNEEDs" (2012/2013) studies of the Max Planck Institute as well as the "Effective Criminal Defence in Europe" study of the University of Maastricht, Open Society Institute and JUSTICE (2010).

In November 2012 the ECBA was consulted and invited by the EC to comment on the current political plan to present a draft regulation on EPPO mid-2013. At the ERA conference in Trier on 17/18 January 2013 it has been again clearly expressed by several representatives of the EC including the European Anti-Fraud Office (OLAF) that the forthcoming proposal on EPPO is part of a series of initiatives which all seek to strengthen the legal framework to combat fraud (i.e. strict focus on "PIF"-crimes deducted of "protection of financial interest" of the EU). The first new measure in this regard is the proposal for a Directive on protection of the financial interests of the EU by criminal law of 11 July 2012 which is based on Art 325 par. 4 TFEU.

The main proposals of the EC concerning EPPO have become more concrete but the most crucial points of details are still open and unsolved, e.g. institutional design and organisation, "integrated and yet decentralised system", coordination and relationship between national and European level, coordination and cooperation of EPPO at European level (Eurojust, Europol, OLAF), independence, political or democratic control and accountability, judicial control, procedural framework (national and/or European level), possible and/or necessary differences between investigative and prosecuting and trial stage of any proceeding involving the EPPO and last but not least: *"Equally important for us are the procedural rights and the protection of the fundamental rights throughout the criminal investigations undertaken by the EPPO ... The EU acquis could be consolidated and included to guarantee that the EPPO's activities fully comply with the highest fundamental rights standards"* (Director General DG Justice of EC Françoise Le Bail). The "EU model rules" drafted by the research project ([www.eppo-project.eu](http://www.eppo-project.eu)) *"aim at opening the debate on the procedural framework of the EPPO (and) are not conceived of as a code of European pre-trial procedure. According to Art. 86 TFEU, all aspects of setting up the EPPO must be dealt with by Regulation. Such Regulations must then detail all aspects of enforcement that the Model Rules do not include."*

The debate is now open. The legal framework for the announced draft regulation on EPPO is Art. 86 par. 1-3 TFEU, apart from the Charter of Fundamental Rights (CFREU) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the European Courts which are applicable as a minimum standard for any proceeding of the EPPO (see Art 6 TEU) as well as the directives on basis of Art. 82 TFEU following the Road Map of the Stockholm Programme since 2009, especially Measure A on translation and interpretation, Measure B on right to information including European wide Letters of Rights and potentially Measure C part 1 on access to a lawyer and Measure C part 2 on legal aid. The political expectation is that in the absence of unanimity in the Council at least nine member states wish to establish enhanced cooperation (Art. 20 TEU, Art. 329 TFEU).

### **III. Fourteen political principal points**

The ECBA is not a political body but an institution of legal practitioners who are able to provide legal expertise and practical experience nationally and transnationally in terms of most issues of criminal law and criminal procedural law throughout Europe. Nevertheless the ECBA would like to identify the following fourteen principal points regarding the plans to establish EPPO which should be considered carefully by the political decision makers in order to enforce trust and recognition to such a new powerful EU authority in addition to Eurojust, Europol, OLAF.

- 1. Sufficient evidence for the need of EPPO (no symbolic politics)**
- 2. Restriction to cases where Member States are unwilling or unable to prosecute (rule of complementarity) and to substantial cases (rule of proportionality), as far as in compliance with Art. 86 TFEU**
- 3. Equality of arms between state powers and individual rights of natural and legal persons and procedural safeguards (including access to a lawyer and reasonable EU funded legal aid in all Member States concerned)**
- 4. EPPO proceeding safeguards standard at the highest level - also in the "grey" area of "pre"-investigation (not common minimum and additional to other EU legislation such as directives on minimum standards)**
- 5. EPPO gathering of evidence at the highest safeguard level - also in the "grey" area of "pre"-investigation (e.g. recognition of legal privileges) and ban of use of evidence in cases of infringements of legal rules (in order to minimise investigation and forum shopping)**
- 6. Effective judicial control during the proceedings practically guaranteed - also in the "grey" area of "pre"-investigation (European or national courts, especially in terms of any coercive measures and recognition of negative decisions)**
- 7. Balance and coordination of state powers and competences at European level**
- 8. Political and democratic control versus independence of EPPO (accountability)**
- 9. Hierarchy and coordination of European and national powers**
- 10. Conflict of jurisdiction and termination of proceeding (ne bis in idem)**
- 11. Concurrence of investigation and jurisdiction (especially in mixed cases with dual offences, not only "PIF" crimes)**
- 12. Rules for prosecuting and bringing to judgment including judicial review and appropriate remedies for defence before trial (to minimise "trial" shopping)**
- 13. Compensation mechanism for wrongful investigation or prosecution by EPPO**
- 14. Translation and interpretation services (accessible also for defence)**

