European Criminal Bar Association

Notes on the Internal Rules of Procedure of the

European Public Prosecutor's Office

(College Decision 003/2020)

Introduction: The ECBA

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers, with members from European Union and Council of Europe Member States, and beyond.

The association itself is wholly independent and free from outside interference.

The primary purpose of ECBA is to be a leading group of independent criminal defence lawyers and criminal law experts in Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons. For more information, please refer to our website www.ecba.org.

The ECBA provides these notes in a constructive spirit, in view of promoting a discussion in the context of amendments to the internal rules, under Article 70 thereof.

1. General Remarks

From a **perspective of the defence** (as well as from a perspective of victims' lawyers), a **general remark** must be made: it is **notable that there are no provisions dealing with these actors, and their interactions with the European Public Prosecutor's Office (EPPO)**. This is regrettable as it shows that the internal rules are not aimed at providing any interaction with defence and victims' lawyers, although there are, of course, procedural requirements for such interaction.

It should be a matter of course for future EPPO proceedings that they meet as best practices a high level of legal standards which should not only be exemplarily compliant with the standards of the Charter of Fundamental Rights of the EU (CFREU) (cf. Art 41 par 1 of the EPPO Regulation (EU/2017/1939) and the (future) jurisprudence of the Court of Justice of the European Union (CJEU) including the jurisprudence on the minimum standards according to the Directives on procedural rights (cf. Art. 41 par 2), but also with the minimum standards of the Europan Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR).

The higher the level of legal quality of the proceedings and the more the rule of law standards are fully complied with in future EPPO proceedings, the higher will be the degree of respect and the acceptance of this new European institution, which will finally lead to a stronger and more cohesive Union of all participating Member States and strengthen the European Union.

Evidence collection should consider the legal rules, which have impact in the admissibility of evidence, in all participating Member States, in order to set a clear common standard for all future EPPO proceedings (cf. Art 37 of the EPPO Regulation (EU/2017/1939) irrespective of the geographical area of investigation. That would be the appropriate instrument to avoid any danger of forum shopping and related legal

objections by concerned parties, for example in terms of the use of evidence in a trial at a later stage of the proceedings.

It is also in the interest of justice in all civilized countries that the defence is in a position to contribute responsibly to the case in good time before the closure of the investigation, not only in theory but in practise.

For defence practitioners one of the most essential procedural rights is the effective use of the right to information about the case, including the existing evidence, before any investigation has been finished and an indictment has been submitted to a Court for trial.

Providing the defence with early access to the case files increases the chance to avoid superfluous indictments and trials and finally miscarriages of justice.

The right to **inspection of the file**, a human right guaranteed by Art. 6 of the ECHR as well as by Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, should be strengthened in the daily practise of future EPPO proceedings at a fair high level throughout Europe. However, Art 41 par 2 b and Art 45 par 2 of the EPPO Regulation (EU/2017/1939) refer only to national law and national practise.

Access to the case files is mandatory to guarantee a fair trial. In that sense, EPPO proceedings do not differ from any domestic criminal proceedings.

However, one of the most important aspects of the future operational work of a cross border and supranational structure as the EPPO are the **principles concerning the organisation and record-keeping of the cases files** (completeness, accuracy and accessibility, etc.).

This is also one of the most important issues for suspected or accused persons, as well as for victims, who cannot exercise their rights adequately without accessing the case files.

In this regard, it is regrettable that no provisions on access to the case files by suspect or accused persons, as well as for victims, have been included in the draft internal regulations (namely in Article 61).

The ECBA recalls that, as recognised in Article 7, paragraph, Directive 2012/13/EU, full access to the case must be granted at the latest in the moment when a person is arrested.

In other cases, access to the materials of the case files should be granted in due time to allow the effective exercise of the rights of the defence. In order to make this possible, as a matter of principle, access should be granted at the earliest stage possible. Additionally, access should always be granted as soon as coercive investigative measures have been taken (such as search and seizure, freezing of bank accounts, etc.).

The ECBA urges the EPPO to establish clear guidelines on this topic in the internal rules, in order to ensure to the extent best as possible a uniform EU-wide approach to this issue. Such guidelines would make clear how the discretion allowd by domestic law in this field should be interpreted in EPPO proceedings, in a manner which is consistent with EU Law, in particular the afore mentioned Directive and the CFREU, but also the ECHR.

Those guidelines should further establish that the principles of completeness, accuracy and accessibility, are respected. These principles are a pre-requisite to the fairness of the trial and the equality of arms (Article 6 ECHR).

This will be an important tool both for the EPPO and defence and victim's lawyers, by establishing clear guidelines and equal protection of the rights of suspects and victims all over the EU, irrespective from the MS in which the handling EDP is located.

