

Response to the European Commission “Call for evidence” on the Implementation and Impact of the EPPO Regulation and the Effectiveness and Efficiency of the EPPO’s Working Practices

24/10/2024

Introduction

The Council of Bars and Law Societies of Europe (CCBE), representing over 1 million European lawyers, has been closely monitoring the establishment and functioning of the European Public Prosecutor’s Office (EPPO) since its inception. The EPPO, which has been operational since June 2021, has made a significant impact in cross-border prosecutions within the European Union and the CCBE strongly supports the objectives of the EPPO in safeguarding the financial interests of the European Union through effective cross-border prosecutions.

However, for the EPPO to achieve real success, it is essential that the rights of the defence are fully respected and upheld throughout its proceedings. Ensuring a fair balance between prosecution and defence is crucial to maintaining justice and the rule of law across the EU. The CCBE remains committed to promoting these fundamental rights as part of a fair and robust legal system.

With this objective in mind, and in view of the Commission evaluation, the CCBE wishes to use this opportunity to highlight several concerns regarding the implementation and impact of the EPPO Regulation from the perspective of defence rights, fairness, and procedural justice.

This submission therefore focuses on key concerns from the perspective of the defence, namely:

- Access to the case file
- Cross-border investigations and gathering of evidence
- The lack of specific regulations on defence and procedural rights
- Interpretation and translation issues
- Jurisdictional issues

1. Access to the Case File

Pursuant to Art. 45(1) of the Regulation, the case file shall contain all the information and evidence available to the European Delegated Prosecutor that relates to the investigation or prosecution by the EPPO. According to Art. 45(3) of the Regulation, this provides that the handling European Delegated Prosecutor shall ensure that the content of information in the Case Management System (CMS) reflects at all times the case file.

One of the primary concerns from a defence perspective relates to access to the case file in EPPO proceedings. Access to the case file is a fundamental aspect of ensuring a fair trial and equality of arms between the prosecution and the defence. The EPPO's structure, which includes both the national case file managed by the European Delegated Prosecutor and a second case file maintained within the EPPO's CMS, creates concerns about transparency and fairness.

Under Article 45(2) of the EPPO Regulation, access to the national case file is subject to national law. However, the second case file in the CMS does not have clear rules for access by the defence. This discrepancy between the two case files poses a significant risk of procedural inequality, particularly if the EPPO file contains information not present in the national file, as the CMS might include material from other sources.

The CCBE is therefore concerned that there are no safeguards in place to ensure that the content of information in the CMS always adequately reflects the case file, and that all information present in the CMS and relevant to the case will always be timely integrated into the case file.

Recommendation: The CCBE considers it necessary to install a controlling mechanism to make sure that Art. 45(3) is always and in a timely manner complied with, and, to this end, introduce time limits to ensure that both files are regularly synchronised. The defence should have certified, checked, and traceable digital access to all relevant case materials stored in the CMS to prevent disparities between national and European-level files.

2. Cross-Border Investigations and Gathering of Evidence

The EPPO's mandate to carry out cross-border investigations is vital for prosecuting serious crimes such as fraud, corruption, and money laundering within the EU. However, from the perspective of the defence, there are several practical difficulties with cross-border investigations, especially regarding the collection, exchange, and admissibility of evidence across Member States.

The decentralised nature of EPPO proceedings, where each European Delegated Prosecutor applies their national law, creates inconsistencies in the handling of evidence. Each national system has found a balance between procedural rights when gathering evidence and rights when evidence is used in main proceedings, as one Member States protects rights of the suspect during the gathering of evidence during the investigation, while others protect rights when it comes to the admissibility of evidence. The admissibility of evidence can vary significantly depending on the Member State, which can undermine the fairness of the proceedings, especially in multi-jurisdictional cases.

Moreover, differing standards for the transposition of the EU procedural rights directives into national laws add another layer of complexity.

Recommendation: The EPPO should adopt a uniform framework for evidence gathering in cross-border cases, ensuring consistency and legal certainty.

3. Lack of Specific Regulations on Defence and Procedural Rights

The CCBE is deeply concerned by the absence of specific provisions on defence and procedural rights within the EPPO Regulation itself. While the EPPO Regulation (Art. 41(1)) mentions that the EPPO's activities must be carried out in compliance with the rights enshrined in the EU Charter of Fundamental Rights, including the right to a fair trial and the rights of defence, there are no explicit procedural safeguards to ensure this compliance at a European level.

