

FRA Opinion – 1/2014
[EPP0]

Vienna, 4 February 2014

Opinion of the
European Union Agency for Fundamental Rights
on a proposal to establish
a European Public Prosecutor's Office

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA *“to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”*,

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of FRA to *“formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”*,

Having regard also to Recital 13 of Council Regulation 168/2007, according to which *“the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”*,

Having regard to previous opinions of FRA on related issues; in particular: on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime,¹ on the Confiscation of proceeds of crime,² on the proposed Data protection reform package,³ and on the draft Directive regarding the European Investigation Order,⁴

Having regard to the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office,⁵ and to the accompanying Impact Assessment,⁶

¹ FRA (2013), *Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime*, 15 October 2013, available at: http://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf.

² FRA (2012), *Opinion on the confiscation of proceeds of crime*, 4 December 2012, available at: http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

³ FRA (2012), *Opinion on the proposed data protection reform package*, 1 October 2012, available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

⁴ FRA (2011), *Opinion on the draft Directive regarding the European Investigation Order*, 14 February 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf.

⁵ COM(2013) 534 final, 17 July 2013, available at: http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf.

Having regard to the numerous expert opinions on the issue that are available, in particular those of the European Economic and Social Committee EESC,⁷ the Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX) of the EU Committee of the Regions,⁸ forthcoming by the European Data Protection Supervisor,⁹

Having regard to the request of the European Parliament of 20 December 2013 for an Opinion of the European Union Agency for Fundamental Rights on fundamental rights issues associated with the proposal,

Building on the fundamental rights of the European Union as well as the international human rights standards, especially of the Council of Europe.

SUBMITS THE FOLLOWING OPINION:

⁶ SWD(2013) 274 final, 17 July 2013, available at:

http://ec.europa.eu/justice/criminal/files/swd_2013_274_en.pdf.

⁷ *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office*, COM(2013) 534 final, SOC/491, 11 December 2013, available at: www.eesc.europa.eu/?i=portal.en.soc-opinions.29249.

⁸ Draft Opinion, Commission for Citizenship, Governance, Institutional and External Affairs, proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, CIVEX-V-45, 25 November 2013, available at:

www.toad.cor.europa.eu/ViewDoc.aspx?doc=cdr%5ccivex-v%5cdossiers%5ccivex-v-045%5cEN%5cCDR6520-2013_00_00_TRA_PA_EN.doc&docid=2949058.

⁹ Forthcoming in 2014, see:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Priorities/13-12-18_Inventory_2014_final_EN.pdf.

Opinions

Strengthening the legitimacy of the choice of forum

The foreseeability of the law is one of the crucial elements of the principle of legality. While avoiding excessive rigidity and allowing for a certain amount of flexibility, especially given the need to accommodate diversity across the EU, the requirement of foreseeability in the text of the regulation could be enhanced.

The regulation should provide for more precise and prioritised criteria for the EPP0 to follow when it makes a decision on the competent national jurisdiction. This will enable individuals to foresee the consequences of such a decision, protect the principle of equality before the law and afford adequate protection against any arbitrary exercise of the EPP0's choice of jurisdiction.

In order to avoid any arbitrary exercise of the EPP0's powers under the proposed regulation, more comprehensive rules on access to effective remedies before a court in relation to all EPP0's actions and performance should be considered. In relation to the EPP0's decisions on the competent court, this requires that the judicial review be effective and operational in practice, bearing in mind the potential cross-border nature of cases.

Ensuring proportionality of investigation measures

The specific framework within which the EPP0 can undertake investigation measures should be sufficiently clear to ensure the proportionate use of investigation powers. This should be ensured in light of, for example, the seriousness of the offence and the intensity of interference of investigation measures with the substantive rights of persons under investigation and the risk of irreversible damage. These boundaries are particularly needed given the range of substantive rights potentially affected by the EPP0's investigations, including the right to property or the right to respect for private life. More comprehensive rules on judicial review of prosecutorial powers, in particular on the possibility and procedure for judicial review (ex post factum) into the conduct of investigations and prosecutions, would be beneficial.

Providing clear standards regarding defence rights

Defence rights should be explicitly and clearly guaranteed at all stages of investigations and prosecutions to ensure fundamental rights compliance. The current general reference to other EU secondary law instruments or national laws may not be adequate given the cross-border nature and intrusiveness of the proposed regime. Specific safeguards should be considered and clarifications made in order to ensure the effective exercise of defence rights, including access to legal representation and legal aid and the principle of ne bis in idem. Individuals' effective access to justice at both the EU and national level throughout all stages of investigations and prosecutions should be strengthened and limitations removed. It would also be essential for the regulation to provide for a compensation mechanism for wrongful investigation or prosecutions that affected individuals would have effective access to.

Including a comprehensive reference to the Charter

A non-selective and explicit reference to all rights under the Charter would help to avoid any doubts about the way in which national judges should apply the Charter's articles when considering the admission of evidence submitted by the EPP0. In addition, some form of operational guidance for the national courts to ensure effective implementation of the general fundamental rights standards under the Charter in concrete situations would be useful.

Providing for full-fledged access to remedies

The considerable limits imposed on the role of the CJEU by Article 36 of the proposed regulation should be re-considered to avoid violations of the right protected by Article 47 of the Charter and to ensure that any interferences with this right are proportionate and pursue a legitimate aim.

Ensuring victims' rights in general

The regulation could include specific rules to ensure the effective protection of victims' rights in light of the standards set out in the EU's Victims Directive.

Strengthening victims' participation in criminal proceedings

The victim's role in the decision-making process on whether or not to prosecute could be acknowledged.

Safeguarding victims' rights in transaction cases

The requirement of foreseeability of the law could also be strengthened through specific criteria for cases that are potentially open to transaction. Above all, transactions should be ruled out where they would compromise victims' rights.

Enhancing legal clarity

In addition to specific examples provided for improved clarity and foreseeability throughout this Opinion, additional examples can be offered. The regulation could be more clear and precise and foreseeable, including in relation to the definitions that aim to set out the basic framework within which the EPP0 is to work, such as the types of crime subject to prosecution by the EPP0.

