The road to a European Public Prosecutors Office – an ECBA perspective.

Spring Conference, Prague, 22nd April 2017

James MacGuill

Introduction

Friends and colleagues

I have a simple message for you today which is that in a very few years part of our everyday legal practice will involve dealing with cases being prosecuted by European Public Prosecutor's Office (EPPO) - click here for the proposal.

Almost since the establishment of the European Criminal Bar Association itself this has been a topic which has been discussed interminably, and a bit like the West Ham United annual relegation matches has been a staple feature of all ECBA conferences.

However, the talking is over and the Measure will be implemented in the course of this year, with those member states that wish to follow its course obliged to transpose within a further two years. We know from our discussions that the Measure will be retrospective in the sense that prosecutions in 2019 may relate to crimes allegedly committed in 2017 and earlier. Accordingly clients currently under investigation may not realise, but will soon learn to their cost, that they are to be prosecuted by this new almost pan- European body. As a result it behoves all of us to familiarise ourselves urgently with the Measure and to prepare strategies to ensure that our clients are not victimised by the inherent potential for unfairness that it includes.

Even though Ireland is one of those countries who will not opt in, to say nothing of the difficult situation of our colleagues in the United Kingdom, the reality is that my clients will get caught up in EPPO prosecutions due to their activities abroad so I will need to know what it is all about.

Process

As practitioner, I know that many of us are averse to spending too much time looking at draft legislation, on the understandable basis that we can confuse ourselves as to what the law actually is as opposed to what it was proposed to be. However, in the case of the European Public Prosecutor's office and in the context of the work of our Association I think it is worth spending some little time looking at the evolution of the proposal and at the constructive role that we have played in its development.

The proposal derived its political impetus from the belief, unshakeable and misguided in my view, on the part of many Eurocrats that the European Union was being swindled of massive funds by various criminal elements but that national authorities were disinclined to prosecute those offences because it wasn't really taking money from them, only from the European Union.

That analysis proceeds to the belief that if this type of crime was detected and prosecuted more aggressively the fortunes of the Union would be greatly enhanced and all the Union's inherent financial difficulties would be resolved.

That I regret to say is fanciful but however it is populist

The idea of a special Prosecutor to protect the financial interests of the European Union was certainly current as far back as 2000 and the *Corpus Juris* study of that year specifically considered the possibility.

Subsequent academic studies notably by the Max Planck Institute and the University of Maastricht gave further consideration to the proposal and ultimately in 2012 a consultation process was initiated by the Commission. Both the CCBE representing over 1 million lawyers in Europe and the European Criminal Bar Association with an impressive membership of 300 approx. were invited to contribute

On the one hand it would be easy to be dismissive of the consultation process and to take the view that the governments and politicians were doing no more than a box ticking exercise in consulting persons with a view to express, with no intention of paying more than lip service to those outside opinions.

Continuing that analysis it might be stated that it was a bit of a waste of time for any of us to express our views on the proposal as we were going to be effectively ignored in any event.

My personal view, and I think it is probably shared by others in this room that were involved in the process, is that the Commission understood that the parliamentarians and the member states had a political imperative to appear to be tough on crime and there were no significant counterbalancing voices in the discussion bar defence lawyers and rights bodies such as the Fundamental Rights Agency (FRA). In this context the opportunity that was presented to the ECBA and the CCBE to review and discuss the proposal as it developed was not alone important from the point of view of professional desire to shape legislation in the common and public interest but also important in the context of the European Union itself which after all should have no vested interest in promoting a legal order which is at variance with the principles of natural justice

Engagement

I hope delegates will be interested in a brief overview of the legislative process that has brought us to where we are today with the proposal to establish a European Public Prosecutor's office.

The consultation process was under way informally throughout the 2000's but more formally from March to June 2012 when the exercise considered **"Protecting the EU's financial interest and enhancing prosecutions".**

In addition to the prosecution concept even Model Rules of Procedure (devised in a research project by the University of Luxembourg) were under consideration at this

time Views were invited on the developing concept and the CCBE made its observations on 7th February 2017.

The principal concern expressed at that time was that the measure was premature as for instance the work on developing procedural safeguards was incomplete.

Memories of the promises made but never fulfilled upon the introduction of the European Arrest Warrant were still fresh.

While measures A Translation and Interpretation (20/10/10) and B Information.(22/5/12) had been accomplished, the balance were still under discussion and in particular C Access to a Lawyer (eventually finalised 22/10/13) was being drastically diluted.

An equal concern was the competence of the Union in criminal matters. In total 17 areas of concern were highlighted including:
-overreach into purely domestic matters
-forum shopping
-adopting the ICC model of jurisdiction arising only where national authorities unwilling or unable to investigate/prosecute
-differential application of evidential principles
-legal aid
-detailed list of defendants rights
- evidence gathering in aid of defence
-effective interlocutory remedies
-duty lawyer scheme

In addition there was a critique of the ***Model Rules*** which while not subsequently pursued have a clear influence on all that followed.

The full text of those initial observations are as follows:

"A EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO) 7 February 2013
1
PART I:
COMMENTS FROM THE CCBE REGARDING THE ESTABLISHMENT OF A EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO)
1: Introduction:
The Council of the Bars and Law Societies of the European Union (CCBE), which through the national Bars and Law Societies of the Member States of the European Union represents some 1,000,000 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.
The establishment of the EPPO is high on the European agenda and the aim - to improve the protection of the financial interest of the European Union - is of course a legitimate aim. However, the establishment of a new European legal authority (potentially with considerable investigative and enforcement powers) should be based on an in-depth evaluation of all relevant issues, including whether there is a need for an EPPO, and whether the establishment of an EPPO would be proportionate and in accordance with subsidiarity.

The CCBE believes that a more rational and effective use of existing institutions (especially Eurojust, OLAF, Europol etc.) could be the alternative. Inefficiency in dealing with EU fraud and related crimes, which according to the Commission justifies the establishment of a EPPO, seems to be the result of poor functioning of existing EU and national agencies rather than the result of the lack of a EPPO. In this regard, better use of existing institutions could be a more attractive option than the current rush to a new super-authority, which could create more problems that it would solve.

2: Comments:

The following remarks are based on the perspective of the defence in criminal cases and the perspective of victims in criminal cases. The aim of these remarks is not a detailed discussion on all issues at hand, but to briefly highlight some important general considerations which should be discussed further in the coming process.

2

(a) Constitutional issues:

The question of the establishment of the EPPO and its powers is deeply connected to considerations concerning the organisation of the EPPO, mainly the question whether the EPPO will be a supranational authority or a decentralized organization rooted in the structures of the member states. If it is to be a centralized European organisation this would raise a number of questions. The enforcement of criminal law is traditionally a state function governed and balanced under the constitution of the given state. Each state has its own system of diversion of powers, for checks and balances and mechanisms of control. Each state authority is part of a complex "grown" structure, which balances the interest of the state and the interests of individuals. Should the EPPO be established on a centralised basis the European level state function would be given to a structure that is not a state, which raises questions concerning democratic legitimation, accountability and control as well as the question of the constitutional framework.

(b) Activities of a European Public Prosecutor:

The CCBE believes that the activities of a European Public Prosecutor will in the long run not be restricted to Community fraud only. The CCBE believes that it will be nearly impossible for the European Public Prosecutor to confine his or her investigations to the protection of the Union's financial interests. The CCBE takes the view that, over time, the responsibilities of the office would thus increase beyond strictly Community matters and extend into domestic matters and thus national jurisdictional issues.

(c) Dual offences:

The CCBE also envisages the possibility that if there is fraud of European Union funds at a Community level, the perpetrators may also have committed offences at a national level.

Therefore, a situation may arise where two offences are being investigated side by side. This could also present the prosecution with ample opportunities for forum shopping between the Member States. This could also result in shopping for a jurisdiction where one can obtain an easier conviction than in another State. This would not be in the interests of justice as it would highlight the different standards in different Member States and so undermine the notion of justice overall.

In the event that there is indeed a role for the EPPO it should be confined to cases where Member States are demonstrably unwilling or unable to prosecute themselves, i.e. the same threshold as applies in another supranational criminal forum the ICC.

(d) Supra-national authorities interfering with national authorities:

The CCBE would also like to stress the numerous difficulties inherent in supra-national

authorities, interfering with national authorities in the field of preliminary investigations, gathering of evidence, trial and sentencing.

(e) The free movement of evidence:

The CCBE is concerned with the dangers involved in the free movement of evidence. It is possible that the gathering of evidence would interfere with national rules and procedures, and consequently not be in accordance with the rules of a particular country. The obvious danger is that differential application of evidential principles may result in wholly different outcomes, albeit on identical or broadly similar facts, dependent on the selected trial venue. As such the procedure would be the antithesis of harmonisation,and would bring the administration of justice into disrepute.

3

(f) Proper system of legal aid:

The CCBE would like to stress the importance of having a proper and adequate system of criminal legal aid from the very beginning of EPPO's criminal proceedings. The CCBE encourages the Commission to make every effort to ensure that such a system is in place as a precondition to the establishment of a EPPO.

This system should also be uniform for all member states concerning the EPPO proceedings. The CCBE therefore recommends having an EU-legal aid scheme for these cases. As the EPPO will only investigate in complex cases the CCBE recommends considering EPPO cases as mandatory defence cases for which legal aid should be provided out of an EU budget.

(g) Defendants' rights in an EPPO procedure

Should an EPPO come into existence, the importance of defendants' rights cannot be stressed enough. 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 defence.

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 mean 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 pretrial 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.

5

3: Conclusion

Proceeding with the establishment of the EPPO as a centralized European authority (as has been suggested) seems to be premature. The creation of such an institution could be discussed after the establishment of:

□ an adequate body of EU legal instruments on individual rights in criminal proceedings (we are still far from it); and

□ the establishment of EU widely accepted rules on the gathering and admissibility of evidence (the slow pace of the European Investigation order project demonstrates the difficulty of such a task).

As mentioned in our introduction, the CCBE believes that, in the meantime, a more rational and effective use of existing institutions (especially Eurojust, OLAF, Europol etc.) could be the alternative. Inefficiency in dealing with EU fraud and related crimes, which according to the Commission justifies the establishment of a EPPO, seems to be the result of poor functioning of existing EU and national agencies rather than the result of the lack of a EPPO. As previously referred to, better use of existing institutions could be a more attractive option than the current rush to a new super-authority, which could create more problems that it would solve.

