Admissibility of evidence, judicial review of the actions of the European Public Prosecutor's Office and the protection of fundamental rights

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The author focuses on the different ways of interpreting legal concepts and the different investigative measures in Member States. She then highlights two aspects that are particularly problematic and which need to be addressed during the negotiations for the establishment of a European Public Prosecutor's Office (EPPO), namely the admissibility of evidence and the judicial review of decisions made by the EPPO.

First of all, I really would like to thank to the Fondazione Basso for inviting me to this conference and giving me opportunity to share my view on the European Public Prosecutor (EPPO). I had the luck to be the member of the Working Group in Luxembourg which were devising model rules, and was mainly dealt with the issues which are related to the judicial control admissibility of evidence and some procedural rights. I'm also professor of Criminal Procedural Law so now when we are on the field of the criminal procedural law I can really have a kind of feeling that we are moving from the law of mutual legal assistance to the criminal procedural law as was said yesterday.

I also would hope that the proposal of the Commission, which will soon come, will not lead us on the way to protect our fundamental procedural rights from the future EPPO, but to protect in the criminal proceedings of the EPPO. So I'll certainly give some view on this very important issue and from the constitutional value for the Member States; there are also influences with the creation law and our criminal proceedings. This aspect cannot be undermined. I will try not to repeat the issues which have been said many times: what the EPPO is going to be? What are the tasks of the EPPO? It is major break in this construction that the national law should apply from the moment of indictment and that the EU regulation should prescribe the pre-trial criminal proceedings.

What has been said also yesterday here is very important to know that actually European Convention of Human Rights has regulated many fair trial rights at a stage of trial. Pre-trial phase of the criminal proceedings was not so well regulated and is not so harmonized in the Member States of the European Union. In that sense, the regulation has even prescribed what part of the criminal proceedings should be regulated in this article 6 of the Treaty. So the performance of its functions, the rules of procedure applicable to its activity, is the admissibility of evi-

dence and judicial review of the procedural measures. So it was obviously clear from the previous research and the proposals of the Commission regarding the EPPO which stands from the Corpus Iuris more than 15 years ago and from Green Book (from 2001) that the issue of admissibility of evidence is the crucial one in order that the EPPO can succeed; and, probably, the most difficult one. It has followed actually one of the saying that "where is the prosecutor there must be the Court" despite the indubitable value of the independence of the prosecutor.

All these issues however are very interconnected. When we are devising one investigating measure, we have to take into account the judicial control, whether it is ordered by the Court, ordered by the prosecutor, whether we have some kind of the judicial control afterwards; and also the admissibility of the result of these measures is something what we have to take into account. However, the Treaty is giving us no further guidelines and so it has left undecided many questions, so the European Commission has a huge task in devising of these rules which probably must be much more in detail than it was the Green Book or maybe some model rules; it must be in some way applicable pre-trial proceedings and we know how the criminal procedure is very complex.

As concerns judicial control, we all know that in criminal proceedings the European standard that we have judicial control or judicial procedures from the moment of indictment; so in all European States indictment has to go to the judicial control and the trial is running in front of the Court. So this is not a so problematic path, but it is not what should be regulated by the regulation. The problem is with the pre- trial settings. And the pre-trial settings are very various in the Member States as regard judicial control. Here we have the States which have still judicial investigation so the investigative judge. There is no problem of judicial control because it is the judicial body who runs the investigation. Then we have a State where there is no judicial control of the prosecutorial function of the prosecutor, like in Germany. In Germany you have judicial control only of the investigative measure, but not on the decision whether you will prosecute or not. In many other countries there are really various solutions to these problems, to the lower and the higher extent of the judicial control. This pose, of course, very great problems and open issues: how and what extent of the judicial control should exist for the European Public Prosecutor? Judicial control is certainly in international human rights standards; it is a part of the democratic society and the rule of law; and the criminal proceedings measures are exactly that these measures should be controlled by the Court. One should also mention that we cannot compare judicial control in the cooperation proceedings; so mutual legal assistance and mutual recognition which we have developed in European Union - for example, in the European Arrest Warrant and other instruments - have different standards of judicial control than in criminal proceedings. Just to say that the fair trial principle does not apply to these proceedings, so the art. 6 of the European Convention of Human Rights does not apply to the mutual assistance proceedings, but does apply to the criminal proceedings.

I really would like to make the warning that we have actually a very ambiguous meaning of the word "judicial". It is not so simple today to define, as it today has different meanings depending on the expression or even the context in which is used. We have two main meanings of the word "judicial". The first marrow

meaning can be found in common law countries, Anglo-American jurisdiction and Human Rights law. There the judicial applies only to judge, to the Court; so there for European Court of Human Rights, for European Convention of Human Rights the word "judicial" (like judicial power, judicial authority, judicial guarantee, judicial control) pertains only to the judges and Court. However, in the mutual legal assistance and in European Union law, "judicial" does not pertain only to the judge, but also to the Prosecutor authorities, Police, Ministry of Justice, administrative authorities and so on. So I would like to say that now this confusion actually that is very unfortunate that in the legal documents the UE is using English legal terms inconsistently with their meaning in the legal system of the English speaking countries like United Kingdom and U.S.A.; and also that this confusion can be tolerated in the context of the mutual legal assistance and the mutual recognition instruments, but not when we are back on the field of the criminal procedure. There, the judicial has to refer only to the Court in the sense of the art. 5 and art. 6 of the European Convention of Human Rights.

