



## **Statement on the project of Establishment of the European Public Prosecutor's Office (EPPO)**

### **1.**

*Medel wants to express strong support for the initiative that aims to create EPPO.*

*Over the last few years, thanks to a normative production that found its most important expression in the Stockholm Program, the EU adopted a set of Directives that aim to introduce - in the Member States' criminal trials - a number of rights that strengthen the protection of persons involved in criminal proceedings before the national courts: could they be persons accused of a crime or victims of crimes.*

*Now, a fundamental need, which is to strengthen the protection of EU financial interests against criminal behavior, has led to a proposal, the project to create – along with the EPPO and the rules that regulate its institutional position - a sort of (partial) criminal procedure code that shall regulate the EPPO activities in each Country and in front of their national Courts.*

*If we consider that it will be a Regulation, it follows that the EU criminal procedural Rules will be directly applicable in the criminal trials before the national Courts. This remark leads, objectively, to an important conclusion: thanks to this Regulation, are laying the basis for the creation of "a European system of justice", a common judicial system model, a European criminal trial's model.*

### **2.**

*If we read the subsequent versions of the Draft Regulation circulating for some time now; but if, above all, we read the official comments made by the European Parliament and the EU Agency for Fundamental Rights, we realize that the EU's decisions are going in a direction that had already been drawn by the case law of the two European Courts, the European Court of human rights and the Court of Justice of the European Union, but also by the Rome Convention which in 1998 set up the International Criminal Court (and its Prosecutor). In the drafts is declared, in a solemn manner, that the EU wants to create an independent Prosecutor Office, which acts: in the interest of the EU, as defined by law.*

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*We are in front of the model of an independent public prosecutor who, just because of it, will be accountable to Parliament, Commission and European Council, as solemnly proclaimed in Article 6 of the Project.*

*But, compared to what is stated in art. 6 of the Project, however, it seems that the ongoing negotiations are directing towards institutional and organizational models that are likely to "get away" from the aforementioned principles. The thing that is of particular concern is the fact that the negotiations are moving towards a model of Office whose apical position is no longer represented by the Prosecutor, but by a "College."*

*Well, this "institutional choice" objectively and necessarily implies a risk: the decisions taken by a collective body can't lead to a clear commitment on the part of individuals, but possibly only to a "no-confidence" of a political nature from those who appointed the members of that organ. When we consider that the creation of EPPO and its declared independence have been provided to allow EPPO to conduct investigations even against people who can hold important positions within the Union, we must necessarily remain very puzzled.*

*For appointments to international justice bodies, the practice is that there is a competition, which is divided into an initial selection of candidates carried out by independent experts and, then, in the subsequent election by the body that has announced the competition; such decision cannot, of course, ignore the suggestions by the expert evaluators. These guarantees cover the appointments, that is initial moment. To the which follows a second kind of guarantees: the mandate of judges and prosecutors, has no short-term and is not renewable.*

*It seems almost unnecessary to comment on the function of these rules; but it is precisely for this reason that we must express doubts and concerns. Indeed, as regards the appointments to the various positions in the womb of EPPO, the "material legislators" have in fact provided the selection mechanism now remembered, but only for the position of the Prosecutor. Instead, for European Prosecutors (members of the two bodies entrusted with every essential decision power: the College and the Chambers), the Draft establishes that it is up to States to indicate the names of two candidates. The EU bodies will be able to choose only between these candidates. But there is a further problem: the fact that the mandate of the European Prosecutors is renewable, with all the risks that this situation implies.*

*The Project contains, of course, rules governing possible pathological situations, which may imply the revocation of appointments. The content of these rules is a source of further concern, for two reasons: the generality of the situations in question and the manner in which the decision to revoke the appointments should be regulated:*

*a. the reasons for the dismissal are, in fact, indicated by the formula, completely generic and smoky, "he/she is no longer able to fulfill his/her tasks", next to the equally generic, of being "guilty of serious irregularities";*

*b. the project involves the Court of Justice in an improper role, entrusting to the Court the decision to "withdraw" the Prosecutor by his/her task, on the basis of a joint request by*

the Parliament, the Council or the Commission. And this request refers to factual circumstances that - for their absolute vagueness - could be the result of an assessment of a purely political nature. All this would involve the Court to take a decision as "non-technical" and therefore substantially character "dangerously" political.

Finally, there is one final and most important reason that leads to believe improvident this procedural mechanism. From a legal point of view, in fact, it seems that - in articulating this proposed legislation - weren't taken into account the provisions of art. 263, fourth paragraph of the Treaty on European Union, under which the ECJ could be referred to it by the dismissed Attorney, on the basis of a motivation that - precisely because of the provision of the law suggested in the project - could be entirely generic or even unlawful.

Even more seriously precarious is the position of Deputy European Prosecutors. In fact, they may be discharged at any time, on the basis of absolutely generic reasons; and this, despite the fact that the project affords them the responsibility "for the investigation and for the prosecution" and therefore, the tasks of a public prosecutor in the sense (enshrined in the Council Recommendation of the Council of Ministers 'Europe 19 \ 2000 on the role of public prosecutor in the criminal process system): "The College shall dismiss a European Delegated Prosecutor if it finds that he or she no longer fulfils the requirements set out in paragraph 2 or is not able to perform his or her duties, or that he or she is guilty of serious misconduct".

And, actually, because: "his / her services are no longer Necessary". The dismissal decision is entrusted to the College, with all the risks of "not-transparent irresponsibility, of the individuals" that this decision implies.