6

PART II:

COMMENTS ON MODEL RULES

The CCBE is aware of the development of "model rules". While realising that these "model rules" are not final and are the outcome of a research project carried out at the University of Luxemburg, the CCBE nevertheless believes that it is beneficial to make the following observations as they assist at this stage in identifying issues which would cause real practical problems

□ The "model rules" provide for a fragmented system of court control, partly involving the domestic courts in the member states, partly involving courts on the European level. This leads to the consideration concerning the relation between the different courts involved but also raises, again, the question of "forum shopping". This consideration is also raised in connection with the suggested competence of the EPPO to act in different member state on the basis of provisions not always giving a clear guideline of where to conduct which legal activities.

□ A very serious remark on the practicality of the "model rules" is concerning the position of the defence: The rules provide provisions on the rights of the individual under suspicion and his/her defence. However, the "model rules" do not address the very urgent question of how those rights in reality can be used in a European setting where a centralised EPPO can act in all member states, but where the organisation of defence in no way can "match" such a centralised authority. It is in any system of

criminal justice crucial that there is a balance of power between the main actors, this balance of power, not only in a theoretical sense but also from a practical perspective, has yet to be addressed.

□ Related to fragmented system of court control, partly involving the European Court of Justice located in Luxembourg for very crucial aspects of the proceedings (a.o. appeal against a refusal from the European Public Prosecutor to [Rule 15.3] perform a requested investigation act, to [Rule 16.3] grant access to its investigation file; or [Rule 31.2] the appeal against any coercive measures by any person affected directly and individually by them), will not only generate very important costs for the concerned person in order to defend him/herself in the Front of the European Court (travelling costs for him/her and his/her lawyer(s), but also (very) long delays to obtain a decision due to the relatively heavy procedure of the European Court of Justice.

□ The establishment of an EPPO not matched by a sufficient system of defence raises another issue - one of the critical questions in connection with criminal cases is the question of costs. If a case investigated by the EPPO is conducted in a number of member states, then the exercise of an efficient defence will most likely be connected with considerable costs.

7

Specific comments on the "Model Rules"

Rule 1 (status and competence)

1. The European Public Prosecutor's Office (EPPO) is the authority of the European Union (EU) within the area of freedom, security and justice competent for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union's financial interests. It is independent as regards national authorities and EU institutions.

2. The EPPO is an indivisible supranational body under the direction of a European Public Prosecutor. It includes delegated European Public Prosecutors' offices in national jurisdictions.

1. As mentioned above, it is impossible to envisage the EPPO confining itself solely to narrow financial crime. There will inevitably be a tendency to try other charges at the same time on the basis that they are inextricably linked together and thereby to trespass on domestic cases.

Rule 3 (primary authority for investigations and prosecutions)

1. The EPPO shall have primary authority to investigate and prosecute any offence within its competence.

2. In deciding whether to exercise its authority, the EPPO shall consider inter alia:

a) whether there is substantial harm to interests of the EU;

b) whether the case has a cross-border dimension;

c) whether the investigation extends to officials of the EU;

d) any need to ensure equivalent protection of the interests of the EU in the Member States.

3. The CCBE is uncomfortable with the EPPO having primary responsibility to investigate and prosecute any offence within its competence, especially when it is so loosely worded as "Offences against the Union's financial interests". As referenced at 1 above this is a loose concept which could easily be expanded by an aggressive prosecutor. In the event that one had to have an EPPO it should be a prosecutor purely of last resort. It could operate something along the lines of the International Criminal Court where Article 17 of the Rome Statute of the International Criminal Court effectively provides that that Court can only have jurisdiction where an individual state is unwilling or unable to prosecute. Where a genuine decision is made at a domestic

level not to bring a prosecution, that should be the end of the matter save in the limited and exceptional circumstances as set out in Article 17.
Rule 5 (exclusive authority of the EPPO)
1. If the EPPO decides to investigate a case, national authorities are no longer competent to investigate and prosecute that case.
2. The EPPO may at any time refer a case within its competence to a competent national authority. In that case, the EPPO may later demand that the national authority refer the case back to the EPPO.
5. A proposal that the EPPO shall prevail over a national authority for the same offence will of necessity mean that those offences can only be prosecuted at the pace which the resources of the EPPO will allow. The probability is that the EPPO will struggle to cope with the entire potential case load that falls within its rule 1 competence. This will inevitably lead to delay and as we all know delay is a major cause of injustice. Member States on current form will be conserving limited resources for domestic purposes rather than enthusiastically endowing another Euro quango. The option for the EPPO to refer a case back to national authority and then demand it back again will certainly lead to inconsistency in standards in prosecutions.
Rule 6 (position of the EPPO within the national systems)
[…]
3. Competent national authorities and competent institutions, bodies, agencies and offices of the EU shall provide information and operational assistance and shall carry out the instructions of the EPPO.
6.(3) We are concerned at the thought that a national authority shall carry out the instructions of the EPPO.
Rule 7 (judicial control)
1. To the extent indicated in these Rules, decisions of the EPPO affecting individual rights are subject to review by the European court.
2. Where these Rules provide for prior authorisation of a measure to be applied by the EPPO, a judge designated by each Member State shall be competent to decide upon this authorisation. Authorisation by the judge is effective within the single legal area as defined under Rule 2 (European territoriality).
7. Where is the European Court to find the time and resources to review decisions of the EPPO as envisaged in this rule?
Rule 9 (proportionality) The EPPO shall exercise its powers in the least intrusive manner and in accordance with the principle of proportionality.
9. The CCBE would like this provision to be reformulated as follows:
The EPPO shall exercise its powers in the least intrusive manner and in accordance with the principle of proportionality. The EPPO shall permanently watch over the fairness of the collect of the evidences and of its proceedings.
Rule 10 (duty to investigate impartially)
The EPPO shall seek relevant evidence, whether inculpatory or exculpatory.
10. The CCBE would like this provision to be reformulated as follows :
The EPPO shall seek all relevant evidence, whether inculpatory and/or exculpatory.
9
Rule 12 (rights of the suspect)
The suspect has the following rights:
a) the right to consult a defence lawyer, to have him/her present and to be assisted by him/her during questioning as provided by Rule 14 (right to legal assistance).
b) the right to remain silent, in accordance with Rule 18 (privilege against self-incrimination).

c) the right to be informed by the EPPO that any statement s/he makes during the questioning may be used as evidence against him/her.
d) the right to an interpreter and to a translation of essential documents as provided by Rules 13 (right to interpretation and translation) and 20 (interpretation and application).
e) the right to gather evidence and to request the EPPO to collect evidence on his/her behalf in accordance with Rule 15 (right to gather evidence).
f) the right of access to materials as provided by Rule 16 (access to the materials of the case).
g) the right to be given a letter setting out his/her rights.
h) the right to be promptly informed by the EPPO that s/he is suspected of a criminal offence and of the legal and factual grounds on which the suspicion is based, except where the EPPO has reasonable grounds to believe that to do so would prejudice an ongoing investigation.
12. This is an example of a rule where the CCBE would welcome the acknowledgement on the part of the European Union that the presence of a lawyer during interrogation is a fundamental right. The CCBE would like provision to be reformulated as follows : The suspect has the following rights:
a) the right to consult a defence lawyer prior to any questioning, to have him/her present and to be assisted by him/her during questioning as provided by Rule 14 (right to legal assistance).
b) the right to remain silent, in accordance with Rule 18 (privilege against self-incrimination).
c) the right to be informed by the EPPO that any statement s/he makes during the questioning may be used as evidence against him/her.
d) the right to an interpreter and to a translation of essential documents as provided by Rules 13 (right to interpretation and translation) and 20 (interpretation and application).
e) the right to receive a free copy of the record of interview at the end of it and to communicate this copy to his/he lawyer.
f) the right to gather evidence and to request the EPPO to collect evidence on his/her behalf in accordance with Rule 15 (right to gather evidence).
g) the right of access to materials as provided by Rule 16 (access to the materials of the case).
h) the right to be given a letter setting out his/her rights prior to any questioning.
i) the right to be promptly informed by the EPPO that s/he is suspected of a criminal offence and of the legal and factual grounds on which the suspicion is based, except where the EPPO has reasonable grounds to believe that to do so would prejudice an ongoing investigation.
j) the right to receive a free copy of any judicial decision rendered about the proceedings he/she is the subject of.
Besides and as already afore mentioned, the CCBE wants that equivalent rights should mutatis mutandis be granted to the victim, a.o :
□ the right to be given a letter setting out his/her rights immediately after he/she has showed up towards the ,
□ the right to consult a defence lawyer,
10
□ the right to be informed by the EPPO that any statement s/he makes during the questioning may be used as evidence against him/her, and that s/he has the right to remain silent ;

□ the right to an interpreter and to a translation of essential documents as provided by Rules,
□ the right to receive a copy of the questioning at the end of it and to communicate this copy to his/he lawyer.
□ the right to gather evidence and to request the EPPO to collect evidence on his/her behalf in accordance with Rule 15 (right to gather evidence).
□ the right of access to materials as provided by Rule 16 (access to the materials of the case)
□ the right to receive a free copy of any judicial decision rendered about the proceedings concerning the offence s/he is the victim of.
Rule 14 (right to legal assistance)
1. Any suspect shall have the right to be assisted by a lawyer of his/her choice.
2. Where a suspect has no lawyer, the EPPO shall ensure that a lawyer is appointed, unless the suspect objects.
3. If the suspect is indigent the EU shall bear the reasonable cost of the appointed lawyer for the investigation phase of the proceedings.
14. Again the CCBE would welcome the acknowledgement that the right to legal assistance is deemed to be centrally important.
Rule 15 (right to gather evidence)
[…]
2. The suspect may request the EPPO to perform any investigative act, including the appointment of experts. The request must be made in writing with reasons. The EPPO shall undertake the required measure, unless it reasonably believes that this would jeopardise the investigation or would be futile or disproportionate. Any refusal must be made in writing, with reasons given.
15.(2) The CCBE would be extremely uncomfortable that the prosecution will be instrumental in the appointment of a defence expert. There may be cases where an agreed expert brings real benefits but the Defence must always retain the right to appoint their own expert in accordance with the equality of arms principle and to have the reports treated as confidential and privileged and not available to the prosecution unless the witness is called.
Rule 16 (access to the materials of the case)
[…]
3. Access may never be denied to reports of those investigative measures at which the suspect or his/her lawyer had the right to be present in accordance with these Rules. Refusal is subject to appeal to the European court.
16. (3). This rule would have major resource implications for the European Court. Is other urgent legal work to be ousted by the need to service the EPPO?
11
Rule 17 (disclosure of the materials of the case)
1. Without prejudice to Rule 16 (access to the materials of the case) and to any specific duty of disclosure in respect of any specific investigative measure, the EPPO shall at the end of the investigation disclose the materials of the case to the defence.
2. Access to specified materials may be refused by the EPPO where access to these materials might lead to serious risk to the life or limb of another person or might seriously jeopardise the security of any Member State or of the EU. In such a case, the EPPO shall provide an index of these materials to the defence. Upon request of the defence the European court will examine the materials in question and decide whether and to what extent they can be disclosed, and if so, in what form.
3. Paragraph 1 does not apply if the EPPO decides to dismiss the case or to refer the

