

**European Criminal Bar Association (ECBA)  
EPP0 Working Group**

**Proposal to the College of the European Public Prosecutor's Office (EPP0)  
on Guidelines in respect of Access to the Case File**

**The ECBA**

The European Criminal Bar Association ('ECBA') was founded in 1997 and is an association of independent specialist defence lawyers across Europe, representing the views of defence lawyers and promoting the administration of justice and human rights under the rule of law in Europe and among the peoples of the world.

The ECBA is one of the main interlocutors of the European institutions on issues of criminal justice and the protection of the right of defence and fundamental rights, representing thousands of legal practitioners all around Europe through their direct affiliation to the Association as individual members, or through the Collective members that participate to the life of the Association.

The development of the legislation on the Protection of Financial Interests of the European Union and the European Public Prosecutor's Office ('EPP0') and its consistency with the principles of the rule of law and the rights recognised and guaranteed by the Charter of Fundamental Rights of the EU (the 'Charter') have been one of the main fields of action of the ECBA over the years.

When the EPP0 became operational, as of June 2021, the ECBA continued its work in the field by forming a working group to reflect on defence issues and procedural rights in EPP0 proceedings. Creating a new criminal procedure for a new institution is a complex matter, in which defence rights should be fully acknowledged and protected.

The working group ('WG') has been focusing on the lack of specific regulations of defence and procedural rights, the impact on the rights of the suspects at the national level and problems relating to access to the case file. Since June 2022, the WG organises monthly online meetings to discuss practical issues and experiences regarding EPP0 cases from different countries.

Using the knowledge from the ground gained through the activities of the WG, the ECBA furthermore interacts with the EPP0 and other institutional stakeholders to convey the views of practitioners and help to build a practice that is in conformity with the highest standards of a fair trial and the rights of individuals. These exchanges take place in the context of the main institutional objectives of the ECBA: the dialogue with judicial institutions and the dissemination of a culture of strengthening the protection of fundamental rights and procedural safeguards.

With this aim, back in October 2023, the WG prepared a proposal to improve the framework on access to the case file in EPP0 proceedings. We now wish to bring it to the public and look forward to receiving any comments via our institutional e-mail [secretariat@ecba.org](mailto:secretariat@ecba.org).

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## Introduction

The European Public Prosecutor's Office (EPPO) plays a very important role in ensuring justice across EU Member States in criminal proceedings regarding offences against the protection of the financial interests of the EU ('PIF offences').

However, with regard to EPPO proceedings, disparities have emerged regarding the key issue of access to the case file. These disparities have also been observed in respect of proceedings within the same country.

There are two crucial issues which are dependent on the different procedural law and different practises in Member States - and perhaps these are also applicable in different regions of a Member State:

- (a) the timeline to obtain access to the case file, and
- (b) the contents of the file and the principle of completeness.

A third and fourth issue are specific EPPO issues:

- (c) the contents of a file in the assisting Member State (cf. Art 31 Reg.) and
- (d) the inclusion or exclusion of communication between (handling and assisting) European Delegated Prosecutor (EDP), Permanent Chamber (PC), supervising EP and other internal EPPO communication with relevance for decision-making in respect of the investigation and procedure.

## Proposal

This proposal seeks to ensure a fair and transparent process for all parties involved.

It is important to underline that, at the central level, the Permanent Chambers play an essential role in ensuring the impartiality and objectivity of decisions taken on behalf of the European Public Prosecutor's Office.

The work of the Permanent Chambers is designed to ensure the coherence, efficiency, and consistency of EPPO prosecution policy, which can only be achieved through a harmonised criminal procedure applicable to all EPPO proceedings.

The EDPs carrying out investigations require the approval of the competent Permanent Chamber to take any operational decision, such as closing a case, applying a simplified criminal procedure, referring a case to national authorities, or reopening an investigation following an initial decision to close it. In addition, the permanent chambers provide the EDPs with binding instructions on essential aspects of the investigation, such as opening an investigation, taking over a national investigation, assigning investigations not assigned to the delegated European Prosecutors or reassigning investigations, as well as deciding on whether an assisting EDP has to comply with the assignment of an investigating measure by the handling EDP where *"an alternative but less intrusive measure would achieve the same results as the measure assigned"* or *"the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State"* (Article 31(5), (7) and (8) EPPO Regulation).

