

The European Public Prosecutor's Office and the Principle of Equality



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ABSTRACT

The article examines how the principle of equality must be safeguarded in proceedings of the forthcoming European Public Prosecutor's Office (EPPO). Falletti identifies two main challenges: ensuring equal rights for suspects and ensuring equal handling of cases. Since the EPPO applies both its Regulation and national criminal procedure, differences in procedural safeguards across Member States risk undermining equality, particularly in access to lawyers and defence costs in cross-border cases. On case allocation, fears of forum shopping are addressed by mandatory criteria and oversight by Permanent Chambers, with national courts retaining judicial review. While the system relies heavily on national law and courts, ongoing harmonisation through EU directives and ECJ control should mitigate inequalities. The EPPO's effectiveness will ultimately depend on practice in balancing European coordination with equal treatment of suspects.

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Introduction

After years of negotiations, the adoption of the Regulation on the establishment of the European Public Prosecutor's Office (hereinafter EPPO) is near. Even if no unanimity can be reached in the Council of the European Union, there seems to be a strong political will amongst most Member States to set up the EPPO, if necessary through an enhanced cooperation procedure.¹ The current draft Regulation already provides insight into how the EPPO would take shape.²

The Regulation foresees that the EPPO will be a European prosecution office that is in many ways subject to national courts and legislation. Nevertheless, the principle of equality of all suspects has to be safeguarded wherever the investigations and prosecutions take place in the EU.³ This may raise problems in ensuring equal procedural rights for suspects (OI) and equal handling of cases (OI) in EPPO proceedings.

II. Ensuring Equal Rights for Suspects in EPPO Proceedings

Uniform protection levels of suspects under national legislations

Besides applying the Regulation itself, the EPPO will apply the national criminal procedure of the Member State where it conducts its investigation or prosecution. Consequently, there could be a risk of breach of equality for suspects if the procedural safeguards they are granted in the various Member States differ. In order to ensure common minimum standards across the EU and to remain in line with the so-called Stockholm Programme of 2010,⁴ the EU adopted a set of directives harmonising the rights of suspects in criminal proceedings.⁵ The EPPO, any national prosecuting authority, will also be bound by these common rules wherever the investigations and prosecutions take place in the EU.⁶

This is the reason why only a few special rules relating to the rights of suspects are set out in the draft Regulation itself. The rights of suspects are limited to those provided for under the national legislations and secured by the minimum standard prescribed by the directives. For example, the right not to incriminate oneself will apply to suspects, but perhaps not to witnesses in some Member States.⁷ Full access to the file will be granted, but perhaps only at the end of the investigation.⁸ Broadening the scope of these rights for cases handled by the EPPO could lead to a breach of equality to the detriment of suspects in non-EPPO proceedings. However, the draft Regulation endeavours a level of protection to some degree, which goes beyond the requirements of the directives: for example, the EPPO will have to conduct investigations impartially,⁹ and suspects will be allowed to apply for and present evidence¹⁰.

Nationally organised defence lawyers facing a European prosecution

If the EPPO is set up, the prosecution would be at an advantage compared to national bar associations on account of the EPPO's European organisation. Although the EPPO would be a foreign element to the national legal systems, it would be able to be active in all participating Member States and have its acts recognised by their courts. Lawyers are not granted such a level of European mobility. In principle, they are allowed to work in another Member State under the professional title they acquired in their home Member State.¹¹ However, for all activities relating to the representation or defence of a client in legal proceedings and when the assistance of a lawyer is compulsory under the law of the host Member State, they have to work in conjunction with a lawyer having the professional title of that State.¹² That is to say that, in cross-border

cases handled by the EPPO, the suspect could often be obliged to hire an additional lawyer in each country in which the investigations and prosecutions take place (establishment of “double or multiple defence”). This will inter alia create higher costs. As a result, the balance of power between the prosecution and the defence could become distorted in cross-border cases, which, in turn, could result in a breach of equality between suspects who are prosecuted by the EPPO and those who are not.

Nevertheless, it must be strongly advocated that this problem is minimised. We have to ensure that, in application of the recent EU directives on the rights of suspects, the latter will be granted the same access to a lawyer and to legal aid across the EU no matter where the prosecutions and investigations take place. Creating a special European regime for lawyers of suspects in EPPO proceedings would be a breach of equality to the detriment of suspects in criminal proceedings which do not fall within the competence of the EPPO. The creation of the EPPO could, however, be seen as a chance for lawyers willing to engage more in European activity. Indeed, it will drive law firms to strengthen their links with counterparts in other Member States acting as correspondents or associated lawyers and to improve good practices.