case to the national authorities.
4. If the EPPO later acquires materials that have not yet been disclosed, it shall grant an adequate and prompt prior disclosure to the defence.
17. The CCBE would like Rule 17.1 to be reformulated as follows :
1. Without prejudice to Rule 16 (access to the materials of the case) and to any specific duty of disclosure in respect of any specific investigative measure, the EPPO shall at the end of the investigation disclose all the materials of the case to the defence.
Rule 18 (privilege against self-incrimination)
Subject to any obligation to produce documents under national or EU law, no person is obliged to actively contribute to establishing his/her own guilt.
18. The CCBE is concerned with the first part of the sentence ("Subject to any obligation to produce documents under national or EU law") since the European Courts of Human Right has indeed expressively decided in its judgment of 5 April 2012 Chambaz c/ Switzerland that the right to be not forced to contribute to his/her own incrimination includes not only the right to remain silent but also to refuse to produce any documents, no matter if the keeping of these documents is legally obliged or not under national or EU law.
The CCBE would like this provision to be reformulated as follows:
No person is obliged to actively contribute to establishing his/her own guilt and may thus refuse to produce any answer, verbally or in written, nor produce any document, to the EPPO.
Rule 19 (primacy of the model Rules)
National courts may not treat as illegally or improperly obtained evidence that has been gathered in accordance with these Rules.
19. The CCBE is concerned with the entire national admissibility criteria, which constitute a fundamental element of the fairness of proceedings in each jurisdiction, being set aside by this rule
12
Rule 21 (initiation of investigation)
[…]
2. The initiation of an investigation by the EPPO is not susceptible to legal challenge.
[…]
21.(2) In circumstances where a national authority may already have decided not to prosecute, or indeed even to investigate, an investigation by the EPPO may be arbitrary and oppressive. It should therefore be amenable to legal challenge rather than immunised.
Rule 25 (questioning of the suspect)
1. The EPPO may question the suspect.
2. The EPPO shall inform the suspect in writing at the beginning of each questioning of the rights contained in Rule 12 (rights of the suspect).
25. No practical measures are set out as to who would in fact conduct the questioning and how. The possibility to ask and answer questions verbally or in writing via communication technologies (e-mail, fax, phone, skype, etc.) should be expressively foreseen, to avoid enormous costs to the person to be interrogated (and the costs of his/her accompanying lawyer(s).
Rule 26 (questioning of witnesses)
The EPPO may question witnesses. Witnesses are obliged to identify themselves and give truthful answers about facts known to them regarding the subject of the investigation.
26. This is a major departure from the ordinary principle that a witness is under no

obligation to provide a statement. This presumably would create a new offence on the part of witnesses.
Rule 18, as reformulated above, should at least be repeated under Rule 26 : No person is obliged to actively contribute to establishing his/her own guilt and may thus refuse to produce any answer, verbally of in written, nor produce any document, to the EPPO.
Besides, the possibility to ask and answer questions verbally or in writing to the witnesses via communication technologies (e-mail, fax, phone, skype, etc.) should here also be expressively foreseen, to avoid enormous costs to the person to be interrogated (and the costs of his/her accompanying lawyer(s).
Rule 27 (the right of a witness to refuse to give evidence)
[…]
4. Unless they have the duty to answer questions under EU law, members of the clergy, lawyers, notaries, physicians, psychiatrists, auditors, external accountants, tax advisors, and their support staff, may refuse to answer questions in relation to any secrets which were entrusted to them in their professional capacity or which they become aware of in the course of their work. The privilege does not apply where the client consents.
[...]
27.(4) We welcome the acknowledgement that professional secrecy cannot be violated.
13
The CCBE would like Rule 27.6 to be reformulated as follows taking into account the afore mentioned jurisprudence of European Court for the Human Rights Chambaz c/ Switzerland of 5
April 2012 :
6. Notwithstanding subsection (4) and (5) the person may, subject to his/her right not to be forced to incriminate his/her self as stated under Rule 18, answer questions if s/he has been ordered by a judge to disclose information indispensable for the investigation.
Rule 30 (appointment of experts)
1. Where specialised knowledge is required, the EPPO may, ex officio or at the request of the suspect, appoint an expert.
2. Before appointing an expert, the EPPO shall inform the suspect of the person to be appointed and the questions to be put to him/her, except where this would frustrate the purpose of the investigation
30. The CCBE would like Rule 30.1 to be reformulated as follows :
1. Where specialised knowledge is required, the EPPO may, ex officio or at the request of the suspect or the aggrieved party, appoint an expert.
Rule 31 (general rules for coercive measures without prior judicial authorisation)
[…]
2. Any person directly and individually affected by a measure may appeal to the European court.
31.(2) Implications for the resources of the European Court and for the resources of the affected person (travelling costs for him/her and his/her lawyer) and delay within the decision of the European Court is to be expected.
Rule 36 (access to premises and documents)
1. The EPPO may access for inspection
a) any premises which are private, with the consent of the owner or the occupier, and
b) any premises which are used for professional or business activities.

2. The EPPO may inspect and take samples of goods related to any business or professional activity. This includes the unsealing or opening of packaging, taking measures of quantity and weight, using scans and the taking of visual images.
36. It's overly extensive power to search also contained in Rule 48.
14
Rule 39 (seizure of evidence)
1. Where they are needed as evidence, the EPPO may order the seizure of objects.
2. Where they are held by a person who is covered by Rule 27 (the right of a witness to refuse to give evidence), written communications and other objects covered by the privilege shall not be subject to seizure. This restriction does not apply if this person is suspected of being the perpetrator of or an accessory to the offence under investigation, or if the object to be seized is the product of an offence or has been directly employed in committing an offence.
3. Where a person claims a privilege under subsection (2), the EPPO shall seal the object until the judge has decided on the existence of the privilege.
39. This Rule should include a mechanism to manage the seized goods in order to keep their inherent value during the criminal procedure taking into account the possibly long delay before a definitive decision will be rendered. The aim should be to avoid that when these goods would be restituted to the acquitted, or to the victim, they would have lost all or a substantial part of their value (see for instance computers becoming obsolete in a couple of years or even less, or cars, quoted shares or obligations which may lose in the meanwhile all their value, etc.).
Rule 44 (targeted surveillance in public places)
1. Where necessary for the purposes of an investigation, the EPPO may order the covert video and audio surveillance of a suspect in public places and the recording of its results.
2. This measure may be authorised for a maximum period of three months and may be prolonged for one further period not exceeding thirty days.
3. Personal data concerning third persons may be recorded only to the extent that this is incidental and unavoidable.
44. The CCBE would like Rule 44.1 to be reformulated as follows:
1. Where absolutely necessary for the purposes of its investigation and only if other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand - the EPPO may order the covert video and audio surveillance of a suspect in public places and the recording of its results.
Rule 48 (searches)
[…]
3. Persons affected by the search may attend the search and may have a lawyer present. If no person affected by the search is present, the officer conducting the search must secure the presence of two neutral witnesses. In such a case, the EPPO shall inform the person affected by the search as soon as possible of the search and of any objects that were found and seized.
[…]
48.(3) Is interesting in the context of the debate on exactly the topic of the presence of lawyers at a search in Measure C.
15
Rule 49 (physical examination; taking of blood samples etc.)
1. Where there are reasonable grounds to believe that the measure will produce relevant evidence, the EPPO may order the suspect's body to be searched or

examined and samples of blood or other body fluids or cells to be taken. Examinations which might be detrimental to the health of the suspect are not permissible.
2. Any invasive examination of the body must be conducted by a physician.
49. The power to take blood samples in this fashion might not be consistent with many national laws. Besides, Rule 49 loses sight of the judgment of the European Court for Human Rights Jalloh c/. Germany dated 11 July 2006 by which the Court found a violation of Article 6 of the Convention in case of the use of force by the police authority to take samples from the body of a suspect by administrating emetics to him to make him regurgitate the narcotics he had swallowed, which implied that the taking of samples of breath, blood or urine, hair (etc.) could equally lead to a violation of Article 6 of the Convention, if it happens by force.
The CCBE would like Rule 49 to be reformulated as follows :
1. Where there are reasonable grounds to believe that the measure will produce relevant evidence, the EPPO may order the suspect's body to be searched or examined and samples of blood or other body fluids or cells to be taken with the prior and written consent of the suspect. Examinations which might be detrimental to the health of the suspect are not permissible.
2. Any invasive examination of the body must be conducted by a physician with the prior and written consent of the suspect.
Rule 50 (production order)
1. Without prejudice to Rule 37 (production order for data, documents or other objects used for professional or business activities), the EPPO may order any person to produce any relevant object or document.
2. Without prejudice to Rule 37 (production order for data, documents or other objects used for professional or business activities), the EPPO may order any person to produce stored computer data, including traffic data and banking account data, either in its original or in some other specified form. Any person who has the key to encrypted data may also be ordered to decrypt it.
3. The decision of the EPPO shall specify the materials to be produced.
4. Subsection (2) of Rule 39 (seizure of evidence) shall apply accordingly.
5. Subsection (1) does not apply to the suspect or any other person if the production of the object would expose him/her to the risk of being criminally prosecuted. This privilege does not extend to any documents or other objects which the person concerned is obliged under relevant national or EU law to keep; this applies in particular to the production of business records and samples of goods.
50. Considering the already mentioned judgment Chambaz c/ Switzerland of 5 April 2012 of the European Court for Human Rights, the CCBE would like Rule 50 to be reformulated as follows :
1. Without prejudice to Rule 37 (production order for data, documents or other objects used for professional or business activities) and subject to Rules 18 (privilege against self-incrimination) and 27 (the right of a witness to refuse to give evidence), the EPPO may order any person to produce any relevant object or document.
2. Without prejudice to Rule 37 (production order for data, documents or other objects used for professional or business activities), the EPPO may order any person to produce stored computer data, including traffic data and banking account data, either in its original or in some other specified form. Any person who has the key to encrypted data may also be ordered to decrypt it.
3. The decision of the EPPO shall specify the materials to be produced.
4. Subsection (2) of Rule 39 (seizure of evidence) shall apply accordingly.

