

Contribution by the European Association of Judges to the Debate about the Office of European Prosecutor

Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office (COM (2013) 534)

European Parliament, Resolution A 7- (TA) 2014)0234 (12.03.2014)

The European Association of Judges is part of the International Association of Judges and represents 44 member associations throughout Europe. It has member associations in all jurisdictions of the European Union and EFTA.

The general approach.

The creation of a legal framework to establish the European prosecutor to investigate and prosecute crimes against the interest of the European Union is major step towards a new legal system of applying criminal law in the member states. However, the EAJ wants to stress that it is up to the member states individually and collectively to decide whether to create such a framework.

After a decade of internal discussions and debates, the European Association of Judges (EAJ) notes the proposal of regulation by the European Commission on the establishment of the European Public Prosecutor's Office (EPPO) in July last year (draft regulation, cited "DR") as basis for a thorough debate. The resolution of the European Parliament in March 2014 (Resolution A 7- (TA) 2014)0234 (12.03.2014)) "EPR") **and the council paper from June 2014 (Doc. Nr. 9834/1/14 REV 1) has taken the debate further.**

First, EAJ hopes that the Draft Text from the European Commission is regarded as a text for discussion and not as a final draft. There are still major legal questions to be discussed before such an ambitious project can come into force.

For the EAJ, three major criteria for the Office and its members have to be met:

- Independence and quality of all the members of the office,
- A legal framework to cover all questions arising with its establishment
- The guarantee of judicial review of all of investigations.

Independence and Quality of the Prosecutors

The EPPO can only act successfully as a centralized prosecution service when the European prosecutor him/herself as head of the office, his or her deputies and the seconded national prosecutors can work independent from political instructions and in independence from all administrations, European or national. The EAJ welcomes that this principle has been established not only in the draft by the commission (Art 5 DR), but in the motion of the European Parliament (5, ii EPR) as well.

The EAJ recognizes the need for “accountability” in general of the EPPO for its activities. However, it has problems to accept that this accountability should be not only towards the European Parliament, but towards the Council and the Commission as well, as stated in Art 5 DR. The accountability for a judicial body towards an administration, as represented by the Council and the Commission, has to be rebutted. The final draft of the regulation should therefore hold the EPPO only accountable to the European Parliament. And it should state clearly that this accountability is one only for general activities and none in the handling of single cases. The procedure, in which way Parliament can hold the EPPO accountable, which files and reports have to be presented to Parliament as a whole or to a committee and the power of Parliament to intervene in the general work of the EPPO has to be regulated explicit in the regulation.

The regulation should state that only acting prosecutors and judges should be qualified to act as European prosecutor, his/her deputies or as seconded national prosecutors. The European prosecutor and his/her deputies should be appointed by the European Parliament.

The EAJ considers that any proposal should be based on the principle that a prosecutor is an independent public authority individually responsible for the proper exercise of functions in accordance with the domestic and international norms of the rule of law.

The EAJ considers that the proposed European structure should complement that principle and not replace it.

The EAJ considers that the revised proposals are unnecessarily bureaucratic and as such risks the effective and efficient discharge of the prosecutor’s functions.

The legal framework for the work of the EPPO.

The power of investigation.

The EPPO has to investigate into crimes “as provided for by Directive 2013/xx/EU and implemented by national law” (Art 12 DR). This regulation is still in the law making process. Looking at the text of the PIF-draft, as tabled by Parliament and Council, it will give the member states at least some discretion how to implement it into their national criminal law. The EPPO, investigating into crimes against the financial interests of the Union, will therefore face legal instruments which differ from member state to member state to establish its competence. This is the consequence of not drafting a criminal law instrument within the EPPO- regulation itself under Art 86 TFEU. For the EPPO and the national judges handling the cases it will mean legal uncertainty about the power of investigation of the EPPO.