The Deputy European Prosecutors are the only members of EPPO that carry out institutional activities "inside the Criminal Trials", in their capacity of representative of the Office that, after starting the investigation, plays the role as the "representative of the public accuse".

All the other members of EPPO play different roles, maybe more important: but not a "role inside the criminal trial".

The incredible contradiction of the Project of Regulation on EPPO is that the more its members are close to the judges' activities and positions, the less of guarantees, institutional guarantees as a tool for their activity, they enjoy.

### 3.

The second aspect to be examined concerns the rules of criminal procedure which are contained in the Project. The question Medel wants to propose is that of the protection that must be afforded to individuals involved in criminal proceedings lead by EPPO: whether the accused persons or victims of crimes related to those affecting the Union's financial interest.

This is not, of course, a "purely technical and procedural" issue. It, in fact, involves very considerable consequences on the situation of those indicted in criminal proceedings by EPPO. But quite identical problems also arise with regard to the crimes victims: as is well

known, in fact, the EPPO Regulation Project also provides for EPPO to proceed for crimes which are related (ancillary competence) to those against the financial interests EU.

The demonstration of the "non-academic" nature of the "forum shopping" issue can be found in the results of a study, carried out fairly recently on behalf of the EU, which had led to this picture:

- How definitions of crime and levels of sanction vary in EU Member States?
- With respect to **fraud**, Member States have different definitions of this crime leading to sanctions that can vary from no minimum sentence (e.g. the UK or Ireland), a maximum of 6 months imprisonment (e.g. Austria) up to a maximum of 12 years imprisonment (e.g. Romania).
- With respect to the crime of **money laundering**, the maximum term of imprisonment ranges between 2 years (e.g. Finland) and 20 years (e.g. Austria).
- Definitions of the crime of the **obstruction of public tender procedures** also vary from one Member State to another, leading to sanctions as different as a mere administrative fine (e.g. Bulgaria) to 5 years of imprisonment (e.g. Germany, Luxembourg, Slovakia and Spain).

It must be added that, as regards the regime of the time-limitation statute, the survey has shown that in some systems it, simply does not exist; while - in different Member States - its terms vary from a minimum of one year to a maximum of 20, 30 and even 50 years.

Since the question of the choice of the Court is such as to imply so drastically different consequences, this question was (of course) the subject of decisions by the European Court of Human Rights. In discussions on the creation of EPPO it has become the object of reflection the content of the judgment in the case *Camilleri vs. Malta*.

The Strasbourg Court was asked to rule on the conformity with the Convention of a provision that authorizes the Prosecutors in Malta to choose the Court in which "present" a defendant. Mr. Camilleri was charged with drug trafficking, along with an accomplice; while the latter had a clean record, Camilleri had been already sentenced for drug crimes.

Well, this situation empowers the Public Prosecutor to submit Mr. Camilleri in front of the Court of serious crimes; and his accomplice to a Circuit judge. The consequence was that - for the same act - the accomplice was punishable by up to four years in prison and Camilleri with a sentence of up to life imprisonment. The Court of Human Rights declared that these rules violate the principle of predictability, enshrined in Article 7 of the Convention.

The EU did not sign the ECHR as yet. But we all know the case law of Strasbourg concerning the violation of fundamental rights or freedoms, when the violation of the Convention depends on an obligation taken by a State under an international agreement: the violation of the "protected rights" perpetrated by an international organ (in our case: the EU), is attributed to the individual state.

*This being the most important profile of the forum shopping issue, the only answer is and must be the one that is not conceivable the prospect that the Court, seized by EPPO, can or even should give up its "power" to judge, first, on its jurisdiction to hear that particular case. This conclusion implies, of course, the risk of possible conflicts of jurisdiction (positive or negative) between the individual national Courts, in front of the which EPPO will operate as the Public Prosecutor.*

*But, in this regard, there seems no difficulty in asserting that the judgment on conflict of jurisdiction could be attributed to the CJEU, which is in fact already intervened in situations that implied the existence of a conflict of jurisdiction between Member States for the treatment of certain human rights.*

*In later versions of the project, they have intervened many positive changes as regards the treatment of the rights of persons involved in criminal proceedings of the EPPO competence.*

*The European Union, starting with the Stockholm Program, has issued a series of Directives that require Member States to introduce in their laws, in their codes of criminal procedure, rules concerning and protecting the rights of suspects or accused persons, as well as the victims of a crime.*

*In the Directives to which we refer it is always present, for example, a clause that stipulates "the right to legal remedy", thus giving an implementation to Article 47 of the Charter of Fundamental Rights of the European Union. They also contain a non-regression clause, thus giving a direct application also of Article 52, paragraph 3 of the Charter.*

*Most of these Directives concern the rights of accused persons; but equally important is the Directive 2012/29 / EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220 / JHA.*

*About the rights that the latter Directive recognizes, it should acknowledge that - in later versions of the Project on EPPO – the negotiators have greatly strengthened the legal position of the victims of these crimes (which can also be very serious offenses: a murder to hide the traces of a major fraud against the EU, consumed by a criminal organization).*

*And similar considerations can and should make about the position of people charged in proceedings initiated by EPPO.*

*Here too, one cannot understand what obstacle preventing from taking the only possible decision, by an institutional point of view: to include in the Draft as many rights for those are the ones that the EU has asked Member States to include in their codes of criminal procedure. Whether it's: Interpretation and Translation; Information about rights and about the accusation; Access to a lawyer and right to communicate upon arrest; Rights of vulnerable persons charged; Legal aid; custody; Presumption of innocence.*

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