For example, according to Art. 36 para. 1 EPPO Regulation: *When the European Delegated Prosecutor submits a draft decision proposing to bring a case to judgment, the Permanent Chamber shall, following the procedures set out in Article 35, decide on this draft within 21 days. The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment.* The draft decision issued by the EDP needs to be included in the case file materials and accessible to the defence taking into consideration that the information provided via the draft decision determines the PC to take one decision or another which will have a major impact over the investigation (for example, a decision to bring a case to judgment or to dismiss the case). Moreover, any documents containing the view of the supervising EP on different matters related to the case that are also included in the CMS should be available to the defence.

Another example, according to Article 31(5)(d) and (7), if an assisting EDP states that the measure that has been assigned *"would not be available in a similar domestic case under the law of his/her Member State"*, *"he/she shall inform his supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally"*. If the matter remains unresolved and the assignment is maintained, the matter will be referred to the competent Permanent Chamber. The Permanent Chamber will then *"decide [...] in accordance with applicable national law as well as this Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision to the said European Delegated Prosecutors through the competent European Prosecutor"* (Article 31(8) EPPO Regulation).

The exchanges between handling and assisting EDP and between these and the Permanent Chamber, as well as any interventions of the Supervising EPPO need to be included in the case files. These are essential to understand the decision-making process, as well as for the targeted persons (accused or third parties), victims and any competent courts (including in *ex post* review of the measures during the investigation or at the trial and appellate stages) to verify the lawfulness of the investigations and the potential impact on the admissibility of the evidence.

It is important that the person subject to the proceedings is fully aware of all the information provided to the Permanent Chamber and all the information it has provided to the EP or EDPs, in order to be able to benefit from all the guarantees that the legislator confers on him, such as the right to information provided for in Article 6 of the ECHR and Article 48 of the Charter and the right to an effective defence.

In this respect, the existing rules at Union level include a series of rights for the accused person, who must be informed in detail of the nature and cause of the accusation against him or her, enjoying a fair and public trial within a reasonable time, which are also reflected in the general domestic provisions, which require the prosecution file to be submitted in full to the judge called upon to rule on the merits, together with the court's committal order. In order to file an "effective" remedy after a court's decision the latest time should be legally determined for any access to the case file in the same extent as the court had received the case file, which should be as complete as possible and include all exculpatory evidence.

The inclusion of all communications in the case file is of fundamental importance, as it is vital for the proper administration of justice and for ensuring the right to a fair trial, in which the person accused of having committed a criminal offence is aware of all the relevant aspects of the case and all the evidence on which the charge is based.

The ECBA working group on EPPO matters prioritized the creation of tools for members, focusing on access to the case file. This right, guaranteed by Article 6 of the ECHR and Article 48 paragraph 2 of the Charter of Fundamental Rights of the EU, is essential for an effective defence. The ECBA advocates for consistent access to case files in all EPPO cases, irrespective of their cross-border dimension, but in particular where there is such an element, thereby ensuring practical and effective defence rights.

The ECBA encourages the EPPO to establish clear guidelines on defence rights, starting with access to the case files. These guidelines should align with EU Law, particularly Directive 2012/13/EU and the CFREU, as well as the ECHR. The ECBA offers its expertise in identifying relevant issues and formulating constructive proposals in this area.

Our proposals include:

*1. Uniformity in Access to Case Files:*

- **Guidelines on Contents of the Case File:** the EPPO should develop and publish clear guidelines detailing the contents that should be included in every case file. This will ensure that all parties have a clear understanding of what to expect and will reduce the potential for disputes over missing or excluded information. There should also be explicit guidelines for the content of case files and the means to have access thereto in the context of cross-border investigations.
- **Inclusion of Case-Relevant Internal Communications:** Given the importance of internal communications in understanding the decision-making process and the direction of investigations, it is proposed that all internal communications between the EDP, PC, and EPPO which are relevant to assess the procedural decision-making be included in the case file. This will ensure transparency and allow all parties to have a comprehensive understanding of the case.
- **Regular Review:** Once established, these guidelines should be reviewed regularly to ensure they remain relevant and reflect best practices in the field of criminal justice. During the review process, relevant stakeholders representing the defence should be consulted, namely the CCBE and ECBA.

*2. Comprehensive Access to the Case-Relevant information in the Case Management System:*

- **Extensive Disclosure:** To ensure that the defence can exercise its right to effective defence and the accused is able to have their right to a fair trial, it is essential that all information relevant to assess the procedural decision-making stored in the Case Management System be made available to them. This includes not only the main case documents, but also any supplementary information, notes, or communications that may be relevant to the procedural decision-making.
- **Means of Access:** The EPPO should consider the setting up of a module that allows lawyers to access the case materials electronically, as is already in place in many member states. This would additionally facilitate the management of access to the case file in the cross-border context, bringing a particular added value in comparison with the merely domestic context.