In this regard, the ECBA would like to draw your attention to the **ECBA 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**[1]**.**

EPPO cases are generally more complex and deal with substantial charges and damages. Hence, in the interest of justice, lawyers should be able to participate effectively and meaningfully in the proceedings on behalf of the concerned persons at the earliest stage possible.

The ECBA would like to stress not only the legal necessity to guarantee legal assistance by a lawyer in EPPO proceedings but also the important, 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. On the other hand, if the defence is denied access to the case file, this will in many cases unduly prolong the proceedings, as an admission cannot be reasonably made without knowing the evidence.

It ensures the fairness of proceedings because only on the basis of the same level of information can equality of arms be ensured and only then a meaningful interaction of the parties can be facilitated. 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.

[1] http://www.ecba.org/content/index.php/publications/statements-and-press-releases/623-ecba-cornerstones-on-a-european-public-prosecutor-s-office-eppo-art-86-tfeu (accessed on 31.01.2021).

2. Commentaries on provisions of the internal rules

2.1. Article 2

A positive **exception** to this general remark is **Article 2, paragraph 3**, dealing with the **language arrangements** in the field of "[c]ommunications with persons involved in criminal proceedings, such as suspected or accused persons, victims and witnesses, or with other third parties".

The ECBA welcomes the need to respect the relevant EU and international legal instruments in the field of language requirements. However, the ECBA would recommend that explicit reference to Article 41 of the EPPO Regulation is made in this provision, as a reminder that applicable national laws should abide with the minimum rules established in the procedural rights' directives in this field, namely Directive 2010/64/EU and 2012/13/EU.

The ECBA believes that in the near future it would also be advisable for the EPPO, using the powers conferred by Article 9(2) and (4) of the Regulation, to elaborate a non-exhaustive list of essential documents that normally require a translation, since the differences among Member States in this regard are significant.

In this regard, attention should be drawn to a report of the Fundamental Rights Agency that analysed the implementation of Art. 3 of Directive 2010/64/EU.[2] From this, it follows that EU Member States have seen the necessity to translate, inter alia, the following documents:

- Indictments (Estonia)
- Summons to appear; all decisions that concern deprivation of liberty and inadmissibility of evidence, as well as judicial decisions regarding motions for evidence and recuse (Slovenia);

[2] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf (accessed on 31.01.2021).

- Letters of rights, orders to open investigations, judicial decisions on evidence, indictments, summons, any judicial decision in the intermediary and trial phase and judicial decisions regarding remedies (Croatia);
- Information on the charges, written interview notes and written statements that occurred after being legally warned (UK);
- All judicial decisions regarding detention, indictments, and all judicial decisions in first instance, appeal and cassation, including a right of the defence to apply for the translation of other documents that are deemed essential and that can only be rejected with a reasoned decision (Bulgaria);

In addition to these, the other jurisdictions also foresee the translations of essential documents, inter alia:

- All or part of all decisions regarding detention, indictments issued during the investigation phase if a copy is requested, and final indictments that effectively refer the case to the Court), and judicial decisions on criminal liability (France)[3];

- Decisions regarding personal precautionary measures, notice of the conclusion of the preliminary investigation, decrees that indicate the preliminary hearing, citation to trial, judgments and decrees of criminal conviction (Italy)[4].

- Evidence disclosed to the defence, including statements made during police interviews, memo of interview, witnesses statements (including statements from police officers) and more generally any written evidence (including invoices, bank statements and expert reports); further, facilities are provided for the defence to obtain the translation of any written correspondence exchange with the client (Ireland).

Further, the Supreme Court in the Netherlands declared a conviction of a Romanian citizen accused as null and void as he had received his summons only in Dutch and

[3] Art.D594-6 French Code of Criminal Procedure.

[4] Art. 143 of the Italian Code of Criminal Procedure

not Romanian language (Hoge Raad der Nederlanden, 2015, case no. 14/00030, 03.02.2015 ECLI:NL:HR:2015:136)[5].

Similarly, in Italy the Court of Cassation decided that the time limit to lodge an appeal to that Court would only start running after the judgment had been translated into the mother tongue of the accused (Court of Cassation, 6th criminal chamber, case no. 25376, 06.04.2017 ECLI:IT:CASS:2017:25276PEN[6]).

The ECBA is at the EPPO's disposal to contribute to drafting of such a list, with contributions from the ground, by its members who represent both suspects / accused and victims, as well as witnesses and third parties.

2.2. Article 3

In the field of language requirements, the ECBA notes that Article 3, paragraph 1, refers to high quality and speedy translations. The ECBA urges the EPPO to fund appropriate solutions to make sure that speedy translations are not made by automated means, and are subject to the same quality standards as other translations, also in line with the quality standards referred to in Article 5, Directive 2010/64/EU. In this regard, practitioners' organisations, such as EULITA[7] (European Legal Interpreters and Translators Association) should be consulted.

