



DECISION

At its 39th sitting, held on 5 June 2014, the German Bundestag,
acting on the basis of Bundestag Printed Paper 18/1658
on the

**Proposal for a Council Regulation on the establishment of the European Public
Prosecutor's Office (EPPO)
COM(2013) 534 final; No. initiative 12558/13**

**Here: a) Opinion delivered to the German Federal Government in accordance
with Article 23(3) of the German Basic Law**

b) Political dialogue with the EU institutions

having been apprised of the communication Printed Paper 18/419 No. A.44 on the Proposal for a
Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO)
(COM(2013) 534 final)

decided to adopt in accordance with Article 23(3) of the German Basic Law the following posi-
tion:

I. The German Bundestag notes:

The German Bundestag welcomes the approach taken by the Commission to the estab-
lishment of a decentralised European Public Prosecutor's Office (EPPO), whose task it will
be to combat criminal offences that affect the interests of the European Union. The struc-
ture and legal framework for the activities of the EPPO must be designed to ensure effec-
tive investigations are conducted with due regard for high rule-of-law standards and make
it possible for there to be close cooperation with the authorities of the Member States.
Above all, having given consideration to the Council Presidency note of 18 March 2014
(DS 1154/14), the German Bundestag regards the Commission's proposal for a regulation
of 17 July 2013 (No. initiative 12558/13) as a basis for negotiations about the establish-
ment of the EPPO. The Bundestag welcomes the fact that amendments to a number of pro-
visions the Bundestag had also viewed critically have been proposed in the note.

II. The German Bundestag delivers the following opinion and calls upon the German Federal
Government to gain acceptance for the following concerns in the further course of the ne-
gotiations:

The EPPO must possess the independence required for its operational work. At the same
time, however, a sufficient degree of parliamentary scrutiny over the EPPO must be en-



sured. The Bundestag welcomes the provisions set out in Article 70 of the proposal for a Regulation, which not only foresees the drafting of an Annual Report by the EPPO, but will also ensure that, as the head of the Office, the European Public Prosecutor gives account to the European Parliament in person. It is also to be endorsed, in particular, that the national parliaments will be able to call upon the European Public Prosecutor or the European Delegated Prosecutors to participate in an exchange of views in relation to the general activities of the EPPO. Rightly, the proposal for a Regulation also underlines that, as a matter of principle, the EPPO, its head and the European Delegated Prosecutors will be bound by an obligation of confidentiality with regard to the EPPO's operational activities. Rightly, the proposal for a Regulation also underlines that, as a matter of principle, the EPPO, its head and the European Delegated Prosecutors will be bound by an obligation of confidentiality with regard to the EPPO's operational activities. Nonetheless, ways should be sought to strengthen the EPPO's reporting and accountability duties without this resulting in ongoing investigations or the necessary protection of personal data being endangered. For instance, the EPPO Regulation could go beyond the current proposal and provide for scrutiny to be exercised jointly in a similar fashion by the European Parliament and the parliaments of the Member States.