Safeguarding the EPP0's independence

Given the specific and changing role of prosecutors in the criminal justice system, it is necessary for the regulation to provide for clearer rules and more specific safeguards to ensure an independent, impartial and responsible functioning of the EPP0, including on the role of the European Delegated Prosecutors. For instance, specific rules on the EPP0's annual report required to be sent to the main three EU institutions and the national parliaments and the obligation to appear before the European Parliament and the Council to "give account" of its work, should not include any obligation to justify choices made in individual cases.

Promoting holistic fundamental rights protection and enhancing trust

The regulation could include an additional mechanism to ensure that the functioning of the EPPO meets the highest possible degree of fundamental rights standards. EPPO's activities could be independently reviewed from a fundamental rights perspective and the review findings could be published regularly, and for the first time as soon as possible after the beginning of the regulation's application. This would contribute to the fundamental rights compliance of the whole regime and enhance trust between Member States. Furthermore, fundamental rights should be raised and mainstreamed in the work of all involved, including by comprehensive and regular legal training on related issues for practitioners.

Introduction

FRA welcomes the request of the European Parliament of 20 December 2013 to deliver an “*opinion on fundamental rights issues associated with the Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office [... (proposed regulation)]*”. The request was sent in relation to the preparation of a European Parliament interim report on the proposal for a Council regulation on the establishment of an EPPO.¹⁰ Since the deadline for submission of amendments to the draft interim report was 17 January 2014, FRA provided some pointers as to the content of the future opinion in its letter of response on 14 January 2014, when it also agreed to prepare an opinion.

The European Commission is proposing to establish a European Public Prosecutor’s Office (EPPO) mandated to prosecute crimes against the European Union’s (EU) financial interests – fraud or other fraud-related crimes, such as money laundering. The proposed regulation envisages a specialised EU body with powers to bring cases at national level through delegated prosecutors. Prosecutions are intended to be carried out in national courts and rely on national procedures.

According to the Commission,¹¹ limited resources in EU Member States mean that national law enforcement efforts are fragmented in this area, which often allows cross-border crimes against the EU’s financial interests to remain undetected. EU efforts to solve this problem have proven insufficient, with significant difficulties encountered in the coordination, cooperation and information exchange among existing EU bodies and agencies. National judicial authorities’ responses to fraud investigations conducted by the European Anti-Fraud Office (OLAF) are also inconsistent, with prosecution rates on the whole remaining low. The proposed regulation aims to address these problems by establishing an EPPO that ensures consistency and coordination in the investigation and prosecution of such crimes.

From a fundamental rights perspective, it is important to note that Article 11 of the proposed regulation explicitly requires the EPPO to “*ensure that its activities respect the rights*” of the Charter of Fundamental Rights of the European Union (Charter). This requirement is then detailed in the “*procedural safeguards*” of Articles 32–35, constituting minimum standards. National procedures, on which the EPPO would rely to prosecute any case, must, according to these safeguards, comply with current as well as prospective EU legislation related to enumerated procedural rights (Article 32). The proposed regulation guarantees “*in accordance with national law*” the right to remain silent, to be presumed innocent, to legal aid as well as to the rights concerning evidence (Articles 33–35). Provided it is a strong and independent institution, the EPPO could serve as a catalyst for harmonised EU legislation elevating the level of protection on, for instance, criminal procedures, the rights of victims of crime and data protection, because it is obliged to carry out its activities at national level in accordance with the Charter and EU law.

¹⁰ Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament, *Draft Interim Report on the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office*, 2013/0255(APP), 29 November 2013, available at: www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-519.809&format=PDF&language=EN&secondRef=01.

¹¹ See Explanatory Memorandum, COM(2013) 534 final, 17 July 2013, available at: http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf.

Still, an EPPO as outlined in the proposed regulation raises issues in relation to fundamental rights. These concerns relate both to ordinary prosecutorial powers and the special cross-border nature of the prosecutions to be carried out, including the interaction between the legal systems of the Member States with the legal and institutional framework of the EU.

The details of the EPPO might evolve further before becoming law. FRA has opted, therefore, to offer an overview of selected core fundamental rights principles that are at stake. FRA stands ready, should it be so requested, to also comment at a later stage.

This opinion is divided into five main sections:

1. Judicial review and other safeguards
2. Defence rights
3. Victims' rights
4. Legal clarity
5. Regular assessment and trust

There are two underlying issues which cut across all sections of this opinion and should be kept in mind throughout. The first concerns the complex and at times unclear interaction between the national and EU level in the proposed regulation. Related to this is the importance of judicial review of the EPPO's actions, including the question of where the responsibility for such reviews should lie.

1. Judicial review and other safeguards

According to both the Charter and the European Convention on Human Rights (ECHR) and relevant case law, every individual subject to a criminal investigation must be granted access to an effective judicial remedy, including to complain where the criminal charge is not decided upon within a reasonable timeframe. Prosecutors are not considered, within the meaning of Article 6 (1) of the ECHR, as an independent and impartial tribunal (for prosecutorial independence and developments in this regard, see further Section 4). In order to comply with Article 6, the prosecutors' decisions must be subject to checks by a judicial body having full jurisdiction.¹² To ensure its adherence to these requirements, the regulation would need stronger guarantees at both the national and EU levels.

Choice of national jurisdiction (Articles 18 (5) and 27 (4) of the proposed regulation)

Article 27 (4) of the proposed regulation states that the EPPO shall choose in which Member State a trial is to take place, "*bearing in mind the proper administration of justice*" and "*taking into account*" a series of criteria. The location of a trial is of crucial importance to the ability to mount an effective defence. Individuals must have certainty as to which jurisdiction (forum) they will be subject to as early as possible (foreseeability) in order to familiarise themselves with the relevant legal procedures. This is particularly true when the forum the EPPO chooses is not the home state of the accused. The choice of jurisdiction can also affect the principle of equality before the law, which requires that similar cases are dealt with in similar proceedings.¹³

According to the European Court of Human Rights' (ECtHR) jurisprudence, legal provisions regulating how a prosecutor chooses a court before which to bring a case must satisfy the foreseeability requirement and provide effective safeguards against arbitrary decisions, including via judicial review.¹⁴ The regulation could be clearer and provide more detail on how it deals with foreseeability and effective safeguards.