The ECBA understands that there is a strong political will to promote a draft regulation and announces that it will comment on EC proposals when they become more precise. At this time of the political agenda the ECBA contributes to the debate focusing on the field where the ECBA membership of practitioners in criminal proceedings throughout all EU member states does have the most legal expertise and practical experience: the citizen's view of an individual being confronted with state authorities that investigate, prosecute and bring a case to judgment. The individual citizen can be involved in EPPO proceedings as a witness, as a person under investigation, as suspect or accused and as a convicted person (see following IV. and V. "ECBA-Cornerstones on EPPO"). Because the draft regulation will focus on "PIF"-crimes and the extension of any EPPO competences or powers to other crimes is not a subject of any current public discussion at all (see Art. 86 par. 4 TFEU) the perspective of individual persons as victims is not concerned. There are many other extremely important legal and practical issues to be discussed around the establishment of an EPPO, such as mentioned above (here and under II.) as unsolved, which will have a tremendous factual and legal influence on the individual citizens who get involved in these investigation, prosecution and bringing to judgment proceedings. The ECBA offers further expertise and experience to any national ministry or other national and European institution that is interested in consultation and in practical legal solutions in terms of the possible establishment of an EPPO, now and in future.

**IV. ECBA-Cornerstones on EPPO**

Taking into account that the EC's draft regulation will definitely come mid 2013 the following cornerstones have been discussed in many circles of lawyers and other legal practitioners at several occasions. We have recognised a very high level of consensus in all these circles. The more detailed explanation of the ECBA-Cornerstones can be found under the next point V. It can also be referred to point IV. of the joint position paper of the German Federal Bar ([www.brak.de](http://www.brak.de)) and the German Bar Association (DAV: [www.anwaltverein.de](http://www.anwaltverein.de)) and to the comments of the Council of the Bars and Law Societies of the European Union ([www.ccbe.eu](http://www.ccbe.eu)). Many points have been worked out in ECBA working groups, EU funded training (jointly with ERA) and research projects (e.g. EU Wide Letter of Rights; Pre-Trial-Emergency-Defence; European Arrest Warrant; Translation and Interpretation) and on the occasion of earlier ECBA statements ([www.ecba.org](http://www.ecba.org) "publications"), e.g. commenting the Green Paper on presumption of innocence in 2006, statement on member states' initiative for a European Investigation Order in 2010, the ECBA statements on Measure C part 1 of September 2011 and June 2012 or the upcoming ECBA-Cornerstone-Paper on Legal Aid (Measure C part 2). The ECBA-Cornerstones on EPPO are the result of these professional discussions and follow the political principal points related to defence issues as mentioned: *equality of arms* between state powers and individual rights of natural and legal persons and safeguards (including access to a lawyer and reasonable EU funded legal aid in all concerned member states); EPPO proceeding safeguards standard at the highest level - also in the "grey" area of "pre"-investigation (not common minimum and additional to other EU legislation such as directives on minimum standards); EPPO gathering of evidence at the highest safeguard level - also in the "grey" area of "pre"-investigation (e.g. recognition of legal privileges) and ban of use of evidence in cases of infringements of legal rules (in order to minimize investigation and forum shopping); effective judicial control practically guaranteed - also in the "grey" area of "pre"-investigation (European or national courts, especially in terms of any coercive measures and recognition of negative decisions); conflict of jurisdiction and termination of proceeding (ne bis in idem); concurrence of investigation and jurisdiction (especially in mixed cases with dual offences, not only "PIF" crimes); rules for prosecuting and bringing to judgment including judicial review and appropriate remedies for defence before trial (to minimize "trial" shopping); compensation mechanism for wrongful investigation or prosecution by EPPO; translation and interpretation services (accessible also for defence). The ECBA-Cornerstones on EPPO are:

- 1. Art. 86 par. 3 TFEU legally binding rules including catalogue of rights for EPPO proceedings**
- 2. Immediate access to a lawyer of his choice at any stage of the proceeding**
- 3. Absolute right to silence (principle of human dignity)**
- 4. Right not to incriminate oneself (also for witnesses)**
- 5. Right to information and to be cautioned (Letter of Rights)**
- 6. Mandatory defence and issues of waiver**
- 7. Legal aid on a reasonable and fair financial basis (EU funded)**
- 8. Legal aid in all concerned Member States**
- 9. Right to information (access to the file, translation of documents etc.)**
- 10. Right to gather evidence and to question witnesses (or to ask EPPO)**
- 11. Legal privileges of defence lawyers**
- 12. Effective legal remedies and judicial review**
- 13. Compensation mechanism**

**V. Explanation of ECBA-Cornerstones on EPPO**

- 1. Art. 86 par. 3 TFEU legally binding rules including catalogue of rights for EPPO proceedings**

It must be the political interest of all involved EU institutions including EC, European Parliament and Council of Member States that such a new powerful EU authority established to improve investigation and prosecution of "PIF" crimes in addition to the existing agencies Eurojust, Europol and OLAF is based on recognition and trust by the huge majority of citizens all over Europe and their national governments and parliaments. The only way to achieve that is not only to improve the aspect of security (to combat "PIF" crimes) but also to protect freedom of citizens and to strengthen justice following the rule of law principle (including security from too powerful state authorities). An increasing national concern in many EU Member States is, that EU institutions could become too powerful in relation to national authorities, that national identity and sovereignty are diluted and that well working national law systems including certain safeguards for citizens could be circumvented. The current "Opt-Out" discussion in UK is a good "bad example".

In order to avoid forum shopping it must be guaranteed that the same procedural rules are applied by EPPO in all member states in terms of safeguards and rights of concerned parties (individual and legal persons), e.g. the

recognition of legal privileges and rights not to be obliged to disclose information or documents, cautioning of witnesses. In this regard the principle for EPPO proceedings must be the highest standard as common standard of legal safeguards and it should be fixed as a general principle in the *rules of procedure* in the regulation (Art. 86 par. 3 TFEU). In case of any substantial infringement of legal rules the unlawfully collected evidence must not be used (it must be excluded), to be fixed as a general principle in the *rules of procedure* in the regulation (Art. 86 par. 3 TFEU). The clearer and more transparent the procedural rules and common prerequisites of any coercive measures are codified the more reliable the rule of law is recognized and safeguarded, in theory and in practice. This is in the interest of justice and supporting the reputation of EPPO proceedings.

In order to stress the importance of certain procedural safeguards and rights and to guarantee *equality of arms* between prosecution services and defence of an individual there should be fixed in the forthcoming regulation proposal a catalogue of rights as *rules of procedure* (Art. 86 par. 3 TFEU). Only legally binding rules applicable to EPPO's activities and at the highest level (in comparison to the partly very different, ineffective and low standards of rights and safeguards in national criminal proceedings) lead to an effective, well balanced and fair system of security interests in order to improve combating "PIF" crimes by EPPO and to maintain the necessary protection of individual citizens' freedom and as a consequence to strengthen justice. It is obvious following the objective of *equality of arms* that the protection of an individual citizen through safeguards and procedural rights must be at the highest possible legal level in relation to a genuine armada of investigation and prosecution authorities at European level (EPPO, Eurojust, Europol, OLAF) in addition to national police agencies and prosecutor's offices which may be involved in more than one member state dependant on the case. Therefore a higher standard is justified in comparison to certain national standards or minimum standards of the ECHR and the jurisprudence of the ECtHR or such as ruled in the directives of the measures of the Road Map.

## 2. Immediate access to a lawyer of his choice at any stage of the proceeding

### a. The temporal scope of this right should be:

The right to counsel applies *at any stage* of the criminal proceeding. This starts with the beginning of any investigation, namely if a competent regulatory body acts to clarify the suspicion of an offence and to pursue a suspect if necessary. Whether the suspect has been informed that he is subject to criminal proceedings is totally irrelevant as well as when and how. An "official" notice to the suspect or accused or a "formal" start of investigation are also totally irrelevant for this purpose. The right will be valid throughout the proceedings, until its final completion. The effective exercise of the right to access to a lawyer must be granted immediately. Any examination or interrogation must not be continued as far as the suspect is concerned.