Defence rights are addressed only in general terms in the Recitals of the EPPO Regulation (Recitals 80, 83-85), and their application is largely left to national law in accordance with Article 41 (2) of the EPPO Regulation. This creates a fragmented legal landscape where suspects and accused persons face differing standards of defence rights depending on the jurisdiction in which the proceedings are initiated. The lack of a uniform, European-level approach to procedural rights in EPPO cases raises concerns about the fairness and consistency of the proceedings.

Recommendation: Any revision of the EPPO Regulation should have clear and explicit provisions that provide defence rights and procedural safeguards at a European level. This will result in EPPO proceedings being fairly conducted in all Member States, and the standard of defence rights will be uniform in EPPO cases.

4. Interpretation and Translation

From the perspective of the defence, there are considerable difficulties with interpretation and translation services in EPPO proceedings. Effective communication is essential to ensuring a fair trial, especially in cross-border cases where language barriers may exist. The right to interpretation and translation is enshrined in the EU Directive 2010/64/EU, but practical implementation remains inconsistent.

There is often a lack of clarity regarding which documents are considered "essential" for translation, leading to potential gaps in the accused's understanding of the proceedings against them. Moreover, delays in providing translation services can significantly slow down the proceedings, undermining the right to a trial within a reasonable time.

Recommendation: The revision of the Regulation should define the essential documents that must be translated in EPPO proceedings and ensure that translation services are provided promptly to prevent delays. In addition, the quality of interpretation should be regularly reviewed to ensure that suspects fully understand the charges and evidence against them.

5. Jurisdictional Issues

The CCBE welcomes that, as a rule, clear guidelines have been set in Art. 26 of the Regulation where an investigation shall start, i.e. either in the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been

committed, in the Member State where the bulk of the offences has been committed. The CCBE also recognises that a deviation from this rule is only possible “*if duly justified, taking into account*” a set of specific criteria listed in Art. 26(4) of the Regulation, including as criteria the place of residence of the suspect or accused and his or her nationality.

However, in light of this clear guidance, the CCBE identifies a weakness in the Regulation as the Permanent Chamber shall still be authorised to re-allocate a case to a European Delegated Prosecutor in another Member State “*if such decisions are in the general interest of justice*” (Art. 26(5)). As the general interest of justice is no further defined in the Regulation, there is no legal certainty as to how this term will be interpreted by the Permanent Chamber. Similarly, once investigations are concluded, the Permanent Chamber can still decide to bring the case to prosecution in a different Member State, “*if there are sufficiently justified grounds to do so, taking into account the criteria set out in Article 26(4) and (5)*”, so that again, a jurisdictional change is possible if this is considered “*in the general interest of justice*” (always, of course, provided that the other criteria of Art. 26(4) have been taken into account as well).

In light of this uncertainty, the CCBE invites the Commission to provide a clear indication as to how the “*general interest of justice*” is to be interpreted in this context. This problem becomes more virulent as the Regulation foresees explicitly neither a right of the accused to be heard before such a jurisdictional change, nor a right for the accused to apply for a jurisdictional change. As both rights are inherent in the rule of law and the right to a fair trial, they surely should exist at the national level. However, given that these are “EPPO particularities”, the CCBE invites the Commission to take a stand on them and regulate them explicitly, to increase legal certainty and remove any potential doubts.

Recommendation: The Commission should provide clear guidance as to how the “*general interest of justice*” is to be interpreted.

Conclusion

While the EPPO represents a significant step forward in the fight against cross-border crime in the European Union, the concerns raised by the defence should be addressed to ensure the fairness and effectiveness of EPPO proceedings. The CCBE urges the European Commission to take into account the issues highlighted in this submission, particularly regarding access to case files, issues regarding evidence, the uniform application of defence rights, interpretation and translation services, and jurisdictional matters.

By addressing these concerns, the EPPO can become a model for best practices in European criminal justice, balancing the need for effective prosecution with the imperative of safeguarding fundamental rights. The CCBE remains committed to working with the Commission and the EPPO to ensure that the rights of the defence are fully respected in EPPO proceedings, in line with the EU Charter and the ECHR.