There are many types of judicial control of the prosecutor: it can be *ex post* or *ex ante* control; it can be some kind of review or order. I will say something about the judicial control of investigative function, what means the control of every investigative measure or every course of investigating measure; and the judicial control of the prosecutorial function where we don't have actually the consensus in the European Union on that function. In any case, the regulation of the EPPO has to set a border line between the prosecutorial and judicial powers in the pre-trial. That's one of the main tasks of the regulation and it's not so easy because border line is very different in the Member States.

From the point of view of judicial control of investigating measures, there are three types of measures that can be seen. The first one is on the Prosecutor discretion; so these measures are those that are not so much impinging on the human rights like summons, for example, or collecting data or questioning of accused or witnesses.

Then we have the other type of investigating measure which is ordered by the Prosecutor, but then subject to the judicial control. This is the most challenging category: in this category, although we have some decisions of the European Court of Human Rights, the Member States vary a lot, the measures which are in this part are, for example, compulsory appearance, arrest, identification measures (such as taking photos, fingerprints on biometric samples); line up, inspection in ceiling of means of transportation, seizure of documents and objects; tracking and tracing, control or supervised deliveries). It is maybe interesting to see that in the Green Paper from 2001 even house searches, freezing of assets and interception of communication it was possible to be ordered by the Prosecutor; and then in 24 hours to be again obligatory checked by the Court. This can be very problematic because in some States the measures like house searches, freezing of assets and interception of communication is only in the competence of the Court; and this is the constitutional issue, it's not only an issue of the criminal proceedings, but in many countries like in my country, the house search can be done only by the Court. So not by the Prosecutor, not even in the urgent situations.

In that count, I think that this is one of the point where the regulation has to take really high standards; and to follow the highest standards of the judicial control in this

type of measures. Otherwise, it can run counter to the constitutional and criminal procedural law of the Member States that require mandatory prior judicial authorization.

And the third kind of measures are the measures that are ordered by the Court. They are not problematic except that in some States we have exceptions in the urgent situation. So in the urgent situation some of these measures that I have mentioned already (like, for example, house search) can be ordered by the Court. It's also the question whether there are some measures like physical examination, taking DNA samples, physical psychiatric examination that should never be ordered in any case by even for an urgency situation by the Prosecutor.

One measure which is under the discussion, for example, is the search of business promises. Whether the search of business promises should be ordered by the judge, like in some of the countries, but we have some country which this can be ordered by the Prosecutor. The European Court of Human Rights also gives protection of the privacy of the legal persons according to article 8; but not the same as by the house searches. However if we choose that it can be ordered by the EPPO, this will follow certainly by the Law ring level of protection in some of the countries where these measures can be ordered only by the Court. One of the issue (and we have run to that issue also in the working group on the model rules) is whether the regulation has to prescribe exhaustible or only some of the measures; due to the legality principle, which was mentioned by John Vervaele yesterday, Procedure legality. Due to the effectiveness of the EPPO and also to the admissibility of the evidence, we actually take the decision that the EPPO and the regulation has to prescribe exhaustive list of investigative measures. It is unification then of this kind of measure within the European Union for the EPPO. However, this can lead also to the introduction of new coercive measures that didn't exist before in the Member States. Which is also like the more repressive side of the EPPO.

Now I will go on the issue of the admissibility of evidence which is certainly one of the most difficult issues. If we managed to solve the admissibility of evidence of the EPPO, I think that the EPPO will succeed. Because admissibility of evidence is one field which is very different in the Member States. Member States have different rules on admissibility of evidence and the rules which are set up by the European Court of Human Rights are actually quite low on this issue. The European Court of Human Rights has said that this field of National Courts; so the National Courts are the one who should decide on the admissibility of evidence. This is why it is so different in the European Union. However, they have exclusionary rule, but only very narrow. Only as concerns torture; so the only evidence which, according to the European Court of Human Rights, should be excluded from the criminal proceedings without the principle of proportionality, without the possibility of using it, although it can be the most important evidence, is the evidence which has been collected by torture.