One key element in the decentralised structure of the European Public Prosecutor's Office will be represented by what are known as the European Delegated Prosecutors, who are to have a legal position as prosecutors in the Member States, but at the same time act under the exclusive authority of the EPPO when conducting the investigations assigned to them for the EPPO. The German Bundestag welcomes this proposal from the Commission, which is part of its decentralised approach to the establishment of the Office. This approach will supplement the Regulation by drawing on the procedural law of the nation states, and foresees that the EPPO will cooperate closely with the authorities of the Member States when it conducts its investigations. However, it is not to be denied that the dual role of the European Delegated Prosecutors provided for in Article 6 of the proposal for a Regulation (Article 12 of the draft in the note of 17 March 2014) could also cause problems. Here, the exclusive authority of the European Public Prosecutor and the independence from the national authorities this implies still need to be specified in more precise terms. This is true, *inter alia*, for the resolution of possible conflicts that could arise if the European Delegated Prosecutors continued to perform functions as national prosecutors as well. In view of the conflicts that are predictable, it is to be examined whether it would not be more convenient and clearer to limit the scope of the European Delegated Prosecutors' activities to the work of the European Public Prosecutor's Office. This would also be more likely to ensure sufficient specialisation in offences that affect the financial interests of the EU, something that appears indispensable on account of the complexity of these cases (cf. Grünewald, *Höchstrichterliche Rechtsprechung im Strafrecht* (HRRS) 12/2013, 508 (519)). The solutions to be found here must also take account of the constitutional and civil service standards of the Member States, and uphold the functioning and integrity of the Member States' authorities. In this connection, there is still a need to examine what should apply and what action should be taken when an instruction from the European Public Prosecutor or one of their representatives collides with national law. The German Bundestag suggests the appointment of the European Delegated Prosecutors be made conditional upon the candidates demonstrating levels of professional and practical experience that would have to be defined in greater detail. Instead of the European Public Prose-



cutor and his/her Deputies being appointed by the Council with the consent of the European Parliament, an election procedure should be implemented to ensure the European Delegated Prosecutors enjoy democratic legitimation. In this respect, in particular, thought should be given to election by the European Parliament, since it does not represent the executives of the Member States, but the European electorate. Furthermore, the reasons for a member of the Office to be dismissed should be specified in more precise terms. According to Article 8 and Article 10(3), it should be possible, in particular, for a European Public Prosecutor or European Delegated Prosecutor to be dismissed if they no longer fulfil the conditions required for the performance of their duties. It would appear desirable for these provisions to be formulated with greater precision in order to strengthen the idea of independence and rule out arbitrary dismissals.

Provisions should be added to the basic principles for the activities of the European Public Prosecutor's Office in Article 11 of the proposal for a Regulation that ensure the Office is bound by law and justice. This is a central principle of German constitutional law that applies for all parts of the executive and therefore ought to be formulated clearly when competences are transferred to the European Public Prosecutor's Office as well. It is to be welcomed that Article 11(2) of the proposal for a Regulation mentions the principle of proportionality, which is also essential to the rule of law. In this regard, however, two improvements would be desirable. Firstly, the measures taken by the European Public Prosecutor's Office should not merely have to 'be guided' by the principle of proportionality, but should be bound by it. Secondly, there is need for improvement with respect to Article 26(3), which is intended to define the principle of proportionality. This passage rules out investigative measures if their objective can also be achieved by less intrusive means. However, it does not rule out measures that are required for this purpose, but are not appropriate in proportion to the gravity of the intervention that is being made (proportionality in its narrower sense). As the German Bundestag understands it, the comprehensive weighing-up of all the advantages and disadvantages of a measure, with consideration being given in particular to the citizen's fundamental rights, is one of the core features of the rule of law. This should be safeguarded in the proposal for a Regulation.

The Commission's proposal for a Regulation envisaged that the EPPO would have exclusive competence for the criminal offences that affect the financial interests of the Union listed in Article 12 of the proposal for a Regulation. The Bundestag welcomes the fact that, in its note of 17 March 2014, the Council Presidency has chosen a different approach and configured the EPPO's competences so that they will not exclude the authorities of the Member States (Article 5(3) and Article 19 of the draft in the Presidency note). These competing (parallel) competences, along with EPPO's right of evocation now provided for in the Presidency note, could help to ensure that the EPPO works efficiently and is able to concentrate on cases in which investigations at the Union level deliver real added value.

