Meijers Committee
Standing committee of experts on international immigration, refugee and criminal law

Secretariat
p.o. box 201, 3500 AE Utrecht/The Netherlands
phone 0031 30 297 43 28
fax 0031 30 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

[redacted] [redacted]

To (by email) European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
B-1047 BRUSSELS

Reference CM1315
Regarding Note Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final
Date 25 September 2013

Dear Members of the Civil Liberties, Justice and Home Affairs Committee,

The Meijers Committee read the proposal on a Council Regulation on the establishment of the European Public Prosecutor's Office with great interest. The Committee understands the Commission's concerns with respect to the protection of the financial interests of the European Union and its ambition to introduce a European Public Prosecutor's Office (EPPO) in order to deal with the fight against EU-fraud comprehensively. It notes that initiatives like these inherently imply a series of extremely complex decisions with respect to, *inter alia*, the competences of the new organization, its internal structures, its powers, procedures and human rights issues.

A proposal in this area of law should not only address concerns of effective law enforcement, but also of fundamental rights. The Meijers Committee is pleased to note that the proposal already contains a series of provisions that serve to protect the interests of the individual and the public at large. The proposal is right to stipulate that the activities of the EPPO must be exercised in full compliance with the rights of the EU Charter on Fundamental Rights (CFR), and interpreted accordingly. However, the Meijers Committee believes that a range of issues require more consideration before the current Proposal is adopted. In this note the Meijers Committee will focus on the following seven broad themes that merit further attention:

1. The EPPO's competency and the risk of unequal treatment
2. Prosecutorial policy and political accountability of the EPPO
3. Accountability for human rights and fair trial violations
4. Harmonization of procedures, fundamental rights and legal safeguards
5. Remedies against abuse of forum choice and unlawfully obtained evidence
6. Data Storage by the EPPO
7. Data Transfer to third parties.

1. The EPPO's competency and risk of unequal treatment

The current proposal deliberately leaves a series of issues to national law, as regulation at the European level is considered 'disproportionate' (*cf.* Preamble, Recital 19). The Meijers Committee is not persuaded by this apodictic argument. Against the background of the primacy of EU law and diverging national legal systems, the Meijers Committee is concerned that this legislative choice may harm the position and equal treatment of individuals.

Definitions
The Draft Regulation refers for the definition of the offences for which it is competent to a Draft Directive on the Financial Interests of the EU. This means that the prosecution of the offences before national criminal courts will take place on the basis of the national definition, as implemented by the respective Member State. Why does the proposal not opt for a directly applicable definition of the prohibited conduct (such as in EU competition law)? The EPPO will now have to deal with many different definitions. This creates legal uncertainty for citizens and a risk of different and therefore unequal treatment, depending on the Member State of trial.

A similar question relates to the notion of suspicion, and the definition of when one does become a 'suspect' or an 'accused'. To be operational, the EPPO must have a definition of its own, because it will have to take decisions far before it becomes clear whether and if so in which Member State prosecution will take place.

What is even more worrying is that the text of the Regulation does not indicate which terminology must be interpreted in an autonomous Union law manner, and for which terminology national law is leading.

Exclusive jurisdiction for the EPPO
Preamble Recital 22 implies that willing Member State authorities may not investigate, before consultation with the EPPO has taken place. To what extent can it be avoided that Member States will for the future completely refrain from any activity in this area? Similar to the definitional issues, this may create inequality in treatment of EU citizens, depending on the jurisdiction they find themselves in.

Ancillary competence (Article 13)
The ancillary jurisdiction of the EPPO over related national offences raises a number of questions.
- Who decides whether offences are related? What are the criteria to find such a relation?
- Does the EPPO have the capacity to investigate offences other than for which it is directly competent?
- Where is the legal basis for this competence? Article 13 refers to the *interest of a good administration of justice*. How is this determined and by whom?
- Are legal remedies provided for interested parties against such a decision?
- How does this question relate to Article 13(2)-(4), which provides that the national authority competent to resolve questions of competency in domestic prosecutions is competent to solve any disagreement between the EPPO and MS?