The text of Article 27 (4) discusses the need for the EPPO to consult "*with the European Delegated Prosecutor submitting the case*" and, as mentioned earlier, bear in mind the "*proper administration of justice*" when making a decision on the competent national jurisdiction. To provide guidance on where a case should be prosecuted, the proposed regulation also refers in that same article, sub-paragraph (a) to the "*majority of the offences*". This could be made more precise by prioritising the criteria that the regulation lists to guide the choice of jurisdiction. Alternatively, the regulation could include rules on how to proceed in cases where conflicts over the choice of jurisdiction arise. Such

¹² ECtHR, *Zlinsat, spol. s r.o., v. Bulgaria*, No. 57785/00, 15 June 2006. See also in relation to ECHR Art. 5 (3) where prosecutors have not been deemed sufficiently independent to qualify as "*a judge or other officer authorized by law to exercise judicial power*": ECtHR (General Chamber), *Medvedyev and Others v. France*, No. 3394/03, 29 March 2010 and ECtHR, *Moulin v. France*, No. 37104/06, 23 November 2010. For the relevant Court of Justice of the European Union (CJEU) case law, see, for example, Joined cases C-74/95 and C-129/95, *Criminal proceedings against X*, 12 December 1996, paras. 17–20 and CJEU, C-516/99, *Walter Schmid*, 30 May 2002, paras. 34–44.

¹³ See UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN doc. CCPR/C/GC/32, 23 August 2007.

¹⁴ ECtHR, *Camilleri v. Malta*, No. 42931/10, 22 January 2013.

improvements would enhance legal clarity and foreseeability (other examples concerned with legal clarity are provided in Section 4).

A similar problem with legal clarity and foreseeability exists in relation to the EPPO's power under Article 18 (5) of the proposed regulation to transfer the investigation and prosecution of the case from one European Delegated Prosecutor – and therefore most likely from one Member State – to another, depending on “*one or more*” of the general criteria listed, such as “*the seriousness of the offence*” or the cross-border dimensions of a case.¹⁵ Even a high case load in a particular Member State could be offered as a reason under Article 18 (5), which refers to the possibility of transferring a case due to “*the unavailability of national investigation authorities*”.

Further problems in relation to Article 18 of the proposed regulation could specifically arise in cross-border settings where investigatory powers could be applied in two different Member States (see paragraph (2) of Article 18), such as monitoring of cross-border communication. Here, the EPPO could pursue an investigative measure for the same purpose in a second Member State, if, for example, judicial pre-authorisation was denied in the first.

While some flexibility is needed, strategic choices on jurisdiction (in which Member State to prosecute the case) may lead the EPPO to pursue a case in a particular national system because it offers swifter proceedings, sentencing practices that are more favourable to the prosecution or greater availability of prosecutorial powers. This choice of jurisdiction might negatively affect the extent of defence rights (see further Section 2) and the principle of equality before the law. This flexibility may also compromise foreseeability – by introducing uncertainty about where a case may be brought, individuals will not know under which legal regime they are to be held accountable.

In addition to clarifying and strengthening criteria on the choice of jurisdiction to enhance overall foreseeability, to avoid any arbitrariness in the choice of jurisdiction, it would seem reasonable to explicitly oblige Member States to ensure the availability of judicial review as an ultimate safeguard on the EPPO's choice of forum, in cross-border cases in particular. Such safeguards should in particular ensure that any court providing the judicial review is equipped or provided with a complete picture of the issues at stake so as to be able to conduct a proper review of the choice of forum, not only from the vantage point of one jurisdiction.

FRA opinion

Strengthening the legitimacy of the choice of forum

The foreseeability of the law is one of the crucial elements of the principle of legality. While avoiding excessive rigidity and allowing for a certain amount of flexibility, especially given the need to accommodate diversity across the EU, the requirement of foreseeability in the text of the regulation could be enhanced.

The regulation should provide for more precise and prioritised criteria for the EPPO to follow when it makes a decision on the competent national jurisdiction. This will enable

¹⁵ See also Meijers Committee (Standing Committee of experts on international immigration, refugee and criminal law), *Note on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office*, COM(2013) 534 final, CM315, 25 September 2013, available at: www.commissie-meijers.nl/assets/commissiemeijers/CM1315%20Note%20Meijers%20Committee%20on%20EPPO.pdf.

individuals to foresee the consequences of such a decision, protect the principle of equality before the law and afford adequate protection against any arbitrary exercise of the EPPO's choice of jurisdiction.

In order to avoid any arbitrary exercise of the EPPO's powers under the proposed regulation, more comprehensive rules on access to effective remedies before a court in relation to all EPPO's actions and performance should be considered. In relation to the EPPO's decisions on the competent court, this requires that the judicial review be effective and operational in practice, bearing in mind the potential cross-border nature of cases.

Authorisation of the use of specific investigation powers (Article 26 of the proposed regulation)

The prosecutorial powers under Article 26 of the proposed regulation span from house searches through to intercepting telecommunications. Such measures can have a significant impact on the lives of the individuals subjected to them, including third parties other than the accused. In order to reflect this, authorisation of the use of intrusive measures should be open to judicial review. Whereas some investigative powers are subject to authorisation by the competent judicial authority of the Member State¹⁶ where they are to be carried out (Article 26 (4)), others are subject to such authorisation only “if required by the national law of the Member State where the investigation measure is to be carried out” (Article 26 (5)). In line with well-established jurisprudence,¹⁷ in particular where no prior authorisation is required, there must be adequate overall guarantees that constitute a sufficiently strict framework for the EPPO's investigation powers.¹⁸ The Council of Europe's Committee of Ministers has a detailed annex to their 2005 Recommendation on “special investigation techniques’ in relation to serious crimes including acts of terrorism” laying down requirements that such techniques be clearly defined under national law and allow for judicial scrutiny.¹⁹

Article 26 provides for a non-exhaustive list (other measures available under national law may be used) of investigative measures that must be made available to the EPPO. The EU legislator seems to presume that where non-existent, the listed prosecutorial powers must be incorporated into the national legal order for their use in the EPPO regime.