The provisions on 'ancillary' competence in Article 13 of the Commission's proposal for a Regulation did not appear completely persuasive. From the perspective of the German Bundestag, it is right to find suitable provisions for cases in which the constituent facts of the offences are identical and inextricably linked in a single complex, supplying grounds for both the EPPO to have competence under Article 12 of the proposal for a Regulation and the national prosecuting authorities to have competence over offences other than



those specified in Article 12. Here, the principle of *ne bis in idem*, as it has been interpreted in the decisions of the European Court of Justice (ECJ) on Article 54 of the Convention Implementing the Schengen Agreement, demands that the whole prosecution should be conducted under the auspices of one body, and the person concerned should not have to be investigated by both the EPPO and national authorities for the same offence. Here, the principle of *ne bis in idem*, as it has been interpreted in the decisions of the European Court of Justice (ECJ) on Article 54 of the Convention Implementing the Schengen Agreement, demands that the whole prosecution should be conducted under the auspices of one body, and the person concerned should not have to be investigated by both the EPPO and national authorities for the same offence. The version of this provision presented in the Council Presidency note of 17 March 2014 (Article 18 of the draft in the Presidency note) is a welcome further development of the Commission's proposal and does greater justice to the requirements that have been mentioned than the previous text. However, due to the considerable danger that, as a result of its competence for linked offences, the competences of the European Public Prosecutor's Office may be extended into areas of criminal prosecution that are inherently national responsibilities, further criteria for the limitation of its powers should be sought.

Whether 'ancillary' competence exists and whether this joint competence should, where applicable, be exercised by the EPPO or the national authorities, subject to consideration of which of the offences is preponderant, may also have consequences for the accused person, both with regard to the safeguards for their rights of defence and with regard to the penalty that is to be expected. In consequence, just like the decision to be taken by consensus under Article 13(1), the decision to be taken under Article 13(3) of the proposal for a Regulation (Article 18(6) of the draft in the note of 17 March 2014) should be subject to judicial review. It is therefore to be welcomed that the provision in Article 13(4) of the Commission's proposal that would have explicitly ruled out such judicial review has been deleted in the note that has now been drawn up by the Presidency. Further to this, however, a judicial review should be prescribed in the Regulation.

The provisions on the allocation of competences within the EPPO and the selection of the court before which the prosecution is to be brought are not yet convincing either. With regard to the allocation of cases, Article 7(2) of the Commission's Proposal (Article 16(1) of the draft in the note of 17 March 2014) foresees that this will be provided for by the EPPO itself in its internal rules of procedure. However, cases must be allocated in accordance with transparent provisions that are predictable for the citizen. In any event, the EPPO's internal rules of procedure will have to be generally accessible and available for citizens to consult. Nevertheless, the basic outlines of the provisions on the internal allocation of competences, at least, must be provided for in the EPPO Regulation itself and must not remain left to the internal rules of procedure. In cases that have a cross-border dimension, even if only because a citizen of one Member State is accused of having committed an offence in another Member State, the decision about which of the two Member States the investigation is conducted in could be of considerable significance for the person concerned. Divergent criminal procedural laws, the more or less effective options for the person in question to defend themselves in one or the other Member State, and – despite some harmonisation – differences that continue to exist in the material criminal law of the Member States may have an impact on the outcome of a case. In consequence, compe-



tences must be allocated between the European Delegated Prosecutors from the individual Member States in accordance with criteria and procedural provisions that, in principle at any rate, have been laid down in the Regulation itself.

Both in the interests of the accused person and in the interests of effective prosecution, the legal order applicable to the individual case should already be known during the investigation and not, as the proposal for a Regulation foresees, only be determined once the investigation has been completed by the choice of the court competent for the trial (Article 27(4)). The EPPO should not have complete discretion with regard to either the selection of the Member State whose European Delegated Prosecutor is to conduct the investigations or the selection of the court competent for the trial. Furthermore, it should also be clarified that the EPPO's power to choose the competent court will be limited to the courts of those Member States that actually have 'jurisdiction' over the offence to be prosecuted, while the duty to state the grounds on which it has such 'jurisdiction' will be defined by the 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 (cf. 2012/0193 (COD)), which is still the subject of ongoing negotiations. To this extent, it is to be welcomed that Article 19(1)(b) of the draft in the note of 17 March 2014 takes up this approach for the first time when it stipulates that the exercise of the EPPO's competence will demand the Member State in question has 'jurisdiction' under its national legislation. The criteria mentioned in Article 27(4) of the proposal for a Regulation also need to be specified with greater precision and weighted. Here, thought should be given to the prioritisation of the criteria mentioned in Article 27(4)(a) and (b).