III. Ensuring Equal Handling of Cases in EPPO Proceedings

Coping with the risk of forum shopping

As the competence of the EPPO will not be limited to a single country, this raises the unprecedented question of *forum shopping* by a prosecuting authority. Concerns have been voiced about the EPPO spontaneously choosing to bring cases to courts in Member States that provide the most severe criminal sanctions, leading to a breach of equality in comparison to suspects facing national prosecution. However, this assumption is unfounded. The Regulation imposes mandatory criteria for allocating cases. In principle, cases have to be initiated by the European Delegated Prosecutor (EDP) in the Member State that was the focus of the criminal activity or where the bulk of the offenses were committed. A different decision can only be taken on substantial and legally defined grounds by the competent Permanent Chamber, whose members come from various Member States.¹³ In any event, the allocation of the case is subject to judicial review.

Involvement of national courts in European proceedings

Judicial review of procedural acts of the EPPO will fall within the jurisdiction of the competent national courts.¹⁴ The European Court of Justice (ECJ) will maintain its competence for interpreting and controlling the application of EU law.¹⁵ Consequently, it will be for the national courts of the Member State of the EDP handling the case to assess whether the allocation of the case was correct or not. It might have been preferable that the ECJ be competent in this matter, because national courts are unlikely to waive their own jurisdiction and to refer the case to a jurisdiction in another Member State. However, the ECJ may not yet be ready to handle the quick and systematic review of the EPPO's decisions on jurisdiction, especially if one keeps in mind that strict time limits linked to the detention of suspects will have to be met. National courts seem to be better suited for this task, as they will have full access to the case file, including the evidence on the basis of which the EPPO chose to prosecute in the said state. This seems also right if one considers that national courts would be bound by the interpretation of the Regulation by the ECJ, as a result of which they might not properly apply the allocation rules and take the risk of having cases quashed.

IV. Conclusion

The EPPO will have to ensure that the principle of equality is fully respected in its activities when it comes to the rights of suspects. The Council decided to resort to using national laws and courts in order to enable the EPPO's operability and smooth integration into national systems. Even under these circumstances, the ongoing harmonisation of national criminal legislations pursuant to recent Union law and their control by the ECJ should prevent breaches of equality among suspects in EPPO proceedings. Practice will show how the EPPO will achieve uniformity in investigations and prosecutions across the European Union.

1. The adoption of the EPPO under enhanced cooperation is foreseen by Art. 86 (1) TFEU. On 7 February 2017, the General Affairs Council decided to register the lack of unanimity and to refer the draft regulation to the European Council in March 2017.↔
2. Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Draft Regulation, Council doc. 5766/17, Interinstitutional File: 2013/0255 (APP), 31 January 2017.↔
3. Art. 35 (1) of the Draft Regulation, op. cit. (n. 2), together with Art. 20 of the Charter of Fundamental Rights of the European Union.↔
4. European Council, The Stockholm Program – An open and secure Europe serving and protecting citizens, O.J. C 115, 4 May 2010, 1, point 2.4.↔
5. Directive (EU) 2010/64 on the right to interpretation and translation, O.J. L 280, 20. October 2010, 1; Directive (EU) 2012/13 on the right to information, O.J. L 142, 22 May 2012, 1; Directive (EU) 2013/48 on the right of access to a lawyer and the right to communicate with third parties, O.J. L 294, 22 October 2013, 1; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, O.J. L 65, 9 March 2016, 1; Directive (EU) 2016/1919 on legal aid, O.J. L 297, 4 November 2016. For an explanation of these Directives see also Cras/De Matteis, (2010) *eucrim*, 153; Cras/De Matteis, (2013) *eucrim*, 22; Cras, (2014) *eucrim*, 32; Cras/Erbežnik, (2016) *eucrim*, 25; and Cras in this issue.↔
6. Art. 35 (2) of the Draft Regulation, op. cit. (n. 2).↔
7. Art. 7 of Directive (EU) 2016/343, op. cit. (n. 5).↔
8. Art. 7 (3) of Directive (EU) 2012/13, op. cit. (n. 5).↔
9. Art. 5 (4) of the Draft Regulation, op. cit. (n. 2).↔
10. Art. 35 (3) of the Draft Regulation, op. cit. (n. 2).↔
11. Articles 2 to 5 of Directive (EC) 98/5 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. L 77, 14 March 1998, 36.↔
12. Art. 5 (3) of Directive (EC) 98/5, op. cit. (n. 11) as interpreted by ECJ, 25 February 1988, case 427/85, *Commission v. Germany*.↔
13. Art. 22 (4) of the Draft Regulation, op. cit. (n. 2).↔
14. Art. 36 (1) of the Draft Regulation, op. cit. (n. 2).↔
15. Art. 36 (2-8) of the Draft Regulation, op. cit. (n. 2).↔

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