The content and limits of the listed powers, their conditions and the procedure to be followed are an issue from the perspective of legal clarity (see further examples in Section 4). In particular, the regulation should clearly require the national legislator when introducing such new powers to ensure that they are accompanied by the relevant

¹⁶ The current paragraph (4) of Article 26 only specifies that the most intrusive of these (a)–(j) requires authorisation by a judicial authority. Drawing on the case law presented earlier, “judicial authority” should be more narrowly defined as a court of law. See ECtHR, *Zlinsat, spol. s r.o., v. Bulgaria*, No. 57785/00, 15 June 2006, ECtHR (General Chamber), *Medvedyev and Others v. France*, No. 3394/03, 29 March 2010; and ECtHR, *Moulin v. France*, No. 37104/06, 23 November 2010.

¹⁷ E.g. ECtHR, *Funke v. France*, No. 10828/84, 25 February 1993.

¹⁸ E.g. CJEU, Joined cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn and Others v. Commission*, 6 September 2013.

¹⁹ Council of Europe, Committee of Ministers (2010), *Recommendation Rec(2005)10 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism*, 20 April 2005.

procedural safeguards, including where needed judicial scrutiny – be it *ex-ante* authorisation or *ex-post* review.

The proposed regulation currently requires only that investigation measures shall not be ordered without reasonable grounds and if equivalent, less intrusive means are available (Article 26 (3)). In order to ensure that interferences with the rights protected by the Charter are in accordance with the law as required by the ECtHR's case law, additional limits to these powers should be introduced. In general, intrusive measures should be kept to a minimum, ordered strictly on a case-by-case basis and limited to circumstances directly linked to on-going investigations.

The ECtHR has held that the relevant legislation must specify the precise circumstances in which an interference with human rights may be permitted, and that the decision to allow such interference can only be taken on a case-by-case basis by the authority designated by law to do so.²⁰ Concerning the right to data protection, the ECtHR has held that the foreseeability of use principle requires that clear limits be imposed by law on the collection and storage of data, including as to the type of information collected, the category of persons affected, the circumstances in which collection takes place and the length of storage.²¹ According to the Court's case law, the proportionality of any measure depriving an individual of property will depend upon a variety of factors including the clarity of the conditions set out by law and the extent of discretion conferred upon the authority in question. An unduly long retention of evidence that consists of private property will also be considered disproportionate.²² Finally, individuals must be able to challenge the accuracy of data collected and stored,²³ including evidence obtained through telephone tapping or other methods of covert surveillance.²⁴

In relation to searches, the scope of materials examined must also be proportionate in the relevant circumstances, in particular where issues of professional confidentiality are involved (e.g. when ordering a search of lawyer's offices).²⁵ Personal data collected and stored by the EPPO should be strictly limited to such data linked to on-going investigations and may only be transferred for associated investigatory purposes. Accordingly, the time limits currently outlined by the proposed regulation should be reviewed in order to ensure the shortest possible duration of storage.²⁶ Finally, any requirement to hand over objects or documents should respect the privilege against self-incrimination and the rights of witnesses not to give evidence.²⁷

²⁰ ECtHR, *Malone v. UK*, No. 8691/79, 2 August 1984; see also ECtHR, *Vetter v. France*, No. 59842/00, 31 May 2005; and *Liberty and Others v. the United Kingdom*, No. 58243/00, 1 July 2008. See also the United Nations Human Rights Committee, *Van Hulst v. The Netherlands*, No. 903/1999, 1 November 2004;

²¹ ECtHR, *Rotaru v. Romania*, No. 28341/95, 4 May 2000.

²² See ECtHR, *Raimondo v. Italy*, No. 12954/87, 22 February 1994; ECtHR, *Sporrong and Lönnroth v. Sweden*, No. 7151/75, 23 September 1982.

²³ ECtHR, *Rotaru v. Romania*, No. 28341/95, 4 May 2000.

²⁴ ECtHR, *Matheron v. France*, No. 57752/00, 29 March 2005.

²⁵ ECtHR, *Niemietz v. Germany*, No. 13710/88, 16 December 1992.

²⁶ On this point see also the Meijers Committee, *Note on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)*, CM315, 25 September 2013, available at: www.commissie-meijers.nl/assets/commissiemeijers/CM1315%20Note%20Meijers%20Committee%20on%20EPPO.pdf.

²⁷ ECtHR, *Chambaz v. Switzerland*; No. 11663/04, 5 April 2012; on this point see also CCBE Opinion available at: www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_EPPOpdf1_1360678235.pdf.

The regulation could also be clearer, for example, on the possibility and procedure for judicial review (*ex post factum*) into the conduct of former EPPO investigations and prosecutions.²⁸ Specifics on such judicial reviews would be particularly relevant for those cases where no prior judicial authorisation takes place. The investigation measures in Article 26 of the proposed regulation have the potential to significantly affect several substantive rights protected by the Charter, including the right to privacy (Article 7), the right to data protection (Article 8) and the right to property (Article 17). The ECtHR has consistently held that the possibility of judicial review is crucial to determining whether or not interference with any of the above rights is proportionate and necessary in a democratic society.