Consistent and transparent access to case files is not only procedurally fair but likewise reflects the core values of the European Union's legal system. By adopting these proposals and strengthening the adherence to Regulation (EU) 2017/1939, the EPPO can uphold standards of justice and provide all parties with the necessary information in order to achieve a fair trial. The ECBA's efforts and insights further emphasize the importance of this issue and offer valuable guidance for the EPPO's future actions.

### **Legal basis for EPPO to adopt the guidelines**

Adopting guidelines in respect of access to the case files is part of the EPPO's power to establish guidelines on matters of general interest and prosecution policy.

Article 9, para. 2. of the Regulation provides that:

**"The College** shall meet regularly and shall be responsible for the general oversight of the activities of the EPPO. It **shall take decisions on strategic matters, and on 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 this Regulation. The College shall not take operational decisions in individual cases. The internal rules of procedure of the EPPO shall provide for modalities on the exercise by the College of the general oversight activities and for taking decisions on strategic matters and general issues in accordance with this Article."

Article 5 of the Internal Rules provides the following:

"Exercise of general oversight

1. For the purpose of Article 9(2) of the Regulation, the College may at any time request information on the activities of the EPPO, in addition to the information to be provided in accordance with the Regulation.

2. Information on general issues arising from individual cases shall be provided to the College anonymised and only to the extent required for the purpose of Article 9(2) of the Regulation."

Article 6 of the Internal Rules provide:

"Strategic and policy decisions

The College shall determine the priorities and the investigation and prosecution policy of the EPPO upon a proposal by the European Chief Prosecutor"

### **National law is not an obstacle**

The circumstance that access to the case file is regulated to a great extent by national law is not an obstacle to adopting guidelines since:

(1) Most Member States' laws foresee a margin of discretion on whether to grant access to the case files at certain procedural stages based on an assessment of the risks likely to be caused to the investigation, etc. Guidelines on which criteria should guide the exercise of this discretion are perfectly in line with the Regulation and the applicable national laws.

(2) EU Law also regulates access to the case file:

(2.1) Article 7 Directive 2012/13/EU contains general concepts that need to be implemented with operative criteria, particularly by determining what is necessary *"to safeguard the fairness of the proceedings and to prepare the defence"* and what is *"in due time to allow the effective exercise of the rights of the defence"*.

(2.2) Article 7(1) of Directive 2012/13/EU requires (and exempts from any derogations that "[w]here a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents [rec 30 "and, where appropriate, photographs, audio and video recordings"] related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. [rec 30 "at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention"]". Likewise, this concept requires clarification and uniform EU-wide interpretation.

(3) The EPPO policy and practice has shown that there is no impediment in the adoption of guidelines with the aim of streamlining procedures: see

Guidelines on Article 31:

- "The **main aim of these Guidelines is to ensure an internal uniform practice within the European Public Prosecutor's Office ('EPPO')** in the framework of Article 31 of the EPPO Regulation, which created a new mechanism for the EPPO cross-border investigations."
- "These Guidelines express the position of the College on the **interpretation of certain unclear provisions** of Article 31 and are without prejudice to the judicial independence of the courts of the Member States, the rights of the parties as enshrined in the Charter of Fundamental Rights of the European Union or to any interpretation that will be given in the future by the Court of Justice of the European Union."

## Conclusion

The EPPO College should thus adopt relevant guidelines to clarify how the discretion left to the EPPO under domestic law in this field should be interpreted in EPPO proceedings, in a manner which is consistent with EU Law and with the afore-mentioned Directive, the Charter, and the ECHR. The EPPO would thus establish how it interprets the general concepts stemming from EU Law (in particular Articles 41(1) and (2)(b), Article 45 EPPO Regulation and Article 7 Directive 2012/13/EU) and streamline the exercise of this particular defence right across the EPPO MS.

This would contribute to the aims entrusted to the EPPO in the Regulation:

- Article 5(1) “The EPPO shall ensure that its activities respect the rights enshrined in the Charter” and
- Article 5(2) it “shall be bound by the principles of rule of law and proportionality in all its activities”.
- Article 41(1), which states that: “The activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence”.

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**The ECBA EPPO Working Group**

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