In addition, the Meijers Committee would like to stress that overlap may also occur between the competences of the EPPO and punitive administrative sanctions (as rightly stressed in the Preamble, Recital 31). Both the ECHR as the ECJ have confirmed that these are 'criminal charges' and 'offences' too. There is a risk of *ne bis in idem* situations (*cf.* art. 50 CFR), and therefore a need to establish mechanism for consulting the competent administrative authorities. The proposal is silent on this issue.

Competence of the Court of Justice
Preamble Recital 38 and Article 36(2) should not lead to a situation in which the Court of Justice may not assess whether acts of the EPPO were in compliance with the Union's law, such as this Regulation, the CFR and other human rights obligations. It is rather contradictory that the EU's own court would be side-lined when the EU prosecutor is acting. The Meijers Committee is not convinced that Article 267 TFEU allows for a limitation of the Court's competence for acts of the EPPO having implications beyond interpreting national law. Moreover we are concerned that this will affect the coherence of the framework.

Immunities and Privileges of Persons
Why do immunities and privileges of persons (Article 19) for the offences over which the EPPO is competent exist? Would an efficient system of combating fraud not be served by a situation in which there are no immunities at all? And is it relevant whether the immunity can be upheld *vis-à-vis* the EPPO or *vis-à-vis* the Member State in which the prosecution takes place?

2. Mandatory prosecution; prosecutorial policy and political accountability

Whilst stating that the EPPO will apply mandatory prosecution (*zero tolerance*, see Preamble, Recital 20), a number of exceptions to this principle are mentioned in the Proposal, (Article 28 and Article 29). These exceptions raise the question as to whether the EPPO's powers are not discretionary after all? The Meijers Committee wishes to raise the following issues in relation to this:

Capacity and efficiency
Could an assessment be made of whether the capacity of the EPPO is sufficient to combat the fraud of 500 million euro per year, which should be possible with a mandatory prosecution system?

Prosecutorial policy
Given that exceptions to mandatory prosecution are possible (Article 28), and that the EPPO may choose to offer a transaction or may move cases from one Member State to another (*cf.* Article 18 (5); Article 27 (4)), the question of both judicial and political accountability remains an issue. The proposal largely ignores the fundamental question with respect to (form and shape of) types of control on prosecutorial discretion. The Meijers Committee understands that the EPPO is established to serve the public interest (the financial interests of the EU). Its competence is exclusive (*cf.* Article 11 (4) proposal). Is the EPPO – being independent (Article 5) – the sole decision maker on what is in the interest of the protection of the EU's financial interests and/or the proper administration of justice? How does the EPPO and the national prosecution office decide on what kind of cases priority has to be given in case of limited recourses (See Article 11(7))? What is the legal value of the administrative rules, mentioned in Preamble Recital 31, in the legal orders of the Member States and do they bind the EPPO?

Political Accountability
The proposal provides for rules on financial accountability and stipulates that the EPPO reports on its general activities to the European Parliament, Commission and Council each year (Article 5 (3) and Article 70 proposal). It is the opinion of the Meijers Committee that issues of political accountability (particularly towards the European Parliament) need further attention within the EPPO framework at European level.

3. Accountability for human rights violations

The Meijers Committee finds that the proposal is not clear on the distribution of responsibilities with respect to interferences with and violation of fundamental rights, such as fair trial rights.

Who is responsible for human rights violations when the EPPO acts? Is the EU or are the Member State responsible? If the latter would be accountable, are Member States able to influence their responsibilities and control the relevant acts of EPPO? Article 4 (3) states that the EPPO will exercise the functions of the national prosecutor, whereas Article 6 (7) stipulates that acts will be attributed to the EPPO. The former could be regarded as an indication that the Member State must be held accountable, should a human rights violation occur; the latter would place that obligation at the level of the EPPO and the EU. The above mentioned provisions give EPPO a "double hat" by making it an European and a national authority at once. This appears to be a rather simple way of

allocating responsibilities with the national authorities. If that is intended, it may be expected that these national authorities may wish to exert influence on what the EPPO is doing, which is logical as they are responsible. It is suggested to reconsider the “double hat” principle as it makes responsibilities unclear and may affect the independence of the EPPO.