FRA opinion

Ensuring proportionality of investigation measures

The specific framework within which the EPPO can undertake investigation measures should be sufficiently clear to ensure the proportionate use of investigation powers. This should be ensured in light of, for example, the seriousness of the offence and the intensity of interference of investigation measures with the substantive rights of persons under investigation and the risk of irreversible damage. These boundaries are particularly needed given the range of substantive rights potentially affected by the EPPO's investigations, including the right to property or the right to respect for private life. More comprehensive rules on judicial review of prosecutorial powers, in particular on the possibility and procedure for judicial review (ex post factum) into the conduct of investigations and prosecutions, would be beneficial.

²⁸ E.g. ECtHR, *Heino v. Finland*, No. 56720/09, 15 February 2011, para. 45.

2. Defence rights

General considerations

Fair trial guarantees apply to criminal proceedings in their entirety, including the pre-trial investigation stage.²⁹ According to the ECtHR, “Article 6 of the ECHR – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions”.³⁰ The fair trial guarantees under Article 6 of the ECHR start to apply with an official notification of suspicion against a person³¹ or practical measures, such as a search, when the person is first substantially affected (“the situation of the [suspect] has been substantially affected”)³² by the charge.³³ In order to ensure that the right to a fair trial remains sufficiently practical and effective, for example, access to a lawyer should be provided from the first police interrogation of a suspect, unless there are compelling reasons to restrict this right without unduly prejudicing the rights of the accused under Article 6.³⁴

Defence rights under Article 48 of the Charter form an integral part of the right to a fair trial. The minimum defence standards in criminal proceedings include the presumption of innocence, the privilege against self-incrimination and the rights of witnesses not to give evidence,³⁵ the right to be informed of the accusation, the right to legal representation and the right to free assistance from an interpreter (Article 48 of the Charter and Article 6 (2) and (3) of the ECHR). When examining the fairness of proceedings, a number of other requirements are relevant to securing the right to fair trial, including the principles of legality and proportionality under Charter Article 49³⁶ and the double jeopardy rule (*ne bis in idem*) under Article 50.

The proposed regulation also reflects some aspects of these rights by referring to the existing and planned EU law on criminal procedures, as implemented by national law.

The proposed regulation furthermore refers to the right to remain silent, the presumption of innocence, the right to legal aid and the right to present evidence to the EPPO for consideration, which have to be guaranteed in accordance with national law. How compliance is to be ensured in practice is, however, not clear. National law should apply but may not be in compliance with the Charter or EU law in all respects. It is unclear how such possible shortcomings should be addressed and who is responsible for compliance with fundamental rights standards – the EPPO or the Member State where the prosecution

²⁹ ECtHR *Stratégies et Communications et Dumoulin v. Belgium*, No. 37370/97 15 July 2002; see also *FRA Opinion – 1/2011 on the draft Directive regarding the European Investigation Order*, 14 February 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf.

³⁰ ECtHR (Grand Chamber), *Salduz v. Turkey*, No. 36391/02, 27 November 2008, paras. 50-55.

³¹ ECtHR, *Eckle v. Germany*, No. 8130/78, 15 July 1982, paras. 73-75.

³² *Ibid.*, para. 73.

³³ ECtHR, *Foti and others v. Italy*, No. 7913/77, 10 December 1982, paras. 52-53.

³⁴ ECtHR (Grand Chamber), *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 55.

³⁵ ECtHR, *Chambaz v. Switzerland*; No. 11663/04, 5 April 2012; on this point see also CCBE Opinion available at: www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_EPPOpdf1_1360678235.pdf.

³⁶ See also FRA (2012), *Opinion of the European Union Agency for Fundamental Rights on the Confiscation of proceeds of crime*, 4 December 2012, available at: http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

is being conducted. In general, it would help if the regulation included an explicit reference to the Charter also in relation to the Member States so that it is clear that the same minimum standards apply. The proposed regulation is also not explicit on the relationship between these provisions and the present and proposed (as well as possible future) EU instruments that aim at providing common minimum standards in this area.

In relation to the specific aspects of defence rights, in light of the cited case law, a reference to effective cross-border safeguards to provide access to legal representation and, where needed, legal aid, in every state in which an individual is subject to investigation and prosecution, should be considered.

The proposed regulation's provisions on transaction (Article 29) also seem to be problematic due to its potential conflict with the CJEU's existing case law against trying a person twice for the same crime, known in legal parlance as double jeopardy or *ne bis in idem*. According to Recital 31 of the proposed regulation, "[t]he closure of a case through a transaction in accordance with this Regulation should not affect the application of administrative measures by the competent authorities, as far as those measures do not refer to penalties that could be equated to criminal penalties".³⁷ Yet, the concept of what precisely constitutes a criminal penalty would also depend on the nature of the measure itself – autonomously interpreted by the court.³⁸

In addition, according to CJEU jurisprudence, persons may not be prosecuted in a Member State on the same facts as those on which their case has been finally disposed of in another Member State, even if no court was involved in the settlement of the criminal proceedings and the settlement does not take the form of a judicial decision.³⁹

A further requirement under the case law of the ECtHR, would be to provide safeguards against a transaction designed in a disproportionate way between the terms offered and the potential outcome of the crime so that the acceptance of terms could be seen as the result of coercion.⁴⁰

Finally, in the context of defence rights generally, the regulation should clearly establish a requirement that any persons harmed by the EPPO's conduct should be able to bring an action in their own jurisdiction to seek compensation for damages suffered.

FRA opinion

Providing clear standards regarding defence rights

Defence rights should be explicitly and clearly guaranteed at all stages of investigations and prosecutions to ensure fundamental rights compliance. The current general reference to other EU secondary law instruments or national laws may not be adequate given the cross-border nature and intrusiveness of the proposed regime. Specific safeguards

³⁷ See however CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, Opinion of the AG Cruz Villalón of 12 June 2012, paras. 88-96.

³⁸ ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia*, No. 14939/03, 10 February 2009; see also *Welch v. the United Kingdom*, No. 17440/90, 9 February 1995.

³⁹ CJEU, Joined Cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, judgment 11 February 2003; and CJEU C-469/03, *Criminal proceedings v. Mario Filimeno Miraglia*, judgment of 10 March 2005. See also Meijers Committee, *Note on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534final*, 25 September 2013 available at: www.commissie-meijers.nl/assets/commissiemeijers/CM1315%20Note%20Meijers%20Committee%20on%20EPPO.pdf.