With regard to judicial review, it must at any rate be guaranteed that the choice of the venue is reviewed – *proprio motu* or upon application – in the course of the trial. In so far as the EPPO Regulation foresees adequate criteria for the taking of this decision by the EPPO, it should also be possible for the review to be carried out in an appropriate fashion by the courts of the Member States. In cases of doubt, they would have to use the preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to submit a question concerning the interpretation of the criteria provided for in the Regulation to the ECJ.

With regard to the EPPO's investigative activities, the concept currently provided for in the proposal for a Regulation envisages that investigations for offences that fall within the exclusive competence of the EPPO will be initiated by the EPPO and then, as a matter of principle, conducted by the European Delegated Prosecutors. The individual investigative measures that must be available to the EPPO in each Member State are mentioned in Article 26 of the proposal for a Regulation. Supplementary to this, Article 17(1) of the Commission's proposal for a Regulation foresees that the requisite urgent measures may also be taken by national authorities before the EPPO has initiated an investigation. Following the subsequent referral of the case to the EPPO, the Office is to 'confirm' the measures taken by the national authorities. In this respect, it remains unclear what is to be understood by the term 'confirm' and what consequences any failure to confirm would have for an urgent measure that has been carried out. Here, there is a need for clear provisions on the legal foundations for, and legal implications of, such urgent measures. From this point of view too, the approach taken by the Council Presidency, which foresees competing



competences for the EPPO and national authorities (Article 19 of the draft in the Presidency note of 17 March 2014), may be a more suitable way of arriving at an appropriate solution because, in this case, urgent measures could initially be taken by the national authorities with a view to the conduct of an investigation in accordance with their own criminal procedural law.

Considerable legal problems are thrown up by the fact that, subject to certain conditions, the proposal for a Regulation foresees the head of the EPPO (or the EPPO Central Office) being able to reallocate the investigation and lead it themselves (Article 18(5) of the Commission's proposal for a Regulation). The proposal for a Regulation does not include sufficient provisions on how the delimitation of functions between the Central Office and the Member States' authorities, which are to be involved in the conduct of investigative measures (Article 18(6)), should be configured. It also remains open which national law should find application to such an investigation. In the view of the German Bundestag, there is hardly likely to be any possibility of appropriate provisions that are also predictable for the accused person being found to deal with these issues until action is taken to create uniform rules of criminal procedure especially for the EPPO. Since, the overall conception also suggests it would not to be very practical as far as the EPPO is concerned for the EPPO Central Office itself to lead investigations on the ground in the Member States, the Regulation should, as a matter of principle, not provide for the head of the EPPO or its Central Office to possess a competence of this kind. Since the overall conception also suggests it would not to be very practical as far as the EPPO is concerned for the EPPO Central Office itself to lead investigations on the ground in the Member States, the Regulation should, as a matter of principle, not provide for the head of the EPPO or its Central Office to possess a competence of this kind.

The proposal for a Regulation refrains from putting in place substantive provisions of its own for the investigative measures that are available to the EPPO, instead of which Article 26 largely makes reference to national law. In view of the differences between the Member States' procedural systems, it is to be borne in mind that this solution may lead to problems not just for the authorities involved, but also for accused persons, especially in cross-border cases. In any event, steps must be taken to prevent Article 26 from creating a confused muddle of European and national provisions. In particular, given that the EPPO is to be established by means of a Regulation with immediate validity in the Member States, the provisions on its investigative powers must not cause conflicts with the national procedural systems. Article 26(1) should therefore be amended to the effect that the European Public Prosecutor's Office will only be able to apply for, or order, the investigative measures that are mentioned if they are foreseen by the applicable national law. The first sentence of Article 26(2) should therefore be supplemented to the effect that the measures mentioned in Article 26(1) must, in general, be technically possible, in so far as they are foreseen by national law. According to the second sentence of Article 26(2), however, the ordering of the measures must be guided by national law. Furthermore, Article 26(4) should make it clear that judicial authorisation is always needed for the intrusive investigative measures foreseen in *litera a* to *j* when this would be the case under national law. References to thresholds for intervention, the principle of proportionality and procedural preconditions should also be added, provided they do not lead to ambiguities in application in conjunction with national law.