5. Subsection (1) does not apply to the suspect or any other person if the production of the object would expose him/her to the risk of being criminally prosecuted. This privilege does extend to any documents or other objects which the person concerned is obliged under relevant national or EU law to keep; this applies in particular to the production of business records and samples of goods.
Rule 51 (interception of telecommunication – content data)
1. Where it has reasonable grounds to suspect that a serious offence has been committed, the EPPO may order the interception and recording of telecommunications (including e-mail) to and from the suspect.
2. This order may be extended to other persons where there are reasonable grounds to believe that the suspect is using their telecommunications connection or that they are receiving or forwarding messages on his or her behalf.
3. The measure shall be limited, in the first instance, to a maximum period of three months. Where the relevant conditions are still present, the measure may then be extended by further periods of up to three months, up to a maximum total period of one year.
51. The CCBE would like Rule 51.1 to be reformulated, because the notion of "serious offence"(being not defined) is totally vague since any criminal offence may be considered as "serious" by nature:
1. Where it has reasonable grounds to suspect that a serious offence has been committed and where absolutely necessary for the purposes of its investigation and only if other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand - the EPPO may order the interception and recording of telecommunications (including e-mail) to and from the suspect.
Rule 52 (real-time surveillance of telecommunications traffic data)
The EPPO may order instant transmission of telecommunications traffic data.
52. The CCBE would like Rule 52 to be reformulated as follows :
Where absolutely necessary for the purposes of its investigation and only if other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand - the EPPO may order instant transmission of telecommunications traffic data.
17
Rule 53 (surveillance in non-public places)
1. The EPPO may order the covert video and audio surveillance of non-public places and the recording of its results. Video surveillance of private homes is not permitted.
13
2. Audio recording in non-public places may be authorized for a maximum of thirty days. Where the relevant conditions are still present, the measure may then be extended by a further period of fifteen days.
53. The CCBE would like Rule 53.1 to be reformulated as follows :
1. Where absolutely necessary for the purposes of its investigation and only if the other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand – the EPPO may order the covert video and audio surveillance of non-public places and the recording of its results. Video surveillance of private homes is not permitted.
Rule 54 (privileged persons)
Measures under Rules 51 (interception of telecommunication – content data), 52 (real-time surveillance of telecommunications traffic data), 53 (surveillance in non-public places) are not permitted against journalists in relation to their sources of

information or defence lawyers in relation to their clients.
54. This is very interesting in contract to the current debate on Measure C where member states are seeking to give themselves the power to eavesdrop on lawyer's consultations.
Rule 55 (monitoring of financial transactions)
1. Where there are reasonable grounds to suspect the commission of a serious offence, the EPPO may order any financial or credit institution to inform the EPPO in real time of any financial transaction carried out through any specified accounts held or controlled by the suspect or any other accounts which are reasonably believed to be used in connection with the offence.
2. The measure shall be limited, in the first instance, to a maximum period of three months. Where the relevant conditions are still present the measure may be extended by one further period of no more than three months, up to a total maximum period of six months.
55. The CCBE would like Rule 55.1 to be reformulated because the notion of "serious offence"(being not defined) is totally vague since any criminal offence may be considered as "serious" :
Where there are reasonable grounds to suspect the commission of a serious offence and where absolutely necessary for the purposes of its investigation and only if other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand - the EPPO may order any financial or credit institution to inform the EPPO in real time of any financial transaction carried out through any specified accounts held or controlled by the suspect or any other accounts which are reasonably believed to be used in connection with the offence.
The CCBE recommends also the addition of the following third point to Rule 55 for the interest of the victims : " The financial or credit institution ordered by the EPPO as stated under subsection (1) may not disclose to its concerned client(s) the monitoring by the EPPO of his/her/their financial transaction(s). Any violation of this prohibition by the financial or credit institution will lead to a fine in its head equal to the value of the suspected transactions."
18
Rule 57 (covert investigations)
1. Where there are reasonable grounds to suspect the commission of a serious offence, the EPPO may order an officer to act covertly or under a false identity (covert investigation).
2. The authorisation shall list the measures that the officer may perform. To the extent that the officer is authorised to perform a measure listed in Rule 22 (types of investigative measures), the legal conditions for that measure must be satisfied. If the officer needs to perform a measure not included in the authorised list the EPPO may, where circumstances urgently require, authorise it and seek the retrospective authorisation of the judge.
3. Covert investigators may not incite the commission of an offence which would not otherwise have been committed.
4. Covert investigation may be authorised for a maximum of six months. Where the relevant conditions are still present, the measure may then be extended by a further period of six months.
57. The CCBE would like Rule 57.1 to be reformulated because the notion of "serious offence" (being not defined) is totally vague since any criminal offence may be considered as "serious" by nature :

1. Where there are reasonable grounds to suspect the commission of a serious offence, and where absolutely necessary for the purposes of its investigation and only if other and less intrusive means of investigation are not sufficient– this request being motivated in writing and in concrete terms by the EPPO regarding the case at hand - the EPPO may order an officer to act covertly or under a false identity (covert investigation).
The CCBE would like Rule 57.3 to be reformulated as follows, because of the specific seriousness of the problematic :
3. Covert investigator - nor any third person upon request of the latter - may not incite the commission of an offence which would not otherwise have been committed. The violation of this prohibition implicates the inadmissibility of all evidences collected about the incited offence.
Rule 58 (short term arrest)
1. Where there is a serious risk that the suspect will evade justice by hiding or by flight, or will unlawfully influence witnesses or otherwise interfere with the evidence, the EPPO may order the suspect's short term arrest.
2. A person so arrested may be held in custody for a period not exceeding twenty-four hours. The judge may, upon written request of the EPPO, extend the duration of custody for a further twenty-four hours.
58. It is not clear where the resource will be provided from or who will have the powers to conduct an arrest.
19
Rule 61 (rights of the arrested and detained person)
1. Persons deprived of liberty shall be informed of the legal and factual grounds for their arrest or detention.
2. In addition to the rights listed in Rule 12 (rights of the suspect), they shall have the following rights:
a) to communicate with a defence lawyer freely and without supervision,
b) to have their family or another person designated by them informed that they are under arrest or detention,
c) to communicate with their embassy or consular representative if they are foreign nationals,
d) to an interpreter and translation of essential documents, if they do not understand the language of the proceedings,
61. The CCBE would like Rule 61 to be reformulated as follows :
1. Persons deprived of liberty shall be immediately informed of the legal and factual grounds for their arrest or detention.
2. In addition to the rights listed in Rule 12 (rights of the suspect), they shall have the following rights:
a) to communicate with a defence lawyer freely and without supervision before any questioning
at all time after it or between questionings
b) to have their family or another person designated by them informed that they are under arrest or detention,
c) to communicate with their embassy or consular representative if they are foreign nationals,
d) to an interpreter and translation of essential documents, if they do not understand the language of the proceedings,
Rule 62 (hearing for rendering the ruling on pre-trial detention)
1. The judge shall decide on ordering, extending or ending pre-trial detention after an

oral contradictory hearing.
2. The EPPO, the suspect and defence lawyer shall be summoned to the hearing.
3. The defence shall be given timely access to all such information and evidence as may be necessary for defending against the ordering or extending of pre-trial detention.
62. The CCBE would like Rule 62.3 to be reformulated as follows :
3. Prior to the hearing, the defence shall be given timely access during at least 5 working days to all the information and evidences based on which the suspect has been arrested, in order to be able to organise his/her defence against the ordering or extending of pre-trial detention.
20
Rule 64 (forum choice)
1. The EPPO shall prosecute the case in the jurisdiction which is most appropriate, taking into consideration, in the following sequence:
a) the Member State in which the greater part of the conduct occurred,
b) the Member State of which the perpetrator(s) is (are) a national or resident, and
c) the Member State in which the greater part of the relevant evidence is located.
2. If none of the criteria listed in subsection (1) apply, the case shall be prosecuted in the jurisdiction where the EPPO has its seat.
3. The accused and the aggrieved party may appeal against the EPPO's choice of forum to the European court.
64. The CCBE is concerned with the forum shopping potential if conferred by this article.
66. The CCBE would like the addition of a Rule 66 to the Model of Rules, due to the situation in a number of Member States where at the hearing, the prosecutor sits at the table of the judge and goes with him into the deliberation room before the beginning of the hearing, during any possible suspension of the hearing, and at the end of the hearing, which creates in the eyes of the public in the court room, including the parties to the case and their lawyers, the very unpleasant belief that there exists a special relationship/influence between prosecutor and judge and that some talks may take place between them in the deliberation room outside of the view and the knowledge of the other parties and their lawyers. In this regard, the CCBE proposes the following:
Rule 66 (position of the EPPO at the hearing)
1. Under penalty of inadmissibility of the proceedings, at the hearing, the EPPO should stand and speak exclusively where the other parties and/or their lawyers do stand and plead.
2. Under penalty of inadmissibility of the proceedings, the EPPO may not be in the deliberation room or office of the judge without the presence of the other parties to the case and/or their lawyers.
In case of inadmissibility of the proceedings because of the violation of one or more of the preceding subsections, the civil action of the aggrieved party, if any, shall continue outside the presence of the EPPO, and the same goes for the rest of this civil action through all subsequent stages of the procedure.

ECBA Cornerstones 17th July 2013

The ECBA published its "**ECBA cornerstones on EPPO"** statement which referred to 14 principle political points that should be used as touch stones for the upcoming political discussion.

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.

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). 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 Francoise Le Bail). The "EU model rules" drafted by the research project (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) and the German Bar Association (DAV: www.anwaltverein.de) and to the comments of the Council of the Bars and Law Societies of the European Union
(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 "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 Page 6 of 9 ECBA Cornerstones on EPPO - February 2013 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 ompensated 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 interferences 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 precondition 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 "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 Page 8 of 9 ECBA Cornerstones on EPPO - February 2013 designed for the specific needs of EPPO proceedings (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 Page 9 of 9 ECBA Cornerstones on EPPO - February 2013 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.

The Initial Proposal

A detailed proposal in relation to the European Public Prosecutor was ultimately prepared and released on 17th of July 2013.

There was an evident change in direction following the consultation and the CCBE responded in kind in the observations of 29th November 2013

At this time our key concerns were

- The proposal to confer immediate and exclusive jurisdiction to EPPO for these crimes without even a de minimis saver was too ambitious and in swamping the office with an excessive workload wreak havoc in criminal justice
- -we proposed three possible alternative models, the third of which (including elements of the second) is now in the final text
- The danger of differential trial outcomes depending on choice of MS national court with a consequential temptation to forum shop
- -absence of meaningful judicial review
- -the need for JR to promote harmonised and consistent rulings
- -a proposal for a double lock on admissibility of evidence in transnational cases to the effect that evidence would only be admissible in an EPPO proceeding if it was admissible according to the laws of both the country of trial and the country where it was obtained.
- -removal of repeated reference to "*in accordance with national law"* when dealing with procedural safeguards
- - proposal that the measure expressly state that the new powers are subject to suspects guaranteed rights
- Removal of the provision whereby EPPO is deemed to be national rather than a European institution and only answerable to national courts
- - a proposal to spell out that EPPO must use its powers to seek out exculpatory evidence at the request of the suspect
- - expressed concerns at the transaction option (rich man's justice)
- - need for enhanced legal aid provision
- An entitlement to damages for those acquitted

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.