⁴⁰ ECtHR, *Deweere v. Belgium*, No. 6903/75, 27 February 1980.

should be considered and clarifications made in order to ensure the effective exercise of defence rights, including access to legal representation and legal aid and the principle of ne bis in idem. Individuals' effective access to justice at both the EU and national level throughout all stages of investigations and prosecutions should be strengthened and limitations removed. It would also be essential for the regulation to provide for a compensation mechanism for wrongful investigation or prosecutions that affected individuals would have effective access to.

Admissibility of evidence (Article 30 of the proposed regulation)

Investigations conducted by the EPPO will necessarily include the gathering of a range of evidence, in many cases across national borders. How this evidence is gathered will have an effect on the fairness of the proceedings against the accused. According to ECtHR case law, Article 6 of the ECHR requires that proceedings as a whole should be fair, including the way in which evidence is obtained.⁴¹ This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence put forward by the other party. National law may secure this requirement in various ways. Whatever method is chosen, it should ensure that, at an appropriate stage in the proceedings, each party is given an adequate and proper opportunity to challenge and question the evidence against him or her.⁴²

Article 30 of the proposed regulation obliges national courts to ensure that the EPPO's admission of evidence does not adversely affect the fairness of the procedure, as measured by Charter Articles 47 and 48. This selective reference to two Charter articles could be intended to accommodate different legal traditions. It could also possibly be read as implying that national courts are not to take other Charter rights into account when deciding on the admissibility of evidence. Yet, according to Article 51 of the Charter, all provisions of the Charter are binding on Member States when implementing EU law. Reference to only certain Charter rights may implicitly lead to the creation of a hierarchy of fundamental rights by national judges. In the interest of clarity, therefore, a reference to the obligation of national courts to ensure compliance with the full Charter when admitting evidence should be considered.

FRA opinion

Including a comprehensive reference to the Charter

A non-selective and explicit reference to all rights under the Charter would help to avoid any doubts about the way in which national judges should apply the Charter's articles when considering the admission of evidence submitted by the EPPO. In addition, some form of operational guidance for the national courts to ensure effective implementation of the general fundamental rights standards under the Charter in concrete situations would be useful.

⁴¹ ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996.

⁴² E.g. ECtHR, *Khan v. the United Kingdom*, No. 35394/97, 12 May 2000; or ECtHR, *Kostovski v. the Netherlands*, No. 11454/85, 20 November 1989.

The role of the CJEU

Article 36 (1) of the proposed regulation states that *“the [EPPO] shall be considered as a national authority for the purpose of judicial review.”* This provision explicitly denies an access to effective judicial remedy through the CJEU on the basis of Articles 263, 265, 267 and 268 of the Treaty, which would otherwise be available, in relation to all the acts of investigation and prosecution of the EPPO.

According to Recitals 37 and 38, *“national courts are able [...] to refer to the Court of Justice questions for preliminary rulings on the interpretation or the validity of provisions of Union law, including this Regulation, which are relevant for the judicial review of the acts of investigation and prosecution of the European Public Prosecutor’s Office.”* At the same time, *“[n]ational courts should not be able to refer questions on the validity of the acts of the European Public Prosecutor’s Office to the Court of Justice, since those acts should not be considered acts of a body of the Union for the purpose of judicial review”.*

Such an exclusion of any involvement of EU-level jurisdiction in relation to all the acts of investigation and prosecution of the EPPO does not seem to correspond, however, with the obligation to ensure that any interference with the right under Article 47 of the Charter be justified and proportionate.

To avoid violations of Article 47 of the Charter, any interference must not only be proportionate but must also pursue a legitimate aim. As in the case of proportionality, the proposed regulation does not address this aspect sufficiently clearly.

FRA opinion

Providing for full-fledged access to remedies

The considerable limits imposed on the role of the CJEU by Article 36 of the proposed regulation should be re-considered to avoid violations of the right protected by Article 47 of the Charter and to ensure that any interferences with this right are proportionate and pursue a legitimate aim.

3. Victims' rights

At present, the proposed regulation does not contain any provisions concerning victims' rights. Even though individuals are not likely to be the victim in most of these cases, it cannot be excluded that there also will be natural persons who are victims of crime.⁴³

Rights of natural persons who are victims of crime

Relevant CJEU case law highlights the importance of safeguarding rights and the legitimate interests of victims, including their right to be heard during criminal proceedings.⁴⁴ According to ECtHR case law, the notion of an effective remedy "entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."⁴⁵

ECtHR case law makes clear that the investigation process must guarantee a certain degree of transparency, openness and access for the victims and/or their relatives.⁴⁶ In addition, states are obliged to take measures aimed at carefully protecting victims against the risk of secondary victimisation to the extent that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.⁴⁷

While individual crime victims may not be a frequent feature in EPPO procedures, there may be situations where actions brought by the EPPO affect such victims' rights. An example of such a case would be one involving assets belonging to an individual or crimes included under Article 13 of the proposed regulation, referred to as the "[a]ncillary competence".

FRA opinion

Ensuring victims' rights in general

The regulation could include specific rules to ensure the effective protection of victims' rights in light of the standards set out in the EU's Victims Directive.

Powers to dismiss a case on the basis of the lack of relevant evidence (Article 28 (2) (b))

Article 28 (2) (b) of the proposed regulation allows the EPPO to dismiss a case for lack of relevant evidence. Such a decision may not be in the interest of individuals affected by the

⁴³ For the definition of victims, see Art. 2 of EU's Victims Directive, Directive 2012/29/EU of the Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14 November 2012.

⁴⁴ CJEU, Joined cases C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, 15 September 2011, paras. 58 and 59.

⁴⁵ ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, para. 98.