In addition, the role of the EPPO during investigations itself is rather unclear. This also raises questions as to the division of responsibilities. For example, does the accused have a right to see the file on allocation of the case on the basis of Directive 2012/13 (see Article 32(2)b of the Proposal)? Again, it is not clear whether the provisions of Article 32-35 are rights of the suspect of accused *vis-à-vis* the EPPO, the Member State or both. Is the CFR the only set of applicable human rights obligations (see Article 11(1) and Article 32(1)? Article 32(2) suggests otherwise, where it refers to ‘Union legislation and the national law of the Member State.’ Such a conclusion is further supported by Articles 32(3) and 34. The former stipulates that the suspect and accused person's procedural rights shall be based on the national regime applicable in the relevant case, once the indictment has been acknowledged by the competent national court, while the latter too reads: ‘in accordance with national law’.

4. Harmonization of procedures, fundamental rights and legal safeguards

The last point deals primarily with the distribution of responsibilities for upholding human rights standards and corollary accountability. In addition, the Meijers Committee wishes to make a few observations with respect to the substance of these rights, procedures and safeguards.

Harmonization of procedures and procedural safeguards
Article 26 lists a minimum set of investigatory powers which should be available to the EPPO. The Meijers Committee welcomes the rule that the most intrusive of these powers are available only when reasonable grounds exist, with judicial authorization and in accordance with the principle of subsidiarity (Article 26(3)-(4)). Yet the question of which authority is a *judicial* authority is left to national law. Other safeguards are left to the national level too. In addition, the proposal is silent on custodial measures.

The proposal as it stands now, does not seem to have reached the level of detail for the EPPO to function properly. In comparison to other supranational prosecutor’s, such as the Prosecutor at the International Criminal Court, the current EPPO proposal seems to have declared simplicity as more important than the rule of law. The Statute of the ICC, its Rules of Procedure and Evidence and the Elements of Crime could be taken as a source of inspiration of what is necessary to regulate for an international prosecutor to function in and together with national authorities. The draft EPPO Regulation has left many situations unaddressed. How will the EPPO for instance interrogate a suspect, pursuant to Article 26(1)(t), if there are no clear procedural rules? Do the national procedures where the case is investigated apply or of the country where the suspect/accused is? The Meijers Committee is concerned that the absence of clear operational procedures and the principle of primacy of EU law may serve the efficiency of the investigation, but at the expense of the interests of the accused.

Ne bis in idem
The Meijers Committee would like to know why a transaction of a Member State is not recognized as a ground to dismiss the case in Article 29? This provision conflicts with the case law of the ECJ on Art. 54 CISA (Gözütok and following). Similarly, why is the decision of a non-EU state by which the suspected person has already been acquitted or convicted in last instance of the same facts not recognized as a ground for dismissal inArticle 28(1)(e)?

Manifestly ill-founded prosecutions
What are the remedies in cases where the defendant states that prosecution is manifestly ill-founded? What are the options for victims or directly affected third parties, in cases where a case is considered to be a minor offence?

Position of the suspect and defence
The Meijers Committee is pleased to note that the proposal includes a series of defence rights and provisions on the position of the defence (Articles 32 - 35). Nonetheless, the Meijers Committee also notes that the ECtHR has given the privilege against self-incrimination a broader scope than Article 33(1) of the proposal, which now only focuses on the right to remain silent when questioned in relation to allegations against the suspect himself, but for example not on documents. The wording of Article 33(1) could stipulate more detailed the scope of the privilege against self-incrimination in line with the Strasbourg case law.

The Committee is of the opinion that the wording of Article 35 does not adequately reflect the principle of equality of arms. The suspect/accused person may request – in accordance with national law – certain measures to the EPPO. The wording implies that the final say remains with the latter. However, several legal systems within the EU lay this decision-power in the hands of the judiciary. The Committee invites the EU legislator to formulate a clearer vision on the position of the defence in pre-trial proceedings, in order to guarantee that the proceedings as a whole remain fair. In particular, the Committee would welcome that, at the very least, decisions on measures requested to the EPPO by the defence are subject to judicial review.

