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# *EPPO, procedural safeguards and* impartiality and independence of judges and prosecutors

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## The European Public Prosecutor Office. Guaranties. Accountability.

**1.**

The text of the Proposal[1] for a Council Regulation on the establishment of the European Public Prosecutor's Office was published exactly 15 years after the adoption of the Statute of the International Criminal Court[2].

In July of 1998, when took place the Rome Conference, inside the EU the cultural debate related to the creation of a European Public Prosecutor was in course, the first version of the Corpus Juris had already been published by a year.

Nowadays, in 2013, the International Criminal Court has been operating for a decade.

The EU member States are already, all members to the International Criminal Court.

And now they are about to submit to a new "organ of international justice", to the which they will give a further part of their sovereignty. I think we should express high satisfaction to the fact that, thanks to a legitimating basis represented by the Lisbon Treaty, the resistances which slowed down the creation of the European Public Prosecutor have been to some extent overcome.

There are several reasons why the establishment of a European Public Prosecutor must be very positively greeted.

Indeed, now it will be easier and more effective the response to the crimes affecting the financial interests of the Union. It deals with crimes that - in the most serious cases - often imply the presence of criminal organizations; almost always involve corruption or at least the betrayal of their institutional duties by public representatives as well in each one of our States as by the EU itself. Our professional experience shows that in this field the answers - given by the national judicial authorities - are not fully aware of the seriousness of these crimes. The creation of the PME certainly will be worth to limit the risks of a “tired”, bureaucratic cooperation.

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[1] COM(2013)534 final 2013/0255 (APP). It can be read in: http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf. Hereinafter, the Proposal.

[2] At the issue of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July, 17 1998, in Rome.

The importance of this reform is that a stronger reaction against these forms of criminality will be happening thanks to an "organ of justice."

It should be added that with the creation of this new “organ of justice”, the European integration in the field of Human Rights is doing a further step forward, especially when you consider that this initiative complements others that the EU is taking with regard to the Member States, all designed to ensure a “strengthened, fair treatment” to the rights of the persons accused or involved in a criminal trial.

The most important example of this policy is represented by the Stockholm Program, whose implementation is already started, thanks to the adoption of several Directives[3], all focusing on the position of the accused person. But – as I will better specify[4] - the position and the rights of the victims of a crime forms the object of a specific regulation.

Until now – at the UE level - the Rights of the persons involved in a criminal investigation and then in the subsequent trial had been identified only thanks to the jurisprudence of the two European Courts, the Court of Justice of the European Union and the European Court of Human Rights. Now we are in front of a list of rights that the States are bound to include in their codes of criminal procedure, on the basis of those Directives. It's important to add that the list originally contained in the Stockholm Program was subsequently enriched and integrated.

At the beginning of this paragraph I made a reference to the International Criminal Court, but I had no intention of celebration. I talked about it, however, because this "organ of justice", thanks to the number of its Member States, can reasonably be considered the expression of the International Community; it deals with a Court to the which more than half of existing States accepted to submit, a Court whose organization is particularly complex, being regulated not only by the Rome Statute but also by rules of secondary character: a penal code which is represented by the Body of the elements of Crimes, and a complex regulatory text - the Rules of procedure and evidence - that contains a code of criminal procedure, as well as norms that affect the status of the members of the Court and of the Office of the Prosecutor, rules concerning discipline and ethics. The ICC and its Regulations represent a model that can not be ignored by the States which intend to create a similar judicial structure, an international one.

**2.**

The International Criminal Court and its Prosecutor are institutionally legitimized by the presence of an organ of a political nature, the Assembly of States Parties, in respect of which they

[3] in the Stockholm Program there were originally the following Rights:
• Interpretation and translation,
• Information about rights and about the accusation,
• Access to counsel and the right to communicate at the time of arrest,
• The rights of vulnerable defendants,
• Legal-aid.
Subsequently, have been identified other situations and the related rights deserving of this procedural protection, common and wider:
• pre-trial detention,
• Presumption of innocence.

[4] Paragraph 5.c.

are anyway independent; the Assembly of States Parties is an organ that can be considered, at the same time, a sort of Legislator and of Government. Indeed, it was to the Assembly the adoption of both the Body of the elements of the crimes and the Rules of procedure and evidence; it is up to the Assembly to elect the members of the Court and of the Prosecutor Office; the Assembly is their disciplinary judge.

