EUROPEAN PARLIAMENT

Public Hearing on "The European Public Prosecutor's Office (EPPO) and the European Union's Judicial cooperation Unit (EUROJUST)"

Session 3. EPPO: judicial review

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Ignazio Patrone - Deputy Prosecutor General at the Italian Supreme Court

The access to a competent court to obtain the judicial review of the acts of a public authoritiy is, in a democratic society, a pillar of the Rule of Law: as to Article 47 of the Charter of Fundamental Rights of the EU - Right to an effective remedy and to a fair trial, **"**Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an **effective remedy** before a tribunal in compliance with the conditions laid down in this Article".

It is inconceivable that the activity of an European Body or Agency, specially in the field of criminal law, does not provide an efficient remedy before an independent and impartial tribunal, because this could cause a serious breach of both the Charter and the European Human Rights Convention. The competence of the "tribunal" must be clearly established and every possible conflict previously prevented.

The creation of a common Area of Freedom Security and Justice is strictly linked, under EU primary law, to the adoption of EU defense rights measures. These measures should be harmonized as far as possible, that is because different levels of EU Member State's commitment to respect the fundamental rights of individuals in criminal proceedings would run counter to the objectives and the integrated nature of the Area after the Lisbon Treaty. Once established the EPPO, these basic measures must be fulfilled and respected because EU citizens should not think that their rights are less protected than in national systems.

For these reasons, the issue is not **if** there should be a judicial review of investigation and prosecution acts adopted by the EPPO, but **what kind of review** and **before which judge**,

European or national, the review must be provided.
In order to ensure full compliance with the Charter (and with the European Convention on Human Rights) judicial review of acts of EU agencies and provisions on remedies for affected individuals should be examined as a matter of priority.

We know that in the first version of the Commission's proposal there was a clear choice for a national level of review. Article 36 provided that:
"1. When adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office shall be considered as a national authority for the purpose of judicial review.
2. Where provisions of national law are rendered applicable by this Regulation, such provisions shall not be considered as provisions of Union law for the purpose of Article 267 of the Treaty".

That point of the proposal was surely aimed for the purpose of a simplification of proceedings but it was generally considered inadequate by academics and practitioners.
The European Parliament stressed these doubts in its first resolution, adopted the 12 March 2014 (§ 5-vii) stating that "the right to an effective judicial remedy should be upheld at all times in respect of the European Public Prosecutor's activity throughout the Union; therefore, decisions taken by the European Public Prosecutor should be subject to judicial review before the competent court; in this regard, decisions taken by the European Public Prosecutor before or independently from the trial, such as those described in Articles 27, 28 and 29 concerning competence, dismissal of cases or transactions, should be subject to the remedies available before the Union Courts. Article 36 of the proposal should be redrafted to avoid the circumvention of the Treaty provisions on the jurisdiction of the Union's courts and a disproportionate limitation to the right to an effective judicial remedy under Article 47(1) of the Charter of Fundamental Rights".

In the second resolution, adopted on 29 April 2015, the EP reaffirmed that: "§ 24. … the right to a judicial remedy should be upheld at all times in respect of the EPPO's activity and recognises, also, the need for the EPPO to operate effectively; believes, therefore, that any decision taken by the EPPO should be subject to judicial review before the competent court; stresses that the decisions taken by the Chambers, such as **the choice of jurisdiction for prosecution**, the **dismissal or reallocation of a case** or a **transaction**, should be subject to judicial review before the Union courts".

I can say that these should be considered cornerstones for any future discipline concerning this matter. The review in these cases should be allocated before Union Courts and the reasons for that

choice in my opinion are:

a) **Jurisdiction**

While in civil and commercial matters the Union has elaborated a more and more established and almost complete set of Regulations on jurisdiction (all starting from the fundamental Brussels Convention of 1968) through which a party can know in advance, with very little room for incoherence and uncertainty, if a national court has or does not have the power to decide the case brought before it, in criminal matters there is no standard set of agreed rules to determine which State's courts have jurisdiction over a crime in case of a positive or negative conflict. Considering this lack of mandatory rules on criminal jurisdiction, I think that the decision over positive or negative conflicts could not be left to national Courts (even with the possible request of a preliminary ruling of the CJEU) and should be directly given to the Union Courts.

We should avoid any possible choice of jurisdiction by the Prosecutor (i.e. forum shopping) and at the same time there is a need for the adoption of a solid and coherent case law. On this issue we can recall a judgement of the EctHR, case Camilleri vs. Malta (Judgement of 27/05/2013, Application no. 42931/10). The Strasbourg Court was asked to rule on the conformity with the Convention of a provision that authorized the Maltese Prosecutor to choose – in certain conditions - in which Court the defendant had to be charged with drug trafficking. The Court of Human Rights declared that these discretionary rules violate the principle of predictability, enshrined in Article 7 of the Convention.

Someone argued that the *ne bis in idem* principle, many times invoked by national courts before the CJEU, could be a shelter against the risk of multiple prosecutions: I do not agree with this opinion: the *ne bis in idem* can intervene only at an advanced stage of the proceedings, and it is applied on the basis of the "first come, first served" rule, and it does not say anything on the allocation of proceedings. Finally, the principle is totally unfit to solve potential cases of negative conflicts of jurisdiction.

b) **Dismissal or reallocation of a case and transactions**

Concerning these very important decisions that would be taken by EPPO, the need of a judicial review at Union level depends on the substantial differences existing among our national criminal systems, where we have: prosecutions based on the principle of legality and others on the principle of opportunity: the participation or not of a judge (in some cases of an investigating judge) in the decision of dismissal or in the anticipated definition of the proceeding, such as plea bargaining: hierarchical and non hierarchical organizations of national Prosecution Services: systems where the Prosecutor have the power to order investigations and others where they prosecute after an

independent activity carried on by the police.
The inevitable links of national procedure laws with the future activity of the EPPO require a well established case law in case of disputes arising around this kind of final decisions by the EPPO that only a EU Court could give.

c) **Single procedure acts**

Single Procedure acts like seizure, search, phone tapping etc. should be reviewed at any single national level. These acts, as to Articles 25-28 of the Consolidated version of the Proposal examined by the December Council during the Luxembourg Presidency, will be subject (entirely or in part) to the law of member States and, in general, they imply the check of their regularity under any single procedure system.

d) **Pre-trial arrest and cross-border surrender**

The competence of national courts, in that last consolidated version, is clearly provided in Article 28 for Pre-trial arrest and cross-border surrender: "The European Delegated Prosecutor handling the case may order or request the arrest or pre-trial detention of the suspected or accused person **in accordance with national law applicable in similar domestic cases**".
If the applicable law shall be the national one, the review should be allocated at the same level.
Of course, there would be the possibility for any judge of a Member State to request a preliminary ruling of the CJEU (Article 267 TFEU) on the interpretation of the future EPPO regulation and of consequent national law.
We can also consider that we have now a useful bunch of directives concerning minimum defense standards in criminal proceedings that could avoid excessively different interpretations about individual guarantees.