5. Remedies against abuse of forum choice and unlawfully obtained evidence

The proposal opts for a decentralized model of enforcement. It operates in a single legal area (Article 25), but is also integrated into the legal orders of the Member States. While the proposal introduces a series of harmonizing measures with respect to, *inter alia*, investigative measures (Article 26), the applicable national law is determined by a choice of the EPPO itself (Article 3(3)). Legal protection is largely left to national law (Article 36), implying differences in the intensity of scrutiny and testing standards that national courts will apply. As said, the Meijers Committee understands the reasons for these choices, but is also of the opinion that additional measures will be necessary:

Choice of forum
The proposal contains – broadly formulated – rules on forum choices only in cases of case re-allocation (Article 18(5) of the proposal) and the start of the prosecution stage (Article 27). The Meijers Committee is concerned that this may lead to situations of forum shopping, either because differences between Member States become a decisive factor in choosing the relevant jurisdiction, or because representatives of the EPPO may file consecutive requests for a certain measure in different states. In addition, the proposal is not clear on the remedies against such forum choices. Is a national court for instance competent, at the request of the accused or on its own initiative, to declare itself not competent, because it considers a prosecution in that particular Member State not to be in the interest of a proper administration of justice?

Unlawfully obtained evidence
The proposal is silent on the issue of evidence that was obtained unlawfully by or for the EPPO. Article 30 rightly stipulates that the fairness of the procedure or the rights of the defence should always be respected. However, the Meijers Committee is concerned that these rules will not offer enough guidance to the authorities involved, national courts in particular. Should they apply their national rules on the use and exclusion of evidence, also when that evidence was obtained in

another Member State? Or – in cases where irregularities are established from the outset – should the EPPO make sure that unlawfully obtained evidence is removed from the case file?

A similar question relates to the availability of effective remedies for violations of fundamental rights (*cf.* Article 13 ECHR and Article 47 CFR). Who is responsible for offering those remedies, and what should they entail? Will this be the trial state, or the state where the irregularities occurred or the EPPO itself? The Meijers Committee is of the opinion that the proposal should not leave these important questions unanswered, creating the risk of continued or developing diverging practices amongst Member States at the expense of the accused.

6. Data Storage by the EPPO

The Meijers Committee welcomes the inclusion of data protection standards in Chapter VI of the proposal. These rules include time limits, the appointment of a Data Protection Officer, the right to access, rectification or erasure, and the role of the European Data Protection Supervisor (EDPS). The Meijers Committee also welcomes the provisions in Articles 46 and 47 according to which both the responsibility in data protection measures, as liability for damage due to unauthorized or incorrect data processing lies with the EPPO. Furthermore, the proposal includes the right for an individual to lodge a complaint with the EDPS, or to submit a claim of liability against the EPPO before the EU Court of Justice in accordance with Article 268 TFEU (Articles 46 and 47 of the proposal).

However, considering the actual meaning of these provisions in practice, the Meijers Committee is of the opinion that gaps remain, also taking into account the right to data protection and the right to effective judicial protection as provided in Article 8 and 47 CFR. With regard to the safeguarding of the available time limits, the Meijers Committee questions whether Article 48 of the proposal is sufficiently clear and does not allow for divergent practices. Actual Compliance with the obligation to erase data from the files of the EPPO will be difficult in practice because of the different legal systems at stake and the lack of clear and uniform data retention periods. Furthermore, the proposal allows for the renewal of the data retention every three years, which in practice may easily result in unlimited data storage. The Meijers Committee questions whether the EDPS has sufficient powers and resources to supervise each decision-making on the renewal of storage of data by the EPPO.

The Meijers Committee regrets the lack of a specific provision on the availability of national remedies, allowing the individual to address a national competent court or authority within the Member State in which the individual is resident whenever his or her rights are infringed by data processing or decision making within the scope of this Regulation (comparable to the provision in Article 43 of the SIS II Regulation). The proposal provides in Chapter 8 for the further data transfer by the EPPO to Member States, other organisations, and third parties. Therefore, the Meijers Committee considers it to be essential that the proposal explictly provides further guarantees, safeguarding effective and accessible remedies with regard to the use of personal data by those entities and provision comparable to the provision in Article 43 of the SIS II Regulation.