⁴⁶ See ECtHR, *Güleç v. Turkey*, No. 21593/93, 27 July 1998, para. 82, *Oğur v. Turkey*, No. 21594/93, 20 May 1999, para. 92; *Gül v. Turkey*, No. 22676/93, 14 December 2000, para. 93; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, para. 148.

⁴⁷ ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

alleged crime and should therefore be open to judicial review. The EU's Victims Directive provides in Article 11 for victims of crime to, *"in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute."*⁴⁸

According to well-established ECtHR case law, states are under a positive obligation to ensure that national criminal law provides for the prosecution and punishment of violations of certain ECHR rights.⁴⁹ Where there is an arguable claim that victims' rights have been violated, states also have a procedural obligation to conduct a thorough and effective investigation.⁵⁰ The ECtHR has repeatedly said that the possibility of appealing to a court an investigating authority's refusal to open criminal proceedings represents an important safeguard against that authority's arbitrary exercise of power.⁵¹

Such a duty to investigate, and where justified to prosecute, is affirmed in relation to victims whose fundamental rights have been violated. Indeed, in the bulk of cases, the crimes that the EPPO investigates will have been committed against the EU, but it is also possible that some of those crimes may have affected others, who should have the right to appeal to a court the decision not to prosecute.

The proposed regulation does not appear, however, to provide victims the possibility to appeal a case dismissed due to lack of evidence. In some instances, national systems might allow for a victim to appeal a case dismissed due to lack of evidence. The effects of such an appeal on the EPPO's decision not to prosecute, however, are unclear.

FRA opinion

Strengthening victims' participation in criminal proceedings

The victim's role in the decision-making process on whether or not to prosecute could be acknowledged.

Powers to accept a transaction (Article 29 of the proposed regulation)

Article 29 of the proposed regulation allows the EPPO to dismiss a case after the payment of a lump-sum fine by the suspect as compensation for damages. The EPPO may opt to use this procedure *"[...] where the case is not dismissed and it would serve the purpose of proper administration of justice"*. This form of settlement is referred to as a 'transaction'. Article 29 (4) of the proposed regulation explicitly excludes judicial review in 'transaction' cases. From the point of fundamental rights, there is a need to introduce relevant safeguards to ensure that EPPO's discretion would not be unlimited and could never be exercised at the cost of victims.

To ensure that the EPPO takes well-founded decisions on transactions, safeguards should be put in place, in particular since the *"proper administration of justice"* is a rather vague concept. These safeguards could include introducing the possibility of a judicial review over such transactions, which are currently excluded in paragraph (4) of Article 29, as well as imposing specific limits on the EPPO's discretionary powers. The latter could include criteria

⁴⁸ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012, OJ L 315/57, 14 November 2012.

⁴⁹ ECtHR, *X and Y v. The Netherlands*, No. 8978/80, 26 March 1985.

⁵⁰ ECtHR, *Chitayev and Chitayev v. Russia*, No. 59334/00, 18 January 2007.

⁵¹ ECtHR, *Chitayev and Chitayev v. Russia*, No. 59334/00, 18 January 2007.

restricting the range of cases where transactions are possible, such as to cases of less serious crimes and to those where no third party's rights are at stake. Also, as mentioned earlier, the regulation should make sure that transactions do not come at the cost of victims' rights.

FRA opinion

Safeguarding victims' rights in transaction cases

The requirement of foreseeability of the law could also be strengthened through specific criteria for cases that are potentially open to transaction. Above all, transactions should be ruled out where they would compromise victims' rights.

4. Legal clarity

General considerations

Legal clarity is a basic principle of the rule of law and a prerequisite for securing fundamental rights.⁵² In particular, it protects equality before the law by ensuring that all parties subject to a legal system are able to understand their rights and obligations under it. However, more could be done in the proposed regulation to achieve clarity.

FRA has in previous opinions stressed the need for clarity in legislative acts.⁵³ To accommodate the diverse legal systems of the Member States, the regulation will to a certain extent have to remain general. Still, the proposed regulation could be clearer.⁵⁴ In addition to examples mentioned in the previous parts of this opinion, this is also true for the type of crimes which could be subject to prosecution by the EPP0. The provision on “*criminal offences with the competence of the [EPP0]*” defines crime in Article 2 (b) as “*the fight against fraud to the Union’s financial interests by means of criminal law*”.⁵⁵ The proposed regulation also comes with a directive, under which Member States are to transpose the EU definitions of crime contained in the Protection of Financial Interests (PIF) Directive. This opens up a range of interpretations.⁵⁶ While this solution might be needed in the context of the EPP0, the ancillary competence in Article 13 of the proposed regulation exacerbates the lack of clarity by potentially including crimes “*inextricably linked with offences other than those referred to in Article 12*”.⁵⁷

FRA opinion

Enhancing legal clarity

In addition to specific examples provided for improved clarity and foreseeability throughout this Opinion, additional examples can be offered. The regulation could be more clear and precise and foreseeable, including in relation to the definitions that aim to

⁵² ECtHR, *Brumarescu v. Romania*, No. 28342/95, 28 October 1999.

⁵³ See e.g. FRA Opinion – 02/2012, 4 December 2012, p. 15, available at: http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

⁵⁴ See also the *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office*, COM(2013) 534 final, SOC/491, 11 December 2013, p. 2, available at: www.eesc.europa.eu/?i=portal.en.soc-opinions.29249.

⁵⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM(2012) 363 final, 11 July 2012, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0363:FIN:EN:PDF>, the stage of the file at present is available at: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=201814.

⁵⁶ On this point, see also Meijers Committee, *Note on the proposed Council Regulation on the establishment of the European Public Prosecutor’s Office (COM(2013) 534 final)*, CM315, 25 September 2013, available at: www.commissie-meijers.nl/assets/commissiemeijers/CM1315%20Note%20Meijers%20Committee%20on%20EPP0.pdf.

⁵⁷ On this point, see also European Parliament, Committee on Legal Affairs (JURI), Draft Opinion of the Committee on Legal Affairs on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office, 2013/0255(APP), 20 December 2013, available at: www.europarl.europa.eu/sides/getDoc.do?type=COMPARTL&reference=PE-526.192&format=PDF&language=EN&secondRef=01.

set out the basic framework within which the EPP0 is to work, such as the types of crime subject to prosecution by the EPP0.