A second problem with the power of investigation is the exclusive power of prosecution for the PIF-crimes. It will include the power -and duty- to investigate into cases which are of less importance and which are handled as minor offence in most of the member states. It might be difficult for local courts to handle these cases facing a centralized prosecution service trying to introduce its own standards into the procedure. The EAJ therefore proposes a threshold for mundane cases to enable the EPPO to hand over these cases to local prosecution services.

Investigation measures and evidence.

The EPPO shall act within the scope of the given national criminal procedural laws and shall use the national judicial authorities for orders of investigations.

Here, the EAJ wants to focus on two legal aspects: first, the EPPO and the national judges should give a much clearer guideline under which conditions the listed investigative measures can be granted. “Reasonable grounds” and “less intrusive measures”, as stated in section Art 26 DR 3, are legal terms which are not yet defined in European circumstances. It is difficult to see how much reasoning a court has to bring down in its decision to grant an investigation measure for these criteria besides the motivation for its decision under national law. Therefore, the final text of the regulation has to include definitions of “reasonable grounds” and “less intrusive measures”.

A second problem comes with the possibility for the EPPO to present evidence without any “validation” procedure for admissibility by the trial court under its national law (Art 30 DR). Evidence presented by the EPPO to any national court is only inadmissible when the court would regard its admission as “unfair. This rule must be regarded as changing the national laws of evidence by the regulation and does need further consideration. As a first statement the EAJ holds this fairness- test as workable and sufficient to protect the rights of the accused. However, “unfair evidence” is another legal expression yet not defined under European law. A clear definition is necessary to void different rulings in different member states – which would make the prosecution of the EPPO unfair in itself if evidence is being admitted in some court of the Union but not in all.

Judicial review.

The focus of the EAJ in matters of judicial review is on three topics.

Jurisdiction of trial courts.

Jurisdiction of a national court to hear a case and the criteria for the EPPO to select a trial venue in Art 27 sect. 4 DR are not satisfactory. As the choice of the forum is not only of the procedural law, but of substantive criminal law as well, it has to be a motivated one by the EPPO, open to challenge before the European Courts.

Orders of Investigation.

The “reasonable grounds” and “less intrusive measures” tests for granting an order of investigation and the fairness- test for the admission of evidence should be open to preliminary rulings by the ECJ.

These tests are based on the regulation itself and they need interpretation by the European Court of Justice to ensure uniform application throughout the Union. There should be clear wording in the regulation to enable that.

The judicial review of actions of the EPPO in itself.

Art 36 DR and 25 DR of the regulation do not give a clear picture of the competence for judicial review of investigations by the EPPO. While Art 36 DR states that when adopting procedural measures, the EPPO should be regarded for the purpose of judicial review as a national judicial

authority. This gives the court of the member state the action has taken place the only competence for judicial review. However, Art 25DR states a single European legal area for the investigations and prosecutions of the EPPO. This does seem a lot more closer to what the EPPO, as the European prosecutor, seems to be. Therefore, even if legal redress starts with national courts, there must be some jurisdiction by the European Courts at least on a second instance basis.

Procedural safeguards.

In the meantime, a growing legal body of procedural safeguards by the European Union has been established. It has been, or will be, implemented into national law. Therefore, it does not seem necessary to put them into the regulation text itself. However, to ensure that the EPPO will be held to regard these procedural safeguards it might be helpful to write into Art 32 that serious disregards of procedural safeguards might make the prosecution unfair in itself.

Conclusions.

There are more legal problems to be discussed. The resolution of the European Parliament has listed some of them; others are more for practitioners to be named. Therefore, the EAJ would be happy to participate in further debates.

Access to justice, equal treatment of all citizens of the Union, the rule of law, the right to a fair trial are the important issues to be addressed. The fight against crime should be included into this list. The EPPO, which is based upon and embodied into a legal framework which is capable of ensuring effective investigations without violating procedural safeguards, can help to improve justice within the European Union.