EUROPEAN LAWYERS
EUROPEAN BARS
CCBE
BARREAUX EUROPEENS
AVOCATS EUROPEENS

La Présidente
The President

Defence Issues in EPPO Proceedings

Dear Vincent, President of the ECBA, dear Colleagues,

As I am speaking about defence issues today, I will speak about deficits.

We know about the deficits which are incorporated in the Regulation on the Establishment of the European Public Prosecutor's Office (EPPO) resulting from the fact that defence rights are only granted according to national law. Today I will look at the internal rules, guidelines and working documents of the EPPO to analyse how the EPPO dealt with this situation on the central level in Luxembourg.

1. General remarks

Since the beginning of the year 2020, the EPPO has adopted several rules, guidelines and working arrangements, which build the ground - besides the Regulation - for the future work of the EPPO. It is a good achievement that all these documents are transparent and assessable through the EPPO website. It is also appreciated that all European Delegated Prosecutors (EDP) are visible on the EPPO website - this is a standard of transparency which is not the rule in all Member States and of course also serves the interests of the defence.

However, speaking about defence issues, I regret to say that I cannot see any other positive achievements in relation to the published

working documents - as the defence simply does not have a place in these rules and provisions. This might be the result of a Regulation which provides, in Art. 41 (2) and 45 (2), for minimum procedural rights for suspects and accused persons only insofar as they are implemented by national law.

But, given the history of this instrument of a centralised European Prosecutor, it could have been expected that the EPPO would go beyond what is guaranteed on the national level and **implement defence participation on the European Level** as far as this does not contradict the Regulation. The first proposal of the Commission for the Establishment of the EPPO was much more Europeanised as the final Regulation is; but the Member States did not want to adhere to a Europeanised criminal procedure, they wanted to keep their national peculiarities. In this situation, the EPPO could have created at least some defence rights on the European central level. Art. 41 (1) allows the EPPO to carry out its duties in full compliance with the Charter – explicitly including the right to a fair trial and the rights of the defence. Unfortunately, the EPPO did not use this authorisation to create at least some rules at the working level which would have put the defence in a more balanced situation.

“It is an imperative of procedural justice to involve the subject of criminal proceedings fairly and comprehensively”[1] Art. 6 of the European Convention on Human Rights provides for the concrete and effective participation of the defence in criminal proceedings. The Regulation does not provide defence rights on the European central level. This gap could be filled by the EPPO’s internal rules and guidelines, but the European Public Prosecutor’s Office - until now -

[1] *Brodowski* in Herrnfeld/Brodowski/Burchard, Euroepan Public Prosecutor’s Office, 2021, mn. 6 Art. 41

has not taken the chance to use its competence to compensate this deficit.

If you look at the Regulation and the internal rules and guidelines which have been drafted by now, it can be concluded that everything which is happening on the level of the central office in Luxembourg is not assessable for the defence. To comply with the requirements of Art. 6 of the European Convention on Human rights, there should also be rights on the level of the EPPO, and such rights are missing. This issue gains even more importance as there is no legal remedy for individuals on the European Level, as Art. 42 (1) basically excludes the right of natural and legal persons to apply to the Court of Justice of the European Union and only provides for legal remedies at national level. The future will show whether and to what extent this exclusion of the right which is foreseen in Art. 263 (4) TFEU will be confirmed by the Court of Justice.

Meanwhile, I would like to point out three issues - access to case files in the Case Management System (CMS) at the EPPO, the right to be heard before certain decisions of the Permanent Chamber and the issue of the right to a speedy procedure.

2. Access to case files

Access to case files is of crucial importance for the defence, and a very important element regarding the fairness of the trial. Only knowledge of evidence and findings of the investigating authorities will allow the defendant to carry out a proper defence. This concept is also behind Article 7 of the Directive on the Right to Information in Criminal Proceedings, where access to case files for **arrested persons is granted at any stage** of the proceedings as well as for other

suspects in due time to allow the effective exercise of the rights of the defence.