The proposal for a Regulation does not contain sufficiently clear provisions on how cross-border investigations should be conducted within the EPPO. The German Bundestag welcomes the Commission's approach, under which investigative measures are to be taken by a competent local European Delegated Prosecutor in each case (Article 18(2) of the Commission's proposed Regulation). However, it is not sufficient if, in so far as this is the case, it is merely determined that the European Delegated Prosecutor who is leading the investigations is to act in close consultation with the competent local colleague in question. Since the proposal for a Regulation refrains from laying down uniform procedural rules for the investigations carried out by the EPPO, the national law of the place where the investigative measure is implemented will find application (Article 11(3) of the Commission's Proposed Regulation, which corresponds to Article 5(2) of the draft in the note of 17 March 2014). For this reason, the Regulation must be supplemented with provisions concerning the legal foundation on which cross-border action is to be taken. It is to be clarified whether the future Directive regarding the European Investigation Order and the Framework Decision on the European Arrest Warrant are to find application or the Regulation is to contain its own provisions for cross-border investigations that will also take account of the differences between national criminal procedural systems.

Article 28 of the proposal for a Regulation contains provisions on the dismissal of cases, and Article 29 makes it possible for a case to be ended by means of what is known as 'transaction' following the payment of a lump-sum fine. In so far as the possibility of transaction under Article 29 is maintained, provisions on steps to ensure transparency, logging duties and the involvement of the court should be implemented. Furthermore, it is necessary to clarify whom the fine imposed should be paid to. The explicit provisions on the preconditions for the (mandatory) dismissal of a case in Article 28 are to be welcomed. However, this article should be expanded with the addition of a provision on the dismissal of cases that a national court or national public prosecutor's office has dismissed with a view to the fulfilment of instructions or conditions that constitute a final procedural impediment. Nor is it explicitly foreseen that the accused person should be notified when a case has been dismissed – something provided for in Germany, for instance, by Section 170(2) of the Code of Criminal Procedure (StPO). An equivalent obligation should also apply for the EPPO. Apart from this, provisions must be put in place that determine the relationship of the Regulation's provisions on dismissal to the options for the dismissal of cases in the Member States' procedural systems. Apart from this, provisions must be put in place that determine the relationship of the Regulation's provisions on dismissal to the options for the dismissal of cases in the Member States' procedural systems. The possibility of compensation for the accused person and the option of a procedure that allows the party who has reported a crime to compel the prosecuting authorities to bring charges, similar to that in Germany under Sections 172ff. of the StPO, should also be incorporated into the Regulation.

Apart from this, sufficiently precise provisions on the finality of decisions taken under Article 28 and/or Article 29 are lacking. If a case is dismissed under Article 28(2)(b), it should always be possible for investigations to be resumed and/or continued as long as any statutory limitation to prosecute has not expired. The same applies for Article 28(1)(c) if immunity is lifted and for Article 28(2)(a) if new evidence is available that leads to a