### b. There must be a rule concerning witnesses, persons other than suspects and accused, that the EPPO ensures that any of these persons who is heard by the police or other enforcement authorities (e.g. OLAF) is granted access to a lawyer immediately if, in the course of questioning, interrogation or hearing, this person becomes suspected or accused of having committed any criminal offence (cf. EC proposal on a directive - Measure C part 1 of June 2011, Art. 10).

### c. The materiel scope of the right should be:

The right to counsel in criminal proceedings by EPPO applies in all criminal proceedings. It does not matter whether the proceedings concern a petty or a more serious "PIF" crime, if a natural person or a legal person is concerned. Exceptions are not admissible. The right to counsel must be made available also in disciplinary proceedings opened as a consequence of suspicion of criminal acts or connected with the possibility of following criminal investigation. Any violation of the right to access to a lawyer should lead to ban of use as evidence, at least as evidence against the concerned person whose right has been violated.

### d. Absolute confidentiality of defence communication:

Any Communication between the suspect or accused person and his/her counsel has to be absolutely confidential and must not be monitored. No exception to the legal protection of this confidentiality is allowed. Cases in which the lawyer is himself/herself suspected of having committed a crime or an offence follow national law of member states which must consider the legal privileges of a lawyer in his/her professional capacity. Apart from the possibility of substituting a lawyer through a judicial decision, the absolute confidentiality of communication between suspect or accused person and his/her lawyer (as the right of the suspect or accused person) must not be affected by any legal measure against the lawyer in a criminal proceeding against this lawyer.

- e. Further content of the right should be:

The right to communicate with the lawyer always includes the right to meet with a lawyer of his/her choice and must not be restricted because without that substantial legal advice and the positive and constructive role of a defence lawyer that he can bring to the process can be undermined. It must include the right to reasonably long and reasonably frequent personal meetings between the accused and counsel. It must include in principle the right of counsel to be present when investigative measures are being undertaken, the right to ask questions and make comments or submissions. Irrefutable urgent investigative measures may begin in the absence of legal counsel, but never any interview, interrogation or any further questioning. If the person has not waived his right to counsel (also dependant on system of mandatory defence), no interview may begin until the accused has met his legal counsel with the possibility of strictly confidential talks, and the counsel may attend the hearing and participate in it by asking questions etc. Finally, if a person is deprived of his/her liberty, he must always be promptly informed that a certain lawyer is trying contact him for the purpose of providing him with legal assistance.

- f. The right to access to a lawyer must be connected to the right to get interpretation services for the confidential talks and meetings between suspect and defence lawyer unless the language skills don't require any interpretation. These interpretation services should be paid by a budget of EPPO as necessary expenses of EPPO proceedings.

- g. The right to choose a lawyer and the involvement of one or more different member states in EPPO cases lead to the necessity of recognition of any lawyer chosen from any EU Member State, not necessarily from the member state which is concretely concerned.

### 3. Absolute right to silence (principle of human dignity)

The ECBA believes that in order to establish trust and recognition to EPPO proceedings, it is necessary that decisions are „taken fairly“ (cf. EC Green Paper 26 April 2006 on presumption of innocence p. 3). The ECBA had already in 2006 welcomed the fact that the EC included the presumption of innocence in its work on the elaboration of common evidence-based safeguards in the EU for the collection and use of evidence. However, the ECBA stresses again that an absolute right to remain silent at any stage of the proceedings, as well as other aspects of the presumption of innocence (cf. Art. 6 par. 2 ECHR; Art. 48 par. 1 CFREU; Article 14 (3) (g) of the International Covenant on Civil and Political Rights), should be guaranteed as a minimum standard for all (national) criminal proceedings in all member states. Of course this must apply for EPPO proceedings a fortiori.

