

A EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO)

7 February 2013

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.

(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.

(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 defense.
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 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 pre-trial 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.

3: Conclusion

Proceeding with the establishment of the EPPO as a centralized European authority (as has been suggested) seems to be pre-mature. 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.

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 states 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, than the exercise of an efficient defence will most likely be connected with considerable costs.

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.

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/her 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/her has showed up towards the ,
- the right to consult a defence lawyer,

- 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/her 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?

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 expressly 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

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 expressly 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 or 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 expressly 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.

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.**

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.

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 administering 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.

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 contrast 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.**"

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.

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.

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.