2

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 its 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 outcom 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.

4

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.
5
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.

Approach to Lobbying

The concerns of the ECBA and the CCBE expressed at that time were understandably very similar in content and theme. We came to learn in the ensuing years that there was a significant benefit to acting independently but in cooperation with each other.

The persons with whom we were engaging whether representatives of the Commission or Parliamentarians are of course very well accustomed to dealing with different views on legislative measures whether reflecting national priorities, or the concerns for particular political perspective. Accordingly, they did not expect lawyers' organisations to be in agreement on every syllable but equally it was clear that where the lawyers organisations were in agreement on points of fundamental principle that greatly reinforced the argument we were making.

The original submissions were directed only at the concept of the prosecutor.
It was necessary then for the two organisations to review this document and to come up with its initial reaction.

Once again, the observations that we submitted concentrated on issues such as defendant's rights, the admissibility of evidence and legal aid. We had from the outset been extremely concerned that there would be a temptation to forum shop allowing prosecutors the advantage of choosing jurisdictions where the laws of evidence were most in their favour and where a wholly different outcome might be expected than if the prosecution was conducted in a state which might have a more logical link with the subject matter.

Our next submission on this developing topic was on 18th November 2014

Statement 18th November 2014

By now we were aware that a vastly different proposal was being considered at the Council than the one promoted by the Commission and which we had all commented upon. Naturally given the harder pro law and order line typically adopted by the Ministers we were gravely concerned. We had no expectation of a receptive hearing there so the next step was to try and influence the trialogue specifically by addressing our concerns to the LIBE committee.

In this statement, we focussed on the important principle of *equality of arms* and enumerated seventeen detailed procedural safeguards essentials

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 18/11/2014

1

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 defence.

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 person's 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 pretrial 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.
4
□ 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.

Text of 2nd March 2015

The next revision of the text emanated from the Member States on 2nd March 2015 to which the CCBE responded on 27th April 2015. Things had changed significantly and in particular we welcomed the departure from the automatic and exclusive model for jurisdiction. However disappointingly this draft did not address all the articles and pointedly neither the text for the judicial review nor procedural safeguards was available. Our key concerns were
- lack of effective safeguards against forum shopping
-the proposal should not be proceeded with until there was effective and harmonised legal aid
- having regard to the EAW experience it is not possible to evaluate this proposal without sight of detailed procedural safeguards provisions
-we accept that some lower end cases have significance nonetheless
-welcomed mandatory language concerning rights in Art 5(1)
-calling again for an obligation to seek out evidence at the request of the defence
- concerns about demonstrating independence of the prosecutor by e.g. not participating in judicial deliberations even where this is permitted in national law
- concerns about the conflict of interest that might arise from grafting the European Delegated Prosecutor onto national prosecutors who will continue in that capacity
-concerns about the breadth of the investigatory measures powers, much broader than EIO
- while the *Transaction* proposal has been modified we still express concerns

CCBE Comments on the text from Member States (dated 2 March 2015) regarding the creation of a European Public Prosecutors Office
27/04/2015
1
INTRODUCTION
1. The CCBE is the representative organisation of more than 1 million European lawyers through its member bars and law societies from 32 full member countries, and 13 further associate and observer countries. The CCBE has been following the discussions on the creation of a European Public Prosecutors Office.
The CCBE welcomes the opportunity to comment on the proposal of the Latvian Presidency set out in document "6318/1/15 revision 1" dated 2 March 2015. Our comments should be read in conjunction with previous detailed CCBE comments on this proposal of 7th February 2013, 29th November 2013 and most recently 18th November 2014.
As we have previously observed (29th of November 2013) the CCBE accepts that the task of creating a legislative framework for a European Public Prosecutor's Office poses a singular if not unique challenges. Equally the CCBE acknowledges its responsibility to engage constructively, albeit without compromising on core values affecting the integrity of the criminal process wherever it is conducted. The comments and reservations offered are proposed in that vein.

PRELIMINARY AND GENERAL

2. The Presidency document under consideration is not complete and has not addressed key concerns previously raised by the CCBE including an effective mechanism for Judicial Review

MEASURES TO RESTRAIN IMPROPER FORUM SHOPPING

3. Guarantees in relation to fundamental rights - including provisions in relation to the admissibility of evidence, access to a lawyer, legal aid (there should be proper legal aid in all cases which are investigated by the EPPO and there should be no EPPO as long as there are no common standards of legal aid in the Member States which will participate) standardisation of fundamental rights across the European Union, reinforcement of the principle of ne bis in idem and the provision of a remedy in respect of wrongful prosecution - these fundamental rights and procedural safeguards have been set out exhaustively in our earlier commentary and we refer expressively to them as they need to be included in the EPPO paper.

We remain firmly of the view that the measure to establish a European Public Prosecutor's Office cannot be properly evaluated until the provisions protecting the rights of suspected persons are also available for consideration.

2

The European Union is only too well aware of the unsatisfactory situation which persists as a result of the framework decision establishing the European Arrest Warrant model being introduced in advance of the procedural safeguards which were promised. Those safeguards have still not been fully introduced and the Arrest Warrant continues to pose significant practical problems for requested persons and their advisers by virtue of the lack of simultaneous safeguards being put in place.

Having regard to the above introductory observations, we comment as follows on the 2 March Presidency proposal:

In the first instance, we are happy to welcome the move to priority competence in place of the previously proposed automatic and exclusive competence being given to the European Public Prosecutor's Office.

We previously expressed concerns that the original proposal would swamp the office from the outset with an unrealistically heavy caseload resulting in damage being suffered not only by suspected persons but by national legal systems also. The current proposal appears to us to strike the correct balance identifying reasonable criteria for case selection and especially the provision which acknowledges that some cases can have such significance for the broader European Union that their prosecution by the European Public Prosecutor is warranted even if the sums at issue are not particularly high.

We reserve of course our position in respect of the internal rules of procedure which are not yet available to us.

SOME SPECIFIC ISSUES.

Article 5 - Basic principles of the activities

Article 5 (1)

We welcome the express and mandatory obligation on the European Public Prosecutor's Office to respect the rights enshrined in the Charter of Fundamental Rights of the European Union. While some commentators may take the view that this is merely an expression of the state of the law, in any event we are of the opposite view and hold that it is vital that fundamental rights are expressly acknowledged, especially in a document conferring significant additional powers on a new European institution. We accordingly expect that this mandatory language will also be included when the sections on fundamental rights and procedural safeguards are published.

Article 5 (5)
We believe this article could be expanded upon to indicate that the European Public Prosecutor will have the obligation of seeking out and disclosing exculpatory evidence and to make that evidence available to the defence in any proceedings they see fit to bring either in a national court or by way of Judicial Review to the court in Luxembourg.
Article 6 - Independence and accountability
Due to the situation in a number of Member States (for example, France, Spain, Poland, Belgium, Luxembourg), where at the hearing, the prosecutor sits at the table of the judge and accompanies the judge in the deliberation room before the beginning of the hearing, during any possible suspension of the hearing, and at the end of the hearing, which creates in the eyes of the public in the court room, including the parties to the case and their lawyers, the very unpleasant appearance and belief that there exists a special relationship/influence between prosecutor and judge and that discussions may take place between them in the deliberation room outside of the view and the knowledge of the other parties and their lawyers, we believe this article could be expanded upon to indicate that:
Under penalty of inadmissibility of the proceedings:
3
a) at the hearing the EPPO stands and speaks exclusively where the other parties and/or their lawyers do stand and plead;
b) the EPPO may not be in the deliberation room or in the office of the judge without the presence of the other parties to the case and/or their lawyers.
Article 7 and Article 8 - Structure of the European Public Prosecutor's Office/the College
The College Model risks creating bureaucracy without any added value. The Permanent Chambers will have to review the case material and take all the relevant decisions during the proceedings. This may have the effect that proceedings last much longer than they would if they were only led at a national level. This is especially true in cases where the suspect is in pretrial detention, as the College Model may cause an unnecessary period of pre-trial detention which may be in conflict with Art. 5 Par 3 of the European Convention on Human Rights.
Article 9 – Permanent Chambers
We wish to reserve comment on this Article and indeed on the other Articles conferring powers until such time as we have the text of the Judicial Review mechanism available to us.
It is our central concern that the measure should not provide a platform for forum shopping where a decision as to the venue of trial could be influenced by factors such as differential laws of evidence or more restrictive rules on pre-trial detention or on sentencing generally. We believe that any decision as to the venue of trial must be subject to meaningful Judicial Review, and that the rules of evidence ought not to be more favourable in one jurisdiction over another, and that sanctions should be on a par.
We believe that the material available to the permanent chamber under the provisions of Article 9 (3) ought also to be available to the suspect and his advisers.
Article 12 - European Delegated Prosecutors (and Article 6.1 and Article 15.2 last sentence)
While the internal rules of procedure (when they become available to us) may address some of our concerns, we wish once more to highlight the potential for a conflict of interest between a Prosecutor acting on the one hand as a National Prosecutor and at

the same time as a European delegated Prosecutor. There must be some measures proposed to remove the clear temptation to act inappropriately given the real potential for a conflict of interest. Whilst we appreciate the economic reason for having a part-time delegated Prosecutor we believe that the principled approach of having a strict dividing line between the two functions more than justifies the additional cost that might be borne.

Article 13 - Appointment and dismissal of the European Chief Prosecutor

Article 13 (2A)

We do not believe that serving members of the judiciary should be considered for appointment as European Public Prosecutor's. We have previously sought to emphasise the importance of distinguishing between the function of Prosecutors and the function of the judiciary. We believe that the rules of procedure must address this expressly. In keeping with that aim, members of the judiciary should remain disengaged from prosecution activities.

Article 13 (4)

We welcome the supervisory role to be given to the Court of Justice of the European Union and believe that a expanded section on the role of the court in relation to European Public Prosecutor issues will be required in the next draft of the Presidency proposal to include

4

issues such as Judicial Review, admissibility of evidence etc. We have previously pointed out our belief that a centralised system of obtaining rulings on procedural matters from the Court of Justice of the European Union will improve the standard of justice where European Public Prosecutor cases are concerned.