The problem is, however, that the EPPO has two case files. One case file is managed by the handling European Delegated Prosecutor in accordance with the law of the member state where the proceedings are led (Article 45 (2)). For this case file, the Regulation provides that access to the case file shall be granted by the EDP according to national law.
However, there is the second case file which the EPPO stores in the CMS of the EPPO (Art. 45 (3) of the Regulation). For this case file, there is no rule at all regarding access for the defence. This case file is not supposed to be identical with the EDP's case file. The regulation only rules that this case file "**reflects**" the case file on the national level. This implies that the case file should not have less content than the national case file. It does not prevent the EPPO to put more information to this case file than just the content of the national case file. For instance, if you look at the working arrangement between the EPPO and OLAF and the agreed exchange of information including access by OLAF to the EPPO's CMS and vice versa, it does not take much imagination to understand how easily information might find its way into the Case file in the EPPO's CMS which is not in the national file.

The regulation does not say anything regarding access for the defence to this file.

Therefore, the EPPO would have the possibility to provide access to this case file by internal rules. However, so far, this has not been done. Article 61 of the internal rules of procedure of the EPPO deals with access to the files in the CMS by the prosecutors and other staff

members. It does not even mention how the EPPO should react if the defence asks for access to this file.

According to the ECHR case law, equality of arms may be breached when the accused has limited access to his case file or other documents.[2] In systems where the prosecuting authorities are obliged to take into consideration the facts for and against the suspect, **a procedure** whereby the prosecuting authorities themselves assess what may or may not be relevant to the case, without any further procedural safeguards of the rights of the defence, does not comply with the requirements of Art. 6 (1).[3]

It is obvious and undeniable that there will be differences between a national case file and a case file in the EPPO's case management system. If there were no differences, there would be no need for having two case files. I believe that in the light of Art. 6 (1), it is not explicable why there should be no access for the defence to the second case file. As far as it is identical with the national case file, there is no need to prevent access to the file. As far as it is not identical with the national case file and access would be denied on the grounds that access is not necessary to exercise defence rights, we would have exactly the situation for which the ECHR ruled that it does not comply with Art. 6 (1).

So, to conclude, there should be access to the case files in the EPPO's case management system. This access could be provided by the EPPO and it would be much appreciated if the EPPO incorporated this issue into the internal rules of procedure.

[2] ECHR, Guide on Article 6, updated on 31 August 2021, no. 170 with reference to case law
[3] ECHR Guide on Article 6, updated on 31 August 2021, no. 175 with reference to case law

2. Right to be heard before decisions of the Permanent Chamber

After a criminal investigation has been initiated, there are **three** important situations where the Permanent Chamber can make decisions to the detriment of the defendant: During the investigation phase, the Permanent Chamber decides upon reallocation, merging and splitting of cases (Art. 26 (5). When the investigation has been concluded, the Permanent Chamber takes the decisions like taking a case to court or dismissing it (Art. 35), or to apply a simplified prosecution procedure (Art. 40).

The Regulation does not provide for any right for the defence to be heard before these decisions provided in Art. 26, 35 or 40 are taken. I believe that this should be changed.

It is undisputed that a suspect cannot be heard if he or she is not aware of the proceedings and awareness might jeopardise the proceedings. Therefore, when I am demanding a right to be heard, this refers only to the situation where the defendant has been made aware of the proceedings or when making him or her aware would not contradict the interests of the investigation.

Decisions on reallocation and merging and splitting of cases which again can lead to reallocation may be of utmost importance for the defendant; for instance, if there is a choice between the country of his or her habitual residence and a country where he or she has no relation with and does not speak the language.

Regarding the nationalisation of the proceedings led by the EPPO, defence lawyers have always been worried regarding the so-called “forum shopping”. “Forum-shopping” is a risk because there is no unique European procedural law for the investigation phase, and the applicable substantive law which transforms the PIF Directive differs among the member states.