change in the legal assessment of the offence. Article 28(1)(e) foresees that the EPPO has to dismiss any new investigation if the suspect has already been finally acquitted or convicted of the same offence in the Union or a transaction has been concluded under Article 29. In the view of the German Bundestag, this is a correct and necessary provision in the light of Article 50 of the Charter of Fundamental Rights of the European Union. However, according to Article 4(2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, it should also be possible, as a matter of principle, for such a case to be reopened. Furthermore, the proposal for a Regulation contains no provisions that indicate whether the national authorities of the Member States are also prevented from conducting a criminal prosecution when the EPPO has already dismissed a case concerned with the same offence following the payment of a fine in accordance with Article 29. Although the Member States are also bound by the principle of *ne bis in idem* laid down in Article 50 of the Charter of Fundamental Rights of the European Union, consideration should be given to the clarification of this point in the EPPO Regulation. Furthermore, an option to resume investigations should be weighed up where the case has been dismissed by means of a transaction in accordance with Article 29 following the payment of a fine, and facts come to light that give grounds to suspect a crime.

Article 32 of the proposal for a Regulation makes reference, on the one hand, to the validity of the rights of accused persons laid down in the Charter of Fundamental Rights of the European Union and, on the other hand, to directives intended to implement the Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings of 24 November 2009 that have already been adopted or remain to be adopted. The German Bundestag is of the view that high minimum standards with regard to rights for accused persons must be ensured in the investigations conducted by the European Public Prosecutor's Office. In so far as, to date, the individual rights for accused persons enshrined in Articles 33 to 35 are still not covered by European directives that at least put in place minimum standards, i.e. in relation to the right to refuse to give evidence, the presumption of innocence, rights concerning evidence and an entitlement to legal aid, it is not sufficient merely to oblige the EPPO to ensure these procedural guarantees are offered 'in accordance with national law'. In the view of the Bundestag, the national legal systems should initially be further harmonised by putting in place a minimum set of common rights for accused persons with directives adopted on the basis of Article 82(2) of the TFEU, for which the EPPO should then also be bound to show due regard. Such a course should be given precedence over a complete and detailed codification of the rights of accused persons in the Regulation itself. Furthermore, the right to inspect files would also have to be taken into consideration when it came to the rights of accused persons (Articles 32ff.). Apart from this, provisions on the handling of differences between the relevant national criminal laws (e.g. concerning the imposition of penalties on undertakings) and other differences in procedural law, for instance with regard to the admission and use of evidence, are urgently necessary.

Finally, logging and documentation duties, minimum rights under criminal procedural law and the right to refuse to give evidence are to be incorporated into the Regulation.

Sufficient opportunities must be permitted to obtain legal protection against investigative



measures taken by the European Public Prosecutor's Office. In this respect, the German Bundestag supports the approach taken in the proposal for a Regulation under which the national courts will grant protection in accordance with their own criminal procedural law because, for the purposes of judicial review, the European Public Prosecutor's Office is to be 'considered' as a national justice authority in the performance of its functions (Article 36(1)). However, it must be ensured under this basic conception that an appropriate judicial review is actually guaranteed as well in all cases. In so far as it is foreseen that the European Public Prosecutor's Office is to be empowered to take certain decisions solely on the basis of the provisions of the EPPO Regulation, rather than domestic criminal procedural law, it must be made possible for legal protection to be granted at the EU level or clear provisions put in place concerning which Member State's courts should be competent to conduct the requisite judicial review. The provision of an effective option to obtain legal protection is the precondition for acceptance of the grounds for the establishment of a European Public Prosecutor's Office.

With regard to the taking of evidence, the competent Member State court before which the trial takes place must be able to review whether the evidence has been gathered according to rule-of-law principles. Furthermore, the competent Member State court must be able to review whether the use of evidence comes into consideration under rule-of-law principles. It must also be able to reject the use of a piece of evidence if, exceptionally, that evidence has been collected in another Member State in accordance with the procedural law of that country, but the use of the evidence would infringe essential procedural principles of the court's own national law. The provisions set out in Article 30 of the proposal for a Regulation must be adjusted accordingly.

- III. In order to secure the support of the German Bundestag for the important project of a European Public Prosecutor's Office, it would be helpful if the Commission and the European Parliament were to take account of the points set out above in the further course of the negotiations. The German Bundestag requests that its President communicate this decision to the President of the European Commission and the President of the European Parliament.