The EC Green Paper of 2006 failed to recognise that the right of silence and human dignity are inseparable. Human dignity holds the highest constitutional rank in the most EU member states (cf. Art. 1 CFREU). According to established practice of many national courts the accused person's right to refuse to give evidence, or the right to remain silent, should be an absolute right insofar as the exercise of this right is neither subject to any kind of evaluation nor to employment against the accused person. From a human dignity point of view, the accused is not a (mere) object of proceedings, but a subject with procedural rights. There must be a (absolutely protected) possibility for the accused to behave in a neutral manner, without the court viewing this behaviour negatively or evaluating it to the accused person's disadvantage. The right to silence lies at the heart of the notion of a fair procedure and protects inter alia the accused against improper compulsion by the authorities and thereby to the avoidance of miscarriages of justice and to the fulfilment of the aims of a fair trial. For example is the right to a lawyer and the exercise to access to a lawyer substantially connected to the right to silence what has been confirmed and highlighted by the ECtHR in many decisions since *Salduz*. The right to silence presupposes that in a criminal trial the prosecution has to seek to prove their case and should not use methods of coercion or oppression in defiance of the will of the accused. The older jurisprudence of the ECtHR and the reasoning in the *Murray* case should be vigorously rejected today. It violates human dignity and is unconstitutional according to national law in many EU member states and in contradiction to Art. 1 CFREU. There is no justification to restrict the right of silence in any EU Member State by citing isolated fragments of the *Murray* case, despite the fact that in this case the accused person's silence had no importance whatsoever in the evaluation of the evidence.

In the view of the ECBA it is generally dangerous to use ECtHR's judgments such as the *Murray* case in terms of the right to silence as guidelines for EU member states to establish any minimum standards for rights which are not even

mentioned in the text of the ECHR since the Court necessarily makes these judgments in retrospect, i.e. from an ex post control perspective in a certain case, taking into account the entirety of all national criminal proceedings. This means that possible infringements resulting from subsequent control mechanisms of national law can be compensated to the effect that ultimately the ECtHR denies a violation of Article 6 ECHR. Of course the jurisprudence of the ECtHR is the absolute minimum of any procedural safeguard in all Council of Europe States including the EU. The German Federal Constitutional Court (Bundesverfassungsgericht) has ruled in 1995: The accused person's right to silence, derived from human dignity, would be an illusion if the accused had to fear that his silence will be used against him later, when the evidence is evaluated. Using silence to prove the accused person's guilt would indirectly put the accused under an inadmissible mental compulsion to give evidence. The ECBA believes this is the right benchmark, for EPPO proceedings even more, and that is common sense in many member states throughout all legal practitioners, judges, prosecutors and lawyers. There might be particular rules for legal persons where the absolute protection of human dignity does not apply. However, the rights derived from the equality of arms principle, presumption of innocence and the fair trial principle apply for legal persons without any restrictions, including the right to silence, connected with certain (legal) privileges and rights for natural persons as representatives of legal persons.

#### **4. Right not to incriminate oneself (also for witnesses)**

There are other problematic issues, many linked to the presumption of innocence principle, but definitely connected to the right not to incriminate oneself. For example, a reversal of the burden of proof could trigger an obligation to give evidence; the obligation to produce incriminating evidence would logically lead to self-incrimination; assessment of remaining silent or drawing adverse inferences violates the accused person's right regarding the liberty to testify or to remain silent. The ECBA will comment this more detailed when precise proposals on the concept of the establishment of EPPO have been presented.

For witnesses, persons other than suspects and accused, the EPPO should ensure that any of these persons who is heard by the police or other enforcement authorities (e.g. OLAF) is granted access to a lawyer immediately if, in the course of questioning, interrogation or hearing, this person becomes suspected or accused of having committed any criminal offence. Of course there must be a related right to silence for witnesses in all these situations if such person could affect investigation or prosecution against himself when testifying truly. The abstract possibility of investigation or prosecution should be sufficient not to be obliged to answer to those questions (right to refuse to give evidence if self-incriminating).

#### **5. Right to information and to be cautioned (Letter of Rights)**

The suspect or accused person – in principle including legal persons if there is any liability potentially to be sanctioned (cf. Art. 6 and 9 of EC proposal for a Directive on protection of the financial interests of the EU by criminal law of 11 July 2012) – must be informed of the suspicion or the charges as soon as possible, when the investigation cannot be jeopardised, but at the latest before any questioning, interview, interrogation or hearing. In addition to the rules in the directive of Measure B it should also be informed about involved member states, the applicable law and which (national) authorities are working on (investigating and/or prosecuting) the case.