Article 22 - urgent measures

We express our concerns about the "confirmation" by the EPPO of "the [investigation] measures taken by the national authorities, even if such measures have been undertaken and executed under rules other than those of this Regulation." This provision could indeed work or be interpreted as an automatic "covering" of any possible inadmissible investigation measures taken by the national authorities, especially in "urgent" situation as concerned by this provision.

Article 23 (6) - Conducting the investigation

The protection of professional secrecy should equally apply to those who are advising suspected persons, and it might conveniently be recited at this juncture.

Article 26 - Investigation Measures

This Article lists several measures of investigation without any concrete preconditions or indications as to who (judge, prosecutor, police etc.) shall be entitled to carry out such measures.

In addition, the provisions of Article 26 (a) which provides that Member States shall ensure that the following investigative measures are also available under their laws to the European Public Prosecutor's Office - search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence - go well beyond the standard of the European Investigation Order.

Article 29 – Transactions

We had previously expressed our concern that the provision of an alternative to prosecution for those who could afford to pay a fine gave rise to the real risk of differential standards of administration of justice which could bring the entire system into disrepute. It would, for instance, appear that the perception would be created of

a "rich man's justice" where persons who had the means to enter into a transaction would be spared imprisonment etc.
While remaining concerned at this potential, we are pleased to note that certain additional measures have been introduced to the current proposal which address those concerns.
The measures which we welcome are 29 (1d) which acknowledges that a transaction must be an exceptional measure in circumstances where a party has not previously offended. 29 (2) acknowledges the importance of legal advice. We have previously expressed the view that the prospect of a prosecution at the hands of the European Public Prosecutor would be so daunting that many citizens, wholly innocent of wrongdoing, may be compelled to enter into a transaction rather than face the potentially ruinous cost of defending the proceedings. We interpret paragraph 29 (2) as acknowledging that a citizen must be provided, at public expense, with legal representation to ensure that there is no inequality of arms and that any decision to enter into a transaction is arrived at freely and fairly and with the benefit of full legal advice.
We welcome Paragraph 29(3) as it appears to specifically envisage the prospect of a low transaction fine being applied where the means of the suspect are such that this is the only realistic avenue open.
5
We would like to add the necessity of a provision stating that if no transaction can be reached between parties - which is a possibility - the EPPO may not use in the later stages of the proceedings any information, communication or documents given during the previous discussion between parties to reach this transaction. If not, the risk exists that a strategy could arise consisting of the EPPO proposing a transaction with no real intention to make it possible, but only to bring the prosecuted person to take such steps that will be used against him/her in the later prosecution as an acknowledgment of guilt.
We reserve further comment on the transaction proposal until the full measure, including the protection of fundamental rights, and provisions in respect of procedural safeguards are available for study.

CONCLUSION
We hope our comments are of assistance, and we are happy to elaborate on any aspect should this be required.

The beginning of the Endgame

Of course, the ECBA and the CCBE were not the only person's commenting on the measure at that time.

At the request of the Parliament the Fundamental Rights Agency prepared a report. Some of their findings are of great interest mirroring in many respects those that we had made ourselves.

While there is an abundance of other published material in relation to the Measure I think that it would be remiss not to make reference to the key findings of European Parliament Citizens Rights (LIBE) Committee who reported on the 28th October 2016 test and had the following key findings:

. SECTION 1 - INSTITUTIONAL DESIGN OF THE EPPO AND MAIN RELATED ISSUES

KEY FINDINGS

- The structure of the EPPO, as amended during the negotiations, now consists in a complex multi-layered system, whose contribution to the efficiency of investigations and prosecutions against PIF offences is doubtful. It is crucial to ensure that the most important operational decisions lie in the hands of the most "European-oriented" layers to keep a minimal level of verticalisation.
- The EPPO's independence from MSs and EU institutions is guaranteed through complex appointment procedures. It is accompanied by its political accountability to the EU institutions for its general activities.
- The EPPO must develop close relations with national authorities, especially since the competence over PIF offences is shared between them, and since national authorities are competent to conduct investigative measures in their respective MS. The principle of sincere cooperation applies from the moment a suspected offence is reported to the EPPO until it decides to prosecute or dismiss the case.

SECTION 2 – EPPO'S MATERIAL SCOPE OF COMPETENCE

The EPPO's material scope of competence has been early restrained to PIF offences. The latter will be defined in a separate instrument, i.e. the PIF directive, which only aims at approximating national laws.

- The insertion of VAT fraud within the PIF directive has been the subject of a long debate. A compromise, envisaging only the insertion of serious cross-border VAT cases, seems within reach. However, the finalisation of one provision in the EPPO proposal (Art. 20(3)) must be carefully monitored, as it might deprive the EPPO of its competence over VAT cases.
- The EPPO is also competent for ancillary offences, i.e. those inextricably linked to PIF offences. The new system based on measuring the preponderance of PIF offences may not be sufficient to prevent tensions, and it is regrettable that in case of disagreements, the final decision on the attribution of competence lies in the hands of national judiciary, with a very limited review by the ECJ.

SECTION 3 – THE PROCEDURAL FRAMEWORK

- With regard to EPPO's investigative powers, which are key to ensure its efficiency, one may regret the numerous limits identified, resulting either from the initial proposal, or introduced later. Variable geometry of EPPO's investigative powers will be strong, and further harmonisation might be necessary.
- In cross-border cases, European Delegated Prosecutors must be able to request the conduct of investigative measures in another MS, and use at a later stage the evidence collected abroad. However, the procedure currently envisaged - relying upon national law in particular to determine if a judicial authorisation is required-, may compromise the efficiency of the EPPO. Furthermore, whereas the mutual admissibility of evidence clearly supports the efficiency of the EPPO, it also raises concerns for the protection of fundamental rights, especially due to the lack of common standards on collection of evidence.

• Procedural safeguards for suspects and accused persons are now only defined with reference to EU Directives adopted in the field of EU criminal procedural law. This choice can be questioned, since it may submit individuals to variable standards depending on the applicable national law. Further harmonisation may be advisable, especially to better ensure the right to be actively involved in the criminal proceedings, and the access to the materials of the case.
• Judicial review has been extended during the negotiations. However, the provision is not clear enough to know the scope of the review respectively carried out by national judges and by the ECJ. More fundamentally, the text restrains to such an extent the jurisdiction of the ECJ that it raises the question of its compatibility with EU primary law.

SECTION 4 - THE EPPO'S RELATIONS WITH ITS PARTNERS

KEY FINDINGS

• The EPPO, as a new EU judicial body, will have to integrate itself in the landscape of already existing EU agencies also active in the PIF field. Its relations with Eurojust, OLAF and Europol are the object of specific provisions. Their cooperation will be of crucial importance to ensure that the EPPO contributes effectively to the fight against PIF offences. One may nevertheless especially regret the lack of details concerning the EPPO-Eurojust relations, and the neglect of Eurojust's specific expertise.
• Not all EU MSs will participate in the establishment of the EPPO. It is thus necessary to organise under which modalities their national authorities will cooperate with the EPPO. Although the text is still subject to changes, it seems to privilege the option of regulating the details of their cooperation in a separate instrument. Close monitoring of this issue is crucial, as the efficiency of the fight against PIF offences will partially depend from the quality of this provision.
• The EPPO's cooperation with third countries and international organisations is also essential. The text envisages a series of legal bases and hypothesis that the EPPO can use to request assistance from authorities located outside the EU territory. It should contribute to the efficiency of the fight against PIF offences

Suffice it to say that in the period from 2013 to 2016 there was extensive debate in both philosophical and practical terms concerning the Measure. We were naturally concerned at issues such as defendant's rights, evidence gathering, forum shopping legal aid and having available a system of Judicial Review which would ensure consistency in application throughout.

By 2016 however the proposal was highly developed in conceptual terms but there were still big political decisions to be made : Unanimity or enhanced co-operation? VAT fraud to be a PIF crime or not? Whither procedural safeguards.

However, there were also technical drafting issues, and practical mode of trial problems to be ironed out. For that reason, we enjoyed a particularly high level of engagement with the Commission officials promoting the Measure. The officials who were involved in the EPPO file were also the people who we were dealing with more or less at the same time in relation to the roadmap for procedural safeguards. While it is obviously invidious to single out any one individual, members will be very familiar

with the work of Peter Csonka who is a frequent participant in ECBA conferences. He is a person who has always given us the opportunity to articulate fair trial rights and insofar as his section in the Commission can do so we have always received maximum cooperation in terms of sharing of information and face-to-face contact.

We made written Submissions of course but in addition we were present at meetings with the Commission including with the Commissioner herself and her special adviser on this file Monsieur Falatelli, formerly the Prosecutor for Lyon

Those representing the ECBA at the meeting with Commissioner Jurova were Holger Matt and Vanya Costa Ramos and the CCBE were represented by Margareta Van Galen, Peter McNamee and myself.

I was also asked to attend a meeting of the special rapporteurs on this file of the European Parliament concentrating on the issue of fundamental rights.

I was not to know then of course that the real political tension was as to whether PIF crimes would include VAT fraud or not. Apparently in political terms the Parliament were extremely anxious to secure competence in respect of VAT fraud. Once it was included in PIF it fell within the competence of EPPO and the parliamentarians got their victory.
Politically, apparently, the trade-off was that those parliamentarians pressing for more detailed attention to fundamental rights simply dropped their concerns in that regard and the Measure is very much now as we see it.

Enhanced cooperation

By the end of 2016 it was apparent that it would not be possible to get unanimity. The United Kingdom, Ireland and Denmark had already ruled themselves out. Sweden became another country to make it clear that they would not agree. The Measure then proceeded not by way of a unanimous Measure but rather on the principle of enhanced cooperation involving at least nine member states as provided for in the Treaty for the functioning of the European Union

The current Measure 31st January 2017

The text as promulgated in January and which is attached to this paper is now the text that is under negotiation with a view to being adopted. We understand that only minor changes are likely to be introduced to this text and therefore this document is effectively that with which we will be working into the future.

We know from our discussions with the Commission and from public statements that the necessary political support is there and that this Measure will become a reality within this calendar year.

It follows also that the Measure will require transposition in those MS that have agreed to adopt it within two years thereafter.

We know that the intention is that the Measure once in place will affect investigations that are already under way and that therefore clients that we have who are under

investigation as of today's date will be proceeded against by the European Public Prosecutor in due course and we will have to have regard to the competences of the Prosecutor's authority.

Continuing Concerns

As colleagues will see many of the points we raised have been addressed at least in part. However, in my view the Measure still permits of becoming an instrument for gross misjustice simply because the evils of

-forum shopping
-differential trial outcomes
-lack of adequate procedural safeguards
-absence of a bespoke legal aid scheme
-overly limited judicial review

have not been dealt with. A brief analysis of some articles will quickly illustrate the difficulties we will encounter. I have added emphasis simply to highlight points for discussion

In the broadest possible terms you see that the Prosecutor will effectively use the national prosecutors as surrogates and conduct the prosecutions in the national courts in that way.