The criteria which the Regulation provides for the allocation of the case in Article 26 (4) give discretion to the prosecutors. The criteria for a deviation from the original allocation by the Permanent Chamber are vague as Art. 26 (5) allows for a deviation in the “general interest of justice”. So, there is room for discretion of the Permanent Chamber and therefore also room for Forum-Shopping.

Regarding the right to a fair trial, it is not understandable that the regulation does not provide for any right to be heard before the Permanent Chamber takes a decision of merging, splitting or reallocating cases. Involving the defendant could also be helpful to find the right solution, as he or she might be able to provide evidence which would have effect on the respective decision.

I believe that the complete exclusion of the defendant from the decisions of Art. 26 (5) does not comply with the right to a fair trial. There is no equality of arms if the Prosecution makes such far-reaching decisions without any involvement of the defendant.

Especially in cases where the defendant is in pre-trial detention, he or she will always be aware of the proceedings and there should be no obstacle to hear them if changes with regard to Art. 26 (5) are at stake.

The same applies for decisions taken according to Art. 35 and Art. 36 of the Regulation. The report which is submitted to the Permanent Chamber may include a draft indictment and is obviously a document which gives (according to Art. 6 (3a)) information on the "nature and cause of the accusations" about which the defendant should be informed "promptly". Regarding the right to a fair trial and equality of arms, I cannot see any reason why the defendant should not be entitled to present his or her view on the report to the Permanent Chamber before the Chamber decides.

Finally, the decision of the Permanent Chamber to apply a simplified prosecution procedure can have an enormous impact for the defence. According to Art. 40 (2b) this decision is – among other criteria - dependant on "the willingness of the suspect to offer to repair the damage". The EPPO's Guidelines state that the procedure has to be "consistent with" … "the principles of proportionality, impartiality and fairness towards the defendant(s)". The EDP shall provide the Permanent Chamber with "information on the nature and background of the defendant(s)". However, here again: no right for the defendant to be heard before the decision by the Permanent Chamber is taken.

This lack of fairness could be solved in the internal rules and guidelines of the EPPO, as the Regulation does not forbid to hear the defendant. Neither rule or guideline considers hearings of the defendants and this should be changed.

3. Right to investigation within a reasonable time

Art. 6 (1) of the Convention on Human Rights provides the right to a hearing within reasonable time. This right corresponds with an obligation for the authorities to speed up investigations as far as possible. The need for speedy proceedings even becomes more relevant when defendants are in pre-trial custody. Defence lawyers have criticised the fact that the distribution between national investigations and decisions on the European Central Level will cause delays for the proceedings. The EPPO Regulation does not include any provision which deals with this issue. Neither do the internal Rules and Guidelines. The only exception where the EPPO explicitly has seen a need for speed is about translations, as Article 3 of the internal rules of procedure provides for “speedy translations”. I am not saying the EPPO is not aware of its obligation to proceed within reasonable time. But I am mentioning the issue because this awareness has not been documented in any of the existing rules and working documents. There are for instance no rules or recommendations which explicitly consider that a defendant is in pre-trial detention and that decisions must therefore be taken as a priority. The EPPO is a big ship which will move slowly by nature. I believe it would help to ensure trust in the new authority if the awareness for the need for speedy manoeuvres was made transparent in the working documents.

4. Conclusion

To conclude, as President of the CCBE I have the honour to represent Bars and Law Societies from 45 European Countries and through them more than one million lawyers. My wish is that the EPPO

reconsiders the points I have mentioned today. The Regulation has gaps regarding the right to a fair trial and the EPPO has the competence to fill these gaps. The CCBE is ready and willing to discuss and to assist with filling the gaps. The EPPO is a high-level instrument which could serve as an example for best practice or a "role model" within the European Union. We, the legal profession, have supported the establishment of a European Public Prosecutor. However, the project is not completed as long as defence rights are not granted in full compliance with the Charter and the Convention.

Margarete v. Galen, 2 October 2021