The suspect or accused person must be informed of his rights orally as well as in writing, at the latest before any questioning, interview, interrogation or hearing. The letter of rights should include at least:

- (a) the right of immediate access to a lawyer of his choice at any stage of the proceeding
- (b) any entitlement to legal aid and the conditions for obtaining
- (c) the right to be informed of the suspicion or accusation, applicable law, involved member states and investigation or prosecution authorities
- (d) the right to interpretation and translation
- (e) the absolute 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
- (i) the maximum number of hours suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

**6. Mandatory defence and issues of waiver**

The ECBA has the view that only a system of mandatory defence for EPPO proceedings is in compliance with the objective of *equality of arms*. Assumed that EPPO cases are generally more complex and dealing with substantial charges and damages it is - in the interest of justice - inconceivable to allow any suspect to act without legal assistance. A system of mandatory defence must respect the right to take a lawyer of own choice and it must be secured by a reasonable legal aid scheme. As a matter of course the ECBA position is that only qualified and experienced lawyers should be appointed in the framework of a mandatory defence system. The lawyer must have the right not to accept the mandate.

The ECBA would like to stress not only the legal necessity to guarantee legal assistance by a lawyer in EPPO proceedings but also the actually important and positive and constructive role of a lawyer for any criminal proceedings, especially in complex transnational cases as EPPO cases will be. The timely and active participation of a defence lawyer in criminal proceedings contributes to the effectiveness of criminal justice systems – it is not an obstacle to criminal justice. It ensures the fairness of proceedings because immediate access to legal advice is a pre-condition to exercising one's rights. It helps to achieve a better quality of process including evidence gathering, and therefore of the evidence obtained, which helps to secure its admissibility. It contributes to preventing miscarriages of justice and even to avoiding large numbers of appeals - resulting in a reduction of the costs of criminal proceedings. It facilitates recognition and trust in EPPO proceedings throughout Europe – as access to a lawyer from the very beginning of the proceedings meets not only ECHR standards but also the common standards of many EU national legislations, regrettably not in all member states in particular in the daily practice of criminal proceedings why we need the directive following Measure C.

Without a system of mandatory defence the issue of a possible waiver comes up. The ECBA follows here partly the EC proposal on measure C part 1 of June 2011, with the following amendments and clarifications:

The waiver does not constitute a waiver of the right itself and may be revoked at any time of the proceedings. Avoiding misuse of waivers cannot be sufficiently remedied through Measure B of the Roadmap on procedural rights, thus the factual and legal consequences of a waiver have to be the subject of real legal advice not only of information, at least for more serious crimes, situations of deprivation of liberty, cases involving vulnerable suspects and arrest warrant cases. Legal advice about the consequences of a waiver through a lawyer should always be available in order to allow a waiver of the right on access to a lawyer in the context of criminal proceedings. Advice on waivers by police officers or any law enforcement or judicial authorities should be inadmissible.

**7. Legal aid on a reasonable and fair financial basis (EU funded)**

EU Member States have widely differing legal aid systems in place, some don't have any (e.g. Germany's system of mandatory defence that does not cover regularly questioning at police stations). Any means and/or merit test leads to certain problems, for example the time and the length of such a test. The complexity of EPPO cases is the main argument to propose a system of mandatory defence at any stage of the proceeding, a legal aid scheme to cover the fee of the defence lawyer chosen by the suspect or accused person, independent of any means or merit test.

Since all cases differ, remuneration in the framework of legal aid cannot be based exclusively on a fixed fee per case. Qualified and experienced lawyers have to be paid reasonably and fairly on the basis of their time and effort they invest (expenditure of time). The hourly rate must be appropriate to the quality and experience which is expected because if "you pay peanuts you get monkeys". It may differ in different member states due to the different market conditions.

Any legal aid scheme must respect the principle of a free profession that is independent from state interference. The ECBA has strong objections against a new EU "institution" as proposed by academics in the past (e.g. Eurodefensor).

It should be considered how to support national bars or law societies or defence associations to provide EU funded emergency defence services. The ECBA refers also to the EU funded project "Pre-Trial-Emergency-Defence", headed by the Austrian Criminal Bar Association, in cooperation with the ECBA and the Universities of Graz, Ljubljana, Vienna and Zagreb, finished and published in 2012 ([www.ecba.org](http://www.ecba.org) "projects").

EU funded training for lawyers to promote quality of defence work should be a matter of course. The ECBA refers to the EU funded defence training courses jointly organized with ERA which are actually very successful and should be

designed for the specific needs of EPPO proceedings ([www.ecba.org](http://www.ecba.org) "conferences"). Legal aid schemes have to consider that only qualified and experienced lawyers get appointed by the competent authority (cf. mandatory defence under point 6.)