Article 17 Material competence of the European Public Prosecutor's Office
1. *The European Public Prosecutor's Office shall be competent in respect of the criminal offences affecting the financial interests of the Union which are provided for in Directive 2017/xx/EU, as implemented by national law, irrespective of whether the same criminal conduct could be classified, under national law, as another type of offence.*
1a. The European Public Prosecutor's Office shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1.
2. he European Public Prosecutor's Office shall also be competent for any other criminal offence which is inextricably linked to a criminal conduct falling within the scope of paragraph 1 of this Article. The competence with regard to such criminal offences may only be exercised in conformity with Article 20(3).
3. In any case, the European Public Prosecutor's Office shall not be competent for criminal offences in respect of national direct taxes and the structure and functioning of the tax administration of the Member States shall not be affected by this Regulation

Money laundering is clearly captured by 17(2) massively broadening the probable impact on all our practices.

Article 18
Territorial and personal competence of the European Public Prosecutor's Office

The European Public Prosecutor's Office shall be competent for the offences referred to in Article 17 where such offences:
a) were committed in whole or in part within the territory of one or several Member States; or
b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
c) were committed outside the territories referred to in point a) by a person who was subject to the Staff Regulations of Officials or to the Conditions of Employment of Other Servants of the European Communities, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

Article 19
Reporting, registration and verification of information
1. The institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent in accordance with applicable national law shall report without undue delay to the European Public Prosecutor's Office any criminal conduct in respect of which it could exercise its competence in accordance with Article 17, Article 20(2) and Article 20(3).
Article 20
Exercise of the competence of the European Public Prosecutor's Office
1. The European Public Prosecutor's Office shall exercise its competence either by initiating an investigation in accordance with Article 22 or by deciding to use its right of evocation in accordance with Article 22a. If the European Public Prosecutor's Office decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.
2. Where a criminal offence falling within the scope of Article 17 caused or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the European Public Prosecutor's Office may only exercise its competence if:
a) the case has repercussions at Union level which require an investigation to be conducted by the European Public Prosecutor's Office, or
b) officials or other servants of the European Union, or members of the Institutions could be suspected of having committed the offence.
The European Public Prosecutor's Office shall, where appropriate, consult the competent national authorities or Union bodies to establish whether the criteria set out in (a) and (b) are met.
3. The European Public Prosecutor's Office shall refrain from exercising its competence in respect of any offence falling within the scope of Article 17 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 28a if :
a) the maximum sanction provided for by national law for an offence falling within the scope of Article 17(1) is less severe than the maximum sanction for an inextricably linked offence as referred to in Article 17(2); or
aa) the maximum sanction provided for by national law for an offence falling within the scope of Article 17(1) is equal to the maximum sanction for an inextricably linked offence as referred to in Article 17(2) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 17(1) or;
b) there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence as referred to in Article 17 does not exceed the damage caused, or likely to be caused to another victim.

Point b) of this paragraph shall not apply to offences referred to in Article 3(a) and (d) of Directive 2017/xx/EU as implemented by national law.
3a. The European Public Prosecutor's Office may, with the consent of relevant national prosecution authorities, exercise its competence even in cases which would otherwise be excluded due to application of paragraph 3 subparagraph a).
4. The European Public Prosecutor's Office shall inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence.
5. In case of disagreement between the European Public Prosecutor's Office and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Articles 17(1a), 17(2), 20(2) or 20(3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall define the national authority which will decide on the attribution of competence

The de minimis test is nonetheless a nuanced one. How far could the extension of competence in 20(3)(a) eventually go ?

Article 22
Initiation of investigations and allocation of competences within the European Public
Prosecutor's Office
1. Where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed, a European Delegated Prosecutor in a Member State which according to its national law has jurisdiction over the offence shall, without prejudice to the rules set out in Article 20(2) and (3), initiate an investigation and note this in the case management system.
2. Where upon verification in accordance with Article 19(2), the European Public Prosecutor's Office decides to initiate an investigation, it shall without undue delay inform the authority that reported the criminal conduct in accordance with Article 19(1) or 19(1a).
3. Where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation4. A case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the Office have been committed, the Member State where the bulk of the offences has been committed. A European Delegated Prosecutor of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from the principle set out in the previous sentence is duly justified, taking into account the following criteria, in order of priority:
a) the place where the suspect or accused person has his/her habitual residence;
b) the nationality of the suspect or accused person;
c) the place where the main financial damage has occurred.
5. Until a decision to prosecute in accordance with Article 30 is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one

Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:
(a) reallocate a case to a European Delegated Prosecutor in another Member State;
(b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it; if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the European Delegated Prosecutor handling the case in accordance with paragraph 4.
6. Whenever the Permanent Chamber is taking a decision to reallocate, merge or split a case it shall take due account of the current state of the investigations.
7. The European Public Prosecutor's Office shall inform the competent national authorities without undue delay of any decision to initiate an investigation.

Article 22a Right of evocation
1. Upon receiving all relevant information in accordance with Article 19(1a), the European Public Prosecutor's Office shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than five days after receiving the information from the national authorities and shall inform the national authorities of that decision. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time frame by a maximum period of five days, and shall inform the national authorities accordingly.
1a. During these time frames the national authorities shall refrain from taking any decision under national law which may have the effect of precluding the European Public Prosecutor's Office from exercising its right of evocation.
The national authorities shall take any urgent measures necessary, according to national law, to ensure effective investigation and prosecution.
2. If the European Public Prosecutor's Office becomes aware, through means other than that information referred to in Article 19(1a), of the fact that an investigation in respect of a criminal offence for which it could be competent is already undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. After being duly informed in accordance with Article 19(1a), the European Public Prosecutor's Office shall take a decision on whether to exercise its right of evocation. The decision shall be taken within the time frame set out in paragraph 1 of this Article.
3. The European Public Prosecutor's Office shall, where appropriate, consult the competent authorities of the Member State concerned before deciding on whether to exercise its right of evocation.
4. Where the European Public Prosecutor's Office exercises its right of evocation, the competent authorities of the Member States shall transfer the file to the European Public Prosecutor's Office and ref5. The right of evocation set out in this Article may be exercised by a European Delegated Prosecutor from any Member State whose competent authorities have initiated an investigation in respect of an offence falling within the scope of Articles 17 and 18. Where a European Delegated Prosecutor, who has received the information in accordance with Article 19(1a), considers not to exercise the right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State with a view to enabling the Permanent Chamber to take a decision in accordance with Article 9(3a).
6. Where the European Public Prosecutor's Office has refrained from exercising its competence, it shall inform the competent national authorities without undue delay. The competent national authorities shall, at any time in the course of the proceedings,

inform the Office of any new facts which could give the Office reasons to reconsider its previous decision.
The European Public Prosecutor's Office may exercise its right of evocation after receiving such information, provided that the national investigation has not already been finalised and that an indictment has not been submitted to a court. The decision shall be taken within the timeframe set out in paragraph 1.
. 7. Where, with regard to offences which caused or are likely to cause damage to the Union's financial interests of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 8(2), issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.
The guidelines shall specify with all necessary details the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to get a full recovery of the damage to the Union's financial interests

Article 25
Investigation measures and other measures
1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least four years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures:
(a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
(b) obtain the production of any relevant object or document either in original or in some other specified form;
(c) obtain the production of stored computer data, encrypted or decrypted, either in original or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to Article 15(1), second sentence, of Directive 2002/58/EC of the European Parliament and of the Council9;
(d) freeze instrumentalities or proceeds of crime, including assets, which are expected to be subject to confiscation by the trial Court and where there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation.
(e) intercept electronic communications to and from the suspect or accused person, on any electronic communication connection that the suspect or accused person is using;
(f) track and trace an object by technical means, including controlled deliveries of goods.
1a. Without prejudice to Article 24, the investigation measures set out in paragraph 1 of this Article may be subject to conditions in accordance with the applicable national law if the latter are explicitly foreseen for specific categories of persons or professionals legally bound by an obligation of confidentiality.

1b. The investigation measures set out in paragraph 1(c), (e) and (f) of this Article may be subject to further conditions, including limitations, provided for in the applicable national law. In particular, Member States may limit the application of paragraph 1(e) and (f) of this Article to specific serious offences. A Member State intending to make use of such limitation shall notify the European Public Prosecutor's Office of the relevant list of specific serious offences in accordance with Article 73.
2. The European Delegated Prosecutors shall, in addition to the measures referred to in paragraph 1, be entitled to request or to order any other measures in their Member State which are available to prosecutors under national law in similar national cases.
3. The European Delegated Prosecutors may only order the measures referred to in paragraphs 1 and 2 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for taking the measures shall be governed by the applicable national law.

Article 26
Cross-border investigations
1. The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the European Delegated Prosecutor handling the case, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where that measure needs to be carried out.

Article 28
Pre-trial arrest and cross-border surrender
1. The European Delegated Prosecutor handling the case may order or request the arrest or pretrial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases.
2. Where it is necessary to arrest and surrender a person who is not present in the Member State in which the European Delegated Prosecutor handling the case is located, the latter shall issue or request the competent authority of that Member State to issue a European Arrest Warrant in accordance with Council Framework Decision 2002/584/JHA10.

In my jurisdiction there has been some debate as to whether given we are not opting in to this measure we would in fact surrender on an EAW. There is no doubt however that the Commission are of the view that a refusal to do so would be a breach of an obligation of membership

Article 28a
Referrals and transfers of proceedings to the national authorities
1. Where an investigation conducted by the European Public Prosecutor's Office reveals that the facts subject to investigation do not constitute a criminal offence for which it is competent in accordance with Articles 17 and 18, the competent Permanent Chamber shall decide to refer the case without undue delay to the competent national authorities.

2. Where an investigation conducted by the European Public Prosecutor's Office reveals that the specific conditions for the exercise of its competence set out in Article 20(2) and (3) are no longer met, the competent Permanent Chamber shall decide to refer the case to the competent national authorities without undue delay and before initiating prosecution at national courts.
2a. Where, with regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it shall in accordance with Article 8(2), issue general guidelines allowing the Permanent Chambers to refer a case to the competent national authorities.
Such guidelines shall also allow the Permanent Chambers to refer a case to the competent national authorities where the European Public Prosecutor's Office exercises a competence in respect of offences referred to in Article 3 (a) of Directive 2017/xx/EU and where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim.