7. Data Transfer to third parties

Articles 60 and 61 of the proposal include general rules on the transfer of personal data by the EPPO. An important provision dealing with the transfer of personal data is however hidden in the section ‘common provisions’, (Article 56). According to Article 56 (1) the EPPO may ‘in so far as necessary for the performance of its tasks, establish and maintain cooperative relations with Union bodies or agencies, in accordance with the objectives of those bodies or agencies, the competent authorities of third countries, international organisations and the International Criminal Police Organisation (Interpol)’.

Article 56 (2) offers both the EPPO and the aforementioned entities a wide power for the dissemination of personal and possibly sensitive data. The Meijers Committee questions why the EPPO is given the sole and discretionary power to decide whether personal information may be forwarded by Member States, EU bodies, international organisations, or even non-EU states. Furthermore, the Meijers Committee notes that by the choice of the wordings 'not incompatible', this provision offers a too wide and unspecified basis for the further processing of personal data by the aforementioned entities. This lack of specification and foreseeability is in breach of the purpose limitation principle of the right to privacy and data protection as laid down in Articles 7 and 8 CFR and in Article 8 ECHR.

Moreover, Article 60 includes the general power of the EPPO to transfer personal data to 'Union bodies or agencies in so far as it is necessary for the performance of its tasks or those of the recipient Union body or agency'. The Meijers Commmittee notes that this provision creates an important deviation from the rule of purpose limitation as it provides that, personal data may be transferred if this is necessary for the recipient Union body or agencies, even if this does not fall within the specified purposes of the EPPO or this proposal. This means that on the basis of this provision personal data may be transferred for any unknown and future purpose of those institutions.

Furthermore, Article 61 allows the EPPO to transfer personal data directly 'to an authority of a third country or to an international organisation or Interpol, in so far as this is necessary for it to perform its tasks'. Generally, this transfer can only take place if the European Commission is satisfied that data protection within that country or international organization is adequate or if an agreement between the Union and that country or international organisation has been concluded to that effect, after which no further authorization for transfer is required.

However, Article 61(2) provides for four broad exceptions to this general rule, by which the EPPO may on a case by case basis, transfer personal data to third countries or international organisations or Interpol, even when no decision of the Commission or international agreement is available. These exceptions render the general requirement of a prior Commission's decision or international agreement void. By the use of terms as 'essential interests of the Union' or 'preventing imminent danger associated with crime or terrorist offences', or 'necessary to protect vital interests of … another person' the power to transfer personal data to other parties becomes non-transparent and unforeseeable, which is in breach of the requirements of Article 8(2) ECHR.

The third exception is particular problematic, as it allows for data transfer if *national law* so requires or necessitates on 'important public interest grounds of … Member States'. The proposed provision thus prioritizes national law over Union law, thus creating the possibility of transfer by the EPPO on the basis of illegitimate grounds laid down in national law. Moreover, the provision does not indicate who is to decide whether national law requires or necessitates the transfer of data on public interest ground: the EPPO or the Member State?

The proposal provides that the EDPS must be informed of the transfers mentioned in Article 61 (3), however it does not include any mandatory powers of the EDPS in this regard. Furthermore, in agreement with the EDPS, the EPPO may authorise a set of the data transfers in the four aforementioned situations during a (renewable) period of one year. It is unclear, however, under which circumstances and conditions, this 'agreement' between the EPPO and the EDPS takes place or is to be adopted. Finally, the Meijers Committee questions the choice to lay the power of authorisation with the EPPO itself and not with the European Commission or EDPS.

8. Concluding remarks

The Meijers Committee appreciates the Commission's concerns with combating of fraud and protecting the EU's financial interests. However, the Committee finds that the current proposal leaves a number of issues vital to the interests of EU-Citizens and other individuals unaddressed. In particular, the Meijers Committee would welcome additional safeguards of fundamental rights, such as:

- the broader application of the *ne bis in idem*-principle;
- manifest ill-founded prosecutions;
- forum-shopping;
- operationalization of investigation measures;
- unlawfully obtained evidence, and
- the protection and transfer of data.

Moreover, the development of clearer rules for responsibility for ensuring and accountability for violations of these fundamental rights are imperative for the proper functioning of an European Public Prosecutor's Office.

The Meijers Committee would welcome the opportunity to further explain these comments and engage in a discussion to formulate responses to the many unsolved issues that we found in the current proposal.

Yours sincerely,

Prof. dr. C.A. Groenendijk
Chairman