2.3. Article 5

[5] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:136 (accessed on 31.01.2021).

[6] http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20170519/snpen@s60@a2017@n25276@tS.clean.pdf (accessed on 31.01.2021)

[7] https://eulita.eu (accessed on 31.01.2021)

As a matter of transparency, the ECBA believes that European lawyers' organizations should be consulted before the approval of a decision in relation to general issues arising from individual cases, in particular with a view to ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the Member States, as well on other matters as specified in the EPPO Regulation – Article 9(2).

This is especially the case when issues relate to the exercise of the rights to defence or victims, but also in regards to general matters in the interests of justice and fairness of proceedings and transparency.

Since the information referred to in Article 5 will be provided in an anonymised manner, such a participation will not jeopardise pending investigations. On the contrary, it will contribute to ensuring the coherence, efficiency and consistency of the decisions made, as well as their acceptance by the public and the potential addressees. It will also contribute to strengthening public trust in and support for this new institution.

The ECBA is happy to assist the EPPO in this regard

2.4. Article 6

These priorities should be made public (preferably, on the EPPO's website). There is no provision laying down such a requirement, which is notable, especially when compared to Article 11, §5, where publication is explicitly provided for.

Moreover, as a matter of transparency and with a view to strengthening public trust in and support for this new institution, the ECBA believes that European lawyers' organizations should be consulted before the approval or amendment of such priorities.

The ECBA is happy to assist the EPPO in this regard.

2.4. Article 11

The ECBA welcomes that the decisions on the adoption of the guidelines referred to in Article 11 (guidelines on delegation by the Permanent Chamber to the Supervising European Prosecutor of the power to bring a case to judgment or to dismiss a case in offences where damage lies under 100.000 EUR; guidelines on the exercise of competence by the EPPO in offences where damage lies under 10.000 EUR; guidelines allowing EDP not to evoke cases where damage lies under 100.000 EUR; guidelines for referring cases to the national authorities where damage lies under 100.000 EUR; guidelines for the use of simplified procedures[8]) are published on the website of the EPPO, which is a sign of transparency.

Here, too, as a matter of transparency and with a view to strengthening public trust in and support for this new institution, the ECBA believes that European lawyers' organizations should be consulted before the approval of such guidelines, or their revision.

The ECBA is happy to assist the EPPO in this regard.

2.5. Article 22

Again, as a matter of transparency and accountability, and in order to strengthen public trust in and support for this new institution, the ECBA believes that these reports should be published (for example, on the EPPO's website).

2.6. Articles 32 and 69

[8] Articles 10(7), 24(10), 27(8), 34(3) and 40(2) of the Regulation.

The defence lawyer (as the victim's lawyer) should also be able to bring conflicts of interest to the attention of the EPPO. A simplified and unified procedure for the communications of such potential conflicts of interest should be established.

Once a decision to replace a Prosecutor is made, the concerned parties (such as the defence and the victim) should also be notified of such a decision to the extent that this does not jeopardize the investigation. If notification is not possible at the time of replacement, notification should be provided for as soon as possible, and a reasoned decision outlining why notification is impossible at this particular point of time should be recorded in the case files.

2.7. Article 38

Article 38(2)(a) states that the registration of information received or acquired by the EPPO in the case management system shall include "the source of the information, including the identity and contact details of the organization or person who has provided it, unless applicable rules regarding the protection of informers and whistle-blowers are applicable and provide otherwise". This should also be read this in conjunction with article 41(2)(b), which stipulates that information regarding the "natural persons who reported" the offence should be included in the case management system.

The ECBA notes that the internal rules do not set out how a person could report a crime to EPPO. There is only reference to reporting by EU bodies or agencies.

The ECBA suggest that the EPPO internal rules are updated to set out such a procedure in a way that would bear in mind whistle-blowers' rights, but also bearing in mind that in principle the suspect or accused person must have access to the information on the identity of the person who reported an offence, in order to exercise their defence rights in an effective manner, as recalled by Article 41(1) and (2)(b) of the Regulation and in accordance with Article 7, Directive 2012/13/EU (see e.g. also

recital 82, 100 and Articles 16 and 22 Directive 2019/1937/EU of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law).

The ECBA is happy to assist the EPPO in this regard.

2.8. Article 41

The ECBA believes that the place where the alleged offence has been committed should also be included in Article 41, paragraph 2, vii). This is the most elementary information, besides the time of the commission, that must be given to precise the specific offence. This information is important not only for the exercise of defence rights, but also for the establishment of jurisdictional links.

On behalf the ECBA

Vincent Asselineau (Chairperson)

The Rapporteurs: Constance Ascione le Dréau, Amedeo Barletta, Vânia Costa Ramos (Vice-Chair), Ioanna Lamprinaki, Elise Martin-Vignerte, Holger Matt, Anna Oehmichen.

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