Article 30
Prosecution before national Courts

2. Where more than one Member State has jurisdiction over the case, the Permanent Chamber shall <u>in principle</u> decide to bring the case to prosecution in the Member State of the European Delegated Prosecutor handling the case. The Permanent Chamber <u>may, taking into account</u> the report provided in accordance with Article 29(1), 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 22(4) and 22(5), and instruct a European Delegated Prosecutor of that Member State accordingly.

A cynic might observe there is a lot of wriggle room here to forum shop.

Article 31
Evidence
1. Evidence presented by the prosecutors of the European Public Prosecutor's Office or the defendant to a court shall not be denied admission on the <u>mere ground</u> that the evidence was gathered in another Member State or in accordance with the law of another Member State.
<u>2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the European Public Prosecutor's Office shall not be affected by this Regulation.</u>

<u>Article 33</u>
<u>Dismissal of the case</u>
1. The Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 29(1), decide to dismiss the case against a person where prosecution has become impossible, pursuant

to the law of the Member State of the European Delegated Prosecutor handling the case, on account of any of the following grounds:
a) death of the suspect or accused person or winding up of a suspect or accused legal person;
aa) insanity of the suspect or accused person;
b) amnesty granted to the suspect or accused person;
c) immunity granted to the suspect or accused person, unless it has been lifted;
d) expiry of the national statutory limitation to prosecute;
e) a person's case has already been finally disposed of in relation to the same acts;
f) lack of relevant evidence.

It is obviously a difficulty that crime that is considered Pan European can nonetheless be subject to varying different statutes of limitation.Is the principal offender in whose jurisdiction there is a strict statute of limitations to be out on trial in the jurisdiction of those who may have laundered the final phase of the proceeds, if conveniently there is no limitation period there.

In this context, there is the recent Italian VAT case of C-105/14 - Taricco and Others where on a reference to the CJEU it is suggested national rules of limitation should be disapplied.

On those grounds, the Court (Grand Chamber) hereby rules:

1. A national rule in relation to limitation periods for criminal offences such as that laid down by the last subparagraph of Article 160 of the Penal Code, as amended by Law No 251 of 5 December 2005, read in conjunction with Article 161 of that Code — which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration — is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU.

2. A limitation system applicable to criminal offences in relation to value added tax such as that established by the last subparagraph of Article 160 of the Penal Code, as amended by Law No 251 of 5 December 2005, read in conjunction with Article 161 of that Code, cannot be assessed in the light of Articles 101 TFEU, 107

This will undoubtedly lead to much litigation.

SECTION 5
RULES ON SIMPLIFIED PROCEDURES

Article 34
Simplified prosecution procedures
1. If the applicable national law provides for a simplified prosecution procedure aiming at the final disposal of a case on the basis of terms agreed with the suspect, the handling European Delegated Prosecutor may, in accordance with Articles 9(3) and 29(1), propose to apply this procedure in accordance with the conditions provided for in national law to the competent Permanent Chamber.
Where the European Public Prosecutor's Office exercises a competence in respect of offences referred to in Article 3(a) of Directive 2017/xx/EU and where the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused or likely to be caused to another victim, the handling European Delegated Prosecutor shall consult national prosecution authorities before proposing to apply a simplified prosecution procedure.
2. The Permanent Chamber shall decide on the proposal of the European Delegated Prosecutor handling the case taking into account the following grounds:
(a) the seriousness of the offence, based on in particular the damage caused to the financial interests of the Union,
(b) the willingness of the suspected offender to repair the damage caused by the illegal conduct,
(c) the use of the procedure would be in accordance with the general objectives and basic principles of the European Public Prosecutor's Office as set out in this Regulation,
The College shall, in accordance with Article 8 (2), adopt Guidelines on the application of these grounds.
3. If the Permanent Chamber agrees with the proposal, the handling European Delegated Prosecutor shall apply the simplified prosecution procedure in accordance with the conditions provided for in national law and register it in the case management system. When the simplified prosecution procedure has been finalised following the fulfilment of the terms agreed with the suspect, the Permanent Chamber will instruct the European Delegated Prosecutor to act with a view to finally dispose of the case.

Transaction by another name
Potential for Forum Shopping
No longer the requirement of previous good character

CHAPTER V
PROCEDURAL SAFEGUARDS
Article 35
Scope of the rights of the suspects and accused persons
1. The activities of the European Public Prosecutor's Office shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the rights of defence.
2. Any suspect and accused person in the criminal proceedings of the European Public Prosecutor's Office shall, as a minimum, have the procedural rights as they are provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as:

(a) the right to interpretation and translation, as provided for in Directive 2010/64/EU of the European Parliament and of the Council12,
(b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU of the European Parliament and of the Council13,
(c) the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention, as provided for in Directive 2013/48/EU of the European Parliament and of the Council,
(d) the right to remain silent and the right to be presumed innocent as provided for in Directive 2016/343/EU of the European Parliament and of the Council15,
(e) the right to legal aid as provided for in Directive 201x/xx/EU of the European Parliament and of the Council16.
3. Without prejudice to the rights provided in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the European Public Prosecutor's Office shall have all the procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the European Public Prosecutor's Office to obtain such measures on behalf of the defence.

Mandatory but non-exhaustive language
All amenable to JR
Is a right to "request" a right at all – why not "direct"

Article 36
Judicial review
1. Procedural acts of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies in case of failures of the European Public Prosecutor's Office to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation.
2. The Court of Justice of the European Union shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning:
a) the validity of procedural acts of the European Public Prosecutor's Office, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;
b) the interpretation or the validity of provisions of Union law, including this Regulation;
c) the interpretation of Articles 17 and 20 of this Regulation in relation to any conflict of competence between the European Public Prosecutor's Office and the competent national authorities.
3. By way of exception to paragraph 1, the decisions of the European Public Prosecutor's Office to dismiss a case, in so far as they are contested directly on the basis Union law, shall be subject to review before the Court of the Justice in accordance with the fourth paragraph of Article 263 TFEU.
4. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 268 of the Treaty in any dispute relating to compensation for damage caused by the European Public Prosecutor's Office.

5. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 272 of the Treaty in any dispute concerning arbitration clauses contained in contracts concluded by the European Public Prosecutor's Office.
6. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 270 of the Treaty in any dispute concerning staff-related matters.
7. The Court of Justice of the European Union shall have jurisdiction on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively, with Articles 13(4) and 14(5) of this regulation.
8. This Article is without prejudice to judicial review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU of decisions of the European Public Prosecutor's Office which affect the data subjects' rights under Chapter VI and of decisions of the European Public Prosecutor's Office which are not procedural acts, such as decisions of the European Public Prosecutor's Office concerning the right of public access to documents, or decisions dismissing European Delegated Prosecutors adopted pursuant to Article 15(3) of this Regulation or any other administrative decisions.

Did our campaigning make any difference ?

I like to think yes; some examples of language that is tighter in respecting defence rights

Article 5
Basic principles of the activities
1. The European Public Prosecutor’s Office shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union.
2. The European Public Prosecutor's Office shall be bound by the principles of rule of law and proportionality in all its activities
4. The European Public Prosecutor’s Office shall conduct its investigations in an impartial manner and seek all relevant evidence whether inculpatory or exculpatory.

Article 20
Exercise of the competence of the European Public Prosecutor’s Office

2. Where a criminal offence falling within the scope of Article 17 caused or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the European Public Prosecutor’s Office may only exercise its competence if:
a) the case has repercussions at Union level which require an investigation to be conducted by the European Public Prosecutor’s Office, or
b) officials or other servants of the European Union, or members of the Institutions could be suspected of having committed the offence.
The European Public Prosecutor’s Office shall, where appropriate, consult the competent national authorities or Union bodies to establish whether the criteria set out in (a) and (b) are met.

Article 22a
Right of evocation
1. Upon receiving all relevant information in accordance with Article 19(1a), the European Public Prosecutor’s Office shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than five days after receiving the

information from the national authorities and shall inform the national authorities of that decision. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time frame by a maximum period of five days, and shall inform the national authorities accordingly.
Where, with regard to offences which caused or are likely to cause damage to the Union's financial interests of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 8(2), issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.
The guidelines shall specify with all necessary details the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to get a full recovery of the damage to the Union's financial interests.

CHAPTER V
PROCEDURAL SAFEGUARDS
Article 35
Scope of the rights of the suspects and accused persons
1. The activities of the European Public Prosecutor’s Office shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the rights of defence.
2. Any suspect and accused person in the criminal proceedings of the European Public Prosecutor’s Office shall, as a minimum, have the procedural rights as they are provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as:
(a) the right to interpretation and translation, as provided for in Directive 2010/64/EU of the European Parliament and of the Council12,
(b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU of the European Parliament and of the Council13,
(c) the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention, as provided for in Directive 2013/48/EU of the European Parliament and of the Council,
(d) the right to remain silent and the right to be presumed innocent as provided for in Directive 2016/343/EU of the European Parliament and of the Council15,
(e) the right to legal aid as provided for in Directive 201x/xx/EU of the European Parliament and of the Council16.
3. Without prejudice to the rights provided in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the European Public Prosecutor’s Office shall have all the procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the European Public Prosecutor’s Office to obtain such measures on behalf of the defence.

Article 36
Judicial review

1. Procedural acts of the European Public Prosecutor’s Office which are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies in case of failures of the European Public Prosecutor's Office to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation.
2. The Court of Justice of the European Union shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning:
a) the validity of procedural acts of the European Public Prosecutor's Office, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;
b) the interpretation or the validity of provisions of Union law, including this Regulation;
c) the interpretation of Articles 17 and 20 of this Regulation in relation to any conflict of competence between the European Public Prosecutor's Office and the competent national authorities.
3. By way of exception to paragraph 1, the decisions of the European Public Prosecutor's Office to dismiss a case, in so far as they are contested directly on the basis Union law, shall be subject to review before the Court of the Justice in accordance with the fourth paragraph of Article 263 TFEU.
4. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 268 of the Treaty in any dispute relating to compensation for damage caused by the European Public Prosecutor's Office.
5. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 272 of the Treaty in any dispute concerning arbitration clauses contained in contracts concluded by the European Public Prosecutor's Office.
6. The Court of Justice of the European Union shall have jurisdiction in accordance with Article 270 of the Treaty in any dispute concerning staff-related matters.
7. The Court of Justice of the European Union shall have jurisdiction on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively, with Articles 13(4) and 14(5) of this regulation.
8. This Article is without prejudice to judicial review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU of decisions of the European Public Prosecutor's Office which affect the data subjects' rights under Chapter VI and of decisions of the European Public Prosecutor's Office which are not procedural acts, such as decisions of the European Public Prosecutor's Office concerning the right of public access to documents, or decisions dismissing European Delegated Prosecutors adopted pursuant to Article 15(3) of this Regulation or any other administrative decisions.