The other jurisdiction of the European Court of Human Rights has developed what is the influence on the fairness of the trial has regarded the defense rights and the breach of some other articles of the Convention (like Article 8 which talks about the privacy). In these cases, the Court has said that it can be that this illegal evidence which, bridge the right of privacy or defense right, can render the proceedings unfair as a whole. So it's not automatically, but it must render the pro-

ceedings as a whole unfair. And the European Court has said that we have to have the defendant has to have the right to challenge the legality of evidence that is something what is necessary. So in any criminal proceedings we have to give the right of the defendants to challenge the use and the legality and then the Court can decide about it. But they have to have this legal remedy. One other rule is the rule on sole and decisive evidence: it is the legal evidence, if the sole evidence or decisive, then this can render the proceedings as a whole, as unfair. So, the national rules are very different. There are Member States which have illegal evidence decided *ex lege*, so prescribed very detailly in the criminal proceedings what should be excluded from the file. There are some States which don't have so much prescribing the law but decide *ex iuditio,* what means that the Court or the judge decides depending on the violation and on the importance of this evidence. And the aim of this exclusionary rule is also different. In some States, it should be excluded if it influences the unfair trial; in some other, only to prevent fraud or illegal action of the State authorities.

So what model should be for the admissibility taken by the EPPO? I can just present you some of the models. To see some of the models have been used also in the *Green Book*, in *Corpus Juris*, in our study, the first is model of mutual admissibility. This is the model which was taken in the *Green Book* and it says that if one evidence is taken in line with the national law it should be just accepted in another law. This has been shown as not acceptable solution; because you cannot just transfer evidence from one criminal proceeding to another criminal proceeding because they are so complex that if you do that, you would go against your procedural guarantees and maybe constitutional guarantees in your own country. It was very much criticized and this is maybe one of the reasons why the EPPO project couldn't go further on and there was no solution in the theory to this problem until now.

The other solution is exclusionary rule only in the cases of violation of the fair trial. This was the proposition of the *Corpus Juris* which said that the judge should exclude the illegal evidence only in the case where illegal evidence would undermine the fairness of the proceedings. However this is a very low standard and I think that this solution should be rejected. Introducing exclusionary rules only if illegal evidence would render the trial unfair as a whole, copying the assessment criteria of the European Court of Human Rights means the abolition of the national rules of admissibility of evidence and show, from my opinion, this respect for protection of human rights in the national legal orders. The National Criminal Courts are not Constitutional Courts or International Human Rights Courts: the former decides on the violation of the criminal procedural law and the latter on the violation of the criminal proceedings, preventing by exclusion of illegal evidence at any stage of the proceedings the violation of fundamental rights and unfair practices at trial.

The European Court of Human Rights decides when the criminal proceedings have been final on fairness of the prosecution as a whole. In certain stage of the proceedings it is not possible to estimate whether certain evidence would render the proceedings unfair as a whole, but the exclusion than prevents such result. Additionally, the aim of the exclusionary rule at the national level it is not only to preserve fair trial, but also to protect other fundamental human rights from arbitrary expression of the State authorities. Therefore, it is not acceptable to bypass rules

of National Criminal Procedural Law and prescribe exclusionary rule as a sanction to the authorities by a violation: its provision by proclaiming that the illusionary rule can be used only if constitutional and convention rights to fair trial is violated. Such solution would undermine also why to public interest in preserving the integrity of the judicial process and values of civilized society founded on the rule of law. It also overvalues the interest of the effective persecution of the EU Fraud and the expense of violation of the basic human rights.

And the third solution is the mandatory admissibility which is also problematic. So any evidence that will be collected in line with the rules of the regulation should be accepted by the national judge. I think that this certainly can be the case because when the investigating authorities are taking these measures they have to follow the regulation. However, in certain cases you don't know whether the evidence is legal or not legal; if, for example, it can be decided only at a stage of trial. For example, the bit statements the European Court of Human Rights that says that the defendant has the right to interrogate the witness of the prosecution. In many countries, we have the solution that in the pre-trial stage of the proceedings, the prosecutor interrogates the witness alone so without the presence of the defense. I don't know what the regulation would be like, but in that case, if the witness is not again at the trial stage interrogated by the defendant, this statement cannot be used, according to European Court of Human Rights, in the judgment. So we have to give some discretion to the trial judge, whether to use or not to use the evidence collected by the EPPO.

And the third and last issue is judicial control of prosecutorial decisions. This is the most controversial one. As I said already, there are different solutions; even two opposite to solutions in the European Union. For example, I gave already the example of the Germany where you have no judicial control of the prosecutorial function of the prosecutor. And, for example, Austria were you will have also prosecutorial investigation, but with judicial control from the first moment of the pre-trial stage of the proceedings. And also we have countries with investigative judge where you have also judicial control. So the question is whether the decision of the prosecutor to open the investigation; to continue with the investigation and to close it should be under the judicial control or not. The European Court of Human Rights does not impose directly that must be judicial control, but it itself has already access the decision of the national court to open investigation and said "if there is no enough suspicion, you cannot open"; or if there is a suspicion to open an investigation or arrest someone. The other is decision not to prosecute: this is related to the effective investigation which is one of the positive obligations of the Member States related to the art. 238 of the European Convention. So if you don't prosecute, you can also violate European Convention of Human Rights. Also the European Court of Justice, if you remember this "mais scandal" in 1989 where the Greek authorities were also condemned by the European Court of Justice because they didn't open criminal investigation in the case of frauds against the financial interests of European Union. In line with what I have suggested (that the EPPO should follow the higher standards of the protection of human rights), I think that the decision of the EPPO should be also under the judicial control.