

Meijers Committee

standing committee of experts on international immigration, refugee and criminal law

CM1611

Note on the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Judicial Review, Forum Choice, Access to the Case File and Data Protection

In response to the most recent, publicly available, version of the draft EPPO Regulation (doc. 11350/1/16 of 28 July 2016), the Meijers Committee wishes to express its view on some of the issues that are still under discussion. These views are in line with the remarks in its previous Note on the original EPPO proposal COM(2013) 534 (Note CM1315, 25 September 2013), and mainly relate to our general observation that, overall, the current proposal fails to show a generous commitment to the principles of a contradictory process. The importance of these principles in the context of criminal proceedings has repeatedly been emphasized by the European Court of Human Rights. In view of that, the following recommendations on judicial review, forum choice and access to documents aim to strengthen the contradictory character of future EPPO proceedings. A fourth and final recommendation concerns data protection.

- Our first recommendation concerns the formulation of draft Article 36 on judicial review. The Meijers Committee is very doubtful whether the current provision will be sufficiently clear to the judicial authorities that may get involved in EPPO proceedings. The Meijers Committee remains concerned that the proposed modest level of harmonization of substantive and procedural rules, the choice for judicial protection at the national level and the limited possibilities for the EU Courts to intervene cause significant uncertainties, for the EPPO itself, its national counterparts, the judiciary, but also EU citizens. National judges need to have clear knowledge of the scope of their competence to review (procedural) acts carried out in the course of the EPPO proceedings. For instance, to limit judicial review of acts adopted 'before the indictment' raises difficulties in competence delineation. Additionally, Article 36 empowers the Court of Justice to give preliminary rulings on the validity of procedural acts of the EPPO as well as on the interpretation and validity of the Regulation *only* when the EPPO's actions are intended to produce legal effects vis-à-vis third parties. As a result, the Court of Justice is prevented to give guidance on many important issues, unless it considers Article 36 to constitute an unacceptable restriction of Article 267 TFEU. In order to clarify the delineation of competences between the national judge and the Court of Justice in this regard, the Meijers Committee suggests that each paragraph of Article 36 be provided with examples of acts that are meant to be subjected to judicial review under its heading. Such a list of examples could be incorporated in the Regulation's preamble, or in a separate document accompanying the Regulation.
- Our second recommendation relates to the issue of forum choice and the lack of judicial review in that regard. It needs no explanation that under the current legal framework as proposed in draft Articles 22-23 and 29-30, decisions on the forum may easily give rise to questions on the side of the defendant, especially in the investigative stage of criminal proceedings. At the same time, forum choice decisions are *not* subject to judicial review under draft Article 36 (unless this is provided for

Meijers Committee

standing committee of experts on international immigration, refugee and criminal law

in national law). As it concerns a matter of procedural fairness, the Meijers Committee takes the view that forum choices must be determined on the basis of a strong legislative framework, and have to qualify for judicial review under Article 36. In the interests of a fair administration of justice, such judicial review should also include the reasonableness of the decision on the forum.

In case of judicial control over forum choice decision, the obvious question arises whether judicial control should be carried out by national courts, or by the Court of Justice. According to the Meijers Committee, forum choice decisions should be subject to review before the Court of Justice in the pre-trial stage of the proceedings. One could think, for instance, of establishing a special Chamber for the review of forum choice decisions in the early stage of EPPO proceedings. The main reason why this would be preferred above *national*-level review of forum choice decisions is that national law not necessarily allows for judicial review mechanisms in the early stage of criminal proceedings (only at the trial stage); and it falls outside the intended scope of the EPPO Regulation to harmonise national legislation on this matter.

- Our third recommendation concerns the right of access to the case file. This right has been harmonized by EU law in Article 7 of Directive 2012/13/EU, but as it stand now an *effective* exercise of this right may not always be possible in EPPO proceedings. On the right of access to EPPO case files for defendants, the EPPO Regulation refers completely to national law (Article 36c par. 2); Access will be granted by the handling European Delegated Prosecutor on the basis of that Member State's national law. However, in cross-border investigations, the European Delegated Prosecutor handling the investigation may very well be situated in a Member State other than where the defendant has been arrested. In such a case, the defendant's opportunities to effectively challenge the lawfulness of arrest or detention would be severely hindered, for it is much more difficult for the defendant to submit a request to access the case file to the handling European Delegated Prosecutor than to the authorities of the Member State where he is detained. The fact that all the information in the case file has to be added to the EPPO's Case Management System has no value in this regard, since the defendant does not have a right to have direct access to that system. Moreover, because its contents will not be available to the competent authorities of the Member State where the defendant is detained, he would not be able to exercise his rights under Article 7 of Directive 2012/13/EU.

The Meijers Committee therefore recommends either to include a right of access to the EPPO's Case Management System, or to empower the European Delegated Prosecutor in each Member State involved to grant access to a case file located in the handling European Delegated Prosecutor's Member State.

- Our fourth recommendation concerns data protection. It is appreciated that the EPPO proposal includes a very balanced and thorough chapter on data protection that has been adapted to the new General Data Protection Regulation 2016/679, which will come into force in 2018, and furthermore guarantees for an effective oversight by the EDPS. However, it provides once again a new and independent legal instrument and therefore contributes to the fragmentation of EU data protection legislation in the police and justice sector.

The Meijers Committee therefore calls on the institutions to include the EPPO, just like Europol and Eurojust, within the new data protection laws concerning EU institutions and agencies, which are currently being prepared by the Commission.

Meijers Committee

standing committee of experts on international
immigration, refugee and criminal law

* * *

About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

The Meijers Committee is funded by the Dutch Bar Association (NOvA), Foundation for Democracy and Media (Stichting Democratie en Media) the Dutch Refugee Council (VWN), Foundation for Migration Law Netherlands (Stichting Migratierecht Nederland), the Dutch Section of the International Commission of Jurists (NJCM), Art. 1 Anti-Discrimination Office, and the Dutch Foundation for Refugee Students UAF.

Contact info:

post@commissie-meijers.nl

+31(0)20 362 0505

Please visit www.commissie-meijers.nl for more information.