**8. Legal aid in all concerned Member States**

In reference to the EC's proposal on Measure C part 1 of June 2011, Art. 11, it should be consensus that a suspect or accused person needs legal assistance in potentially more than one member state, obviously in European Arrest Warrant cases in the executing and the issuing member state. Dependant on the applicable law and the concerned or involved member states the suspect or accused person should have a defence lawyer in all these member states in order to understand and to work with these different national jurisdictions. In this regard the legal aid scheme in EPPO proceedings must consider this necessity of dual (or plural) defence in several member states.

**9. Right to information (access to the file, translation of documents etc.)**

The accused person or his defence lawyer has the right to inspect and take copies of the case files of EPPO and related investigations of national authorities or OLAF. Where investigation is still underway, this right can only be limited for compelling reasons and only insofar as this is absolutely necessary. If the suspect or accused person is detained provisionally or under arrest, unrestricted access to files must be granted. The *equality of arms* demands that the defence must be provided with the same information and (copies of) documents as the court which has to decide on any (coercive) measures or remedies.

Translation of all relevant documents into the suspect's or accused person's language has to be provided. Not only court decisions but also minutes of relevant witnesses' testimonies and other relevant documents must be translated in order to guarantee that the defendant is able to understand the content of the files. As far as documents are recorded electronically the suspect or accused person who is in pre-trial detention should have the right to use the necessary electronic devices to read or print these documents and should be provided with the necessary electronic devices, covered by EPPO budget.

**10. Right to gather evidence and to question witnesses (or to ask EPPO)**

The *equality of arms* demands the right of the suspect or accused person to ask for gathering evidence by state authorities and the right to have his defence lawyer carrying out own investigation including questioning of witnesses. As far as coercive measures are concerned the suspect or accused person should have the right to file a request to EPPO, judicial review must be guaranteed. As far as non-coercive measures are concerned the defence lawyer should have the right to question witnesses, experts and carry out other investigation he deems to be necessary for the defence. As a matter of course the defence lawyer's own investigation must not interfere with the investigation by EPPO.

**11. Legal privileges of defence lawyers**

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 this right applies irrespective of any release from legal privileges by the 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. Communication between suspect or accused person and his defence lawyer must not be monitored at all.

Cases in which the lawyer is himself/herself suspected of having committed a crime or an offence follow national law of member states which must consider the legal privileges of a lawyer in his/her professional capacity. Apart from the possibility of substituting a lawyer through a judicial decision, the absolute confidentiality of the communication between suspect and his/her lawyer (as a right of the suspect or accused person) must not be affected by any legal measure against the lawyer in a criminal proceeding against this lawyer.

**12. Effective legal remedies and judicial review**

If the suspect or accused person is detained in pre-trial detention he/she must have the right to appeal effectively against the arrest warrant. There must be a right to be heard personally and verbally by the court and to get a decision at short notice (e.g. two weeks). Principally there should be at least two court instances in cases of deprivation of liberty. For the rest of coercive measures there must be an effective system of legal remedies and

judicial review. This includes the right to appeal against any coercive measure independent of being accomplished or still being carried out. All coercive measures must be open for judicial review, also with hindsight.

Non coercive measures should be open for judicial review, too, as they are based on legal prerequisites and affect the legal interest of a person. Each of the rights identified above must be capable of enforcement through an effective interlocutory remedy. There should also be effective remedies to solve issues of conflict of jurisdiction and termination of proceeding (ne bis in idem), the concurrence of investigation and jurisdiction (especially in mixed cases with dual offences, not only "PIF" crimes) and in terms of prosecuting and bringing to judgment (before trial to minimize "trial" shopping).

The ECBA does not prejudice the EC's regulation proposal in terms of judicial review by national courts and/or the European Court of Justice in Luxembourg (ECJ). But 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 the ECJ as the court instance for judicial review in EPPO cases.

### **13. Compensation mechanism**

It should be considered to draft a compensation mechanism when investigation or prosecution or bringing to judgment by the EPPO or certain coercive measures were not justified with hindsight. Compensation could be granted for costs and expenses of the suspect or accused person for his defence (the extent dependant on the legal aid scheme) but also for damages caused by the EPPO proceeding and symbolically for all days of deprivation of liberty.

## **VI. ECBA Contact: [www.ecba.org](http://www.ecba.org)**

If you have any further questions, please do not hesitate to contact us:

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