Prosecutorial independence

European instruments and jurisprudence suggest a development in the role of the prosecutor to more ‘quasi-judicial’ powers. Prosecutors have, according to the ECtHR’s case law, a duty to provide reasoning for a decision not to prosecute.⁵⁸ Prosecutors are also obliged to balance their role as ‘accuser’ with respect for the presumption of innocence.⁵⁹ This position of the prosecutor is also reflected in the 2000 recommendations “on the role of public prosecution in the criminal justice system” by the Council of Europe Committee of Ministers.⁶⁰ The instruments specify that the “[d]uties of the public prosecutor towards individuals [... include] in particular [...] that they] carry out their functions fairly, impartially and objectively [...] and] respect and seek to protect human rights [...]” (Article 24 (b)).⁶¹ Prosecutorial powers can have serious consequences on individuals. Such powers can, therefore, only be assigned to judicial officials with specific institutional guarantees that ensure independence and impartiality. The extension of the functions of the public prosecutor (for example through transactions, see further in Section 3) can significantly limit or even exclude court intervention. Public prosecutors’ functions can increasingly be described as quasi-judicial. The protection of fundamental rights in the performance of such functions gains in importance as a result.

A dual connection is foreseen in the proposed regulation for the European Delegated Prosecutors. They would be “*an integral part*” of the EPP0 according to Article 6 (5). Their independence is explicit in Article 5 and would be supported by a number of provisions related to selection and dismissal. Still, these prosecutors will only serve the EPP0 “*when they carry out investigations and prosecutions assigned to them.*” Article 6 (6) clarifies that they “*may also exercise their function as national prosecutors.*” Even though this dual system is addressed subsequently in paragraph (6), their connection also to the national prosecution service could call into question their independence. Greater clarity on their independence would be desirable.

Article 5 (1) of the regulation could be strengthened by including impartiality as an additional requirement. Also, Article 5 (3) (or Article 70) could clarify that the annual report to be given by the EPP0 to the European Parliament, the Council and the European Commission should not include any duty to justify choices made in individual cases.

⁵⁸ ECtHR (General Chamber), *Öneryildiz v. Turkey*, No. 48393/99 , 30 November 2004, ECtHR, *Khachiev and Akaieva v. Russia*, No. 57924/00 , 24 February 2005, ECtHR, *Okkali v. Turkey*, No. 52067/99 , 17 October 2006.

⁵⁹ ECtHR, *Daktaras v. Lithuania*, No. 42095/98, 10 October 2000.

⁶⁰ Council of Europe Committee of Ministers, Recommendation Rec(2000)19, 6 October 2000.

⁶¹ The Council of Europe experts bodies, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE) have issued joint opinions stating that judges and prosecutors “*shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially*”, CCPE Opinion No. 4, CCJE Opinion No. 12, 8 December 2009.

FRA opinion

Safeguarding the EPP0's independence

Given the specific and changing role of prosecutors in the criminal justice system, it is necessary for the regulation to provide for clearer rules and more specific safeguards to ensure an independent, impartial and responsible functioning of the EPP0, including on the role of European Delegated Prosecutors. For instance, specific rules on the EPP0's annual report required to be sent to the main three EU institutions and the national parliaments and the obligation to appear before the European Parliament and the Council to "give account" of its work, should not include any obligation to justify choices made in individual cases.

5. Regular assessment and trust

In addition to the concerns outlined above regarding substantive rights, there are some more general issues which should be considered in order to ensure that the EPPO complies with and promotes fundamental rights to the fullest possible extent. Article 74 of the proposed regulation provides for a European Commission review at the latest five years from the start of its application. Any such review should explicitly include a systematic evaluation of the fundamental rights concerns of the implementation of the regulation. Ideally, such a review should be based on comparative data collected in the EU Member States, ideally by an independent expert body so as to allow for an evidence-based assessment of both the needs of individuals and the fundamental rights. In view of the significant potential effects of the regulation on the rights of individuals, this review should be put in place at the very outset of the operations and be done continuously or at least at frequent intervals.⁶²

An overview of fundamental rights issues encountered could also explicitly be included in the annual report on the EPPO's general activities, which is foreseen in Article 70 of the proposed regulation. This would also support EPPO's accountability as per Article 5 of the proposed regulation.

FRA has previously stated that the EU “[...] needs to devote special attention to fundamental rights – not only because of the obligations undertaken in and of themselves but also to ensure mutual trust between Member States and the system's credibility among users.”⁶³ Regular assessments as suggested here, including a concrete analysis of the fundamental rights challenges encountered in implementing the EPPO regulation, would further reinforce overall trust among Member States as they act under the EPPO regime.

Mainstreaming fundamental rights in the work of all legal practitioners involved, including through comprehensive training on fundamental rights as an integral part of EU criminal law, would be highly beneficial.

⁶² FRA Opinion – 1/2011 on the draft Directive regarding the European Investigation Order, 14 February 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf.

⁶³ On the relationship between fundamental rights and trust among EU Member States, see FRA (2013), *Fundamental rights in the future of the European Union's Justice and Home Affairs*, 31 December 2013, available at: http://fra.europa.eu/sites/default/files/fra_submission_on_the_future_of_eu_justice.pdf.

FRA opinion

Promoting holistic fundamental rights protection and enhancing trust

The regulation could include an additional mechanism to ensure that the functioning of the EPP0 meets the highest possible degree of fundamental rights standards. EPP0's activities could be independently reviewed from a fundamental rights perspective and the review findings could be published regularly, and for the first time as soon as possible after the beginning of the regulation's application. This would contribute to the fundamental rights compliance of the whole regime and enhance trust between Member States. Furthermore, fundamental rights should be raised and mainstreamed in the work of all involved, including by comprehensive and regular legal training on related issues for practitioners.

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