

GAPS AND INCONSISTENCIES IN LEGAL PROTECTION IN EU CRIMINAL LAW

CM1503

Legal Protection and the future European Public Prosecutor's Office

The current body of EU criminal law offers inconsistent and incomplete legal protection to European citizens. Shortcomings are found in the procedural safeguards in instruments of mutual recognition, the proposal on a European Public Prosecutor's Office and the criteria used to decide on criminalization of conduct at the EU level. In light of an expert meeting held at the European Parliament in January 2015, the Meijers Committee publishes three short notes on gaps and inconsistencies in the legal protection offered by EU criminal law. This second note concerns the need ensure that citizens can foresee under which legal regime the EPPO will conduct an investigation against them and the effectiveness of national judicial review in a transnational context.

Introduction

The proposal to establish a European Public Prosecutor's Office is unique in several ways. Several EU institutions and agencies already carry out law enforcement tasks (e.g. the ECB, ESMA), and Member States cooperate extensively in criminal cases. However, unlike other EU agencies, the EPPO can take almost any intrusive investigative measure that a Member State can, such as directly ordering arrests, searches and seizures. Moreover, unlike the Member States, its competences *ratione territoriae* cover the territories of all participating Member States. **This dual horizontal and vertical integration of a new criminal justice body into the legal orders of the Member States poses new challenges.** Much of the political negotiation around the exact design focus on the competences of the EPPO and the details of shared law enforcement in practice.

The Meijers Committee observes that fundamental rights protection is given less priority by the institutional actors. Further interferences with national criminal procedure than those that are now on the table are often considered disproportionate. To better embed legal protection, three aspects should be considered more closely by the co-legislators. First, the EPPO should have clearer rules on determining the applicable law. Second, procedural guarantees should be updated to function effectively in transnational criminal cases. Third, rules on the gathering and admissibility of evidence should be developed further.

Determining the applicable legal regime: accessibility and foreseeability revisited

In its current form, the decentralized structure of EPPO prejudices the rights of suspects in a transnational common law enforcement area. The concept of European territoriality presupposes that the EPPO may move its activities from one country to another. It may even be considered the *raison d'être* of the EPPO to be able to concentrate the investigation in a particular state, while carrying out specific investigative acts elsewhere. Nonetheless, while there are diverging national rules on the use and control of investigative powers and coercive measures, the EPPO proposal does not contain clear criteria as to which national law is applicable during pre-trial investigations. This ambiguity not only gives the EPPO a potentially very wide margin of discretion in determining the

applicable legal regime, it also **creates an incentive for prosecutors to make strategic choices based on where the most lenient national rules apply**. This design may result in a system where an attorney could pick and choose the rules, rather than a balance between effective crime fighting and fair trial rights. **This makes it hard for citizens to foresee the conditions under which powers may be used against them:** not because national rules are absent, vague, or ignored, but because – at the interface of over 20 diverging national legal orders - the EPPO will always find a legal path for its investigative measures, using rules that are most convenient in a given instance. Current proposals **allow the EPPO to change the applicable set of rules without citizens and courts being able to monitor the protection of their interests**. To that extent, such situations not only poses problems in light of the accessibility and foreseeability of the applicable law(s); they may also be considered unfair and in contradiction with the equality of arms. Even if all national criminal codes are in full compliance with human rights standards, there is still a lurking arbitrariness. This, incidentally, not only concerns suspects, but also witnesses, victims or individuals whose telephones may be tapped or computers hacked.

Judicial Review of EPPO's actions

Apart from a lack of rules on the applicable law, the current proposal leaves **judicial review of EPPO investigative and prosecutorial actions almost entirely at the national level**, even though many EPPO decisions will, by their very definition, involve the legal orders of multiple Member States. The question is **to what extent are national courts able, have been trained, and are equipped to monitor EPPO activities that were not executed on their national territory**. The proposal requires trial courts to admit evidence that was collected under different rules elsewhere in the EU, save for a human rights and a general fairness exception. Yet both the original proposal and certainly later proposals refrain from defining the applicable procedural safeguards and applicable remedies in sufficient detail, leaving these matters to national law. Nevertheless, in its explanatory memorandum, the **European Commission considers this modest harmonization of judicial review as justification for the mandatory admissibility of evidence**.

The Meijers Committee is greatly concerned about the effectiveness of the organization of judicial review, in both the pre-trial and trial stages. National courts are not well equipped to address these issues. **At present, they largely operate on the basis of a rule of non-inquiry and do not, as a general rule, assess the legality of actions by foreign authorities**. The question is whether this concept still fits within the EPPO design, which is not based on individual states cooperating, but on a single EU body, competent to act in all participating states, yet under the control of national courts. **Save for the provisions just mentioned, the proposal is silent on how national courts must perform this role**. The current system of European cooperation in criminal law enforcement, for instance, even after the entry into force of the European Investigation Order, will not be sufficient to have foreign witnesses readily available before national courts, as situations may fall outside the scope of that system or because grounds for refusal may be present.

The Meijers Committee urges the EU legislator to give national courts full competence and powers to assess the legality of actions performed by the EPPO, regardless of where they were executed, and certainly in cases where the legality of such actions has not already been reviewed by local judicial authorities. The Meijers Committee stresses that where the legality or reliability of materials cannot be reviewed, such materials should be omitted from the evidence presented.

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This note is part of a series of papers on legal protection in EU criminal law:

CM1502 Inconsistent legal protection in mutual recognition instruments

CM1503 Legal Protection and the future European Public Prosecutor's Office

CM1504 Inconsistencies in applied grounds for adopting Union-wide criminal prohibitions

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.

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