The European Public Prosecutor does not have its corresponding "European Court", neither as a Judge of Liberties nor as the Judge of the merit, because his\her judges will be all the judges of those Countries that will join the enhanced cooperation procedure.

As regards, however, the legitimacy, the European Public Prosecutor will have as reference the other institutional Bodies of the Union; in particular, he\she will be subject to the controls of legitimacy that are attributed to the Court of Justice, by art. 263 of the Treaty on the Functioning of the European Union[5].

**3.**

EPPO represents a typical organ of "criminal investigation and prosecution".

As we know, in the EU Countries the prosecutors have very different institutional positions, as regards their independency, their role and their tasks as well; but in the international debate, the issue of the structure, of the tasks, of the statutes were, for some time, identified; and the outcomes of these debates are - in some extent - represented by the Statute of the International Criminal Court.

Early indications were provided with the "U.N. Guidelines on the Role of the public prosecutors"[6], dating back to 1990, they had - in particular - stated that:

"*Member States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other.*"

Meanwhile, the Council of Europe was drawing up documents of a political-cultural nature. The first and most important is the Recommendation no. 19 of 2000[7]. That defined the public prosecutor as an impartial body, putting him at “some distance” from the executive power and, instead, inserting it “far closer to or inside the judicial power". But the Recommendation no. 19 was only able to propose a compromise formula, which does not take sufficient account of the fact

[5] *The Court of Justice of the European Union **shall review the legality** of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*
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*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*

[6] Adopted by the 8th Congress of the UN on the prevention of crime and the treatment of the accused persons, 27 August - 7 September 1990.

[7] Recommendation rec(2000)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system.

that the PP participates in the function of the judicial control on the respect of legality. In particular, the Council of Europe was self-limiting its “Recommendation”, by suggesting only a requisite of "*impartiality*"; and in this way wasn’t facing the crucial issue whether it is possible to conceive any impartiality for the members of an organ that lies in the condition of "dependency" from the political parties that appointed these persons.

The Recommendation 19 was not, politically, able to take that step which was subsequently made by other documents of the Council of Europe itself, all of them proposing a situation of independency for the public prosecutors[8].

The dilemma about dependence \ independence was clearly resolved by the Proposal for the creation of **EPPO**. Indeed, exactly in line with the institutional choices contained in the Rome Statute, Article 5 of the Proposal provides for a condition of **independence**. But, at the same time it expresses very clearly what shall be the limit and the legitimizing basis of this independence: the **accountability**[9].

And the result is a pattern of public prosecutor which shall exercise his\her powers in a logic quite similar to that of the judges, that is in an impartial manner and in accordance with the rights of private parties, a prosecutor's office to the which is recognized a condition of independence; a prosecutor's office organized in a transparent way and according to criteria of consistency, according to criteria that imply a duty to be accountable and, therefore, a responsibility. In this sense, we can speak of a prosecutor as an "organ of justice".

**4.**

**4.a.**

Before analyzing the contents of the Proposal for a Regulation on the establishment of the European Public Prosecutor, it seems appropriate to recall some "clauses" that were included in the Directives which have been adopted to implement the Stockholm Program.

Just as an example, can be quoted the Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings; and the Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings. The both of them, while recognizing certain procedural rights, provide for the “right to the legal remedy”; and in this way they give an

[8] Opinion n° 12 (2009) by the Consultative Council of the European Judges and Opinion n° 4 (2009) by the Consultative Council of the European Prosecutors, on Judges and Prosecutor in a democratic society. Magna Charta of the Judges (Fundamental Principles), Consultative Council of the European Judges, Strasbourg, 17 November 2010.

[9] **Independence and accountability**
1. *The European Public Prosecutor’s Office shall be independent.*
*2. The European Public Prosecutor’s Office, including the European Public Prosecutor, his/her Deputies and the staff, the European Delegated Prosecutors and their national staff, shall neither seek nor take instructions from any person, any Member State or any institution, body, office or agency of the Union in the performance of their duties. The Union institutions, bodies, offices or agencies and the Member States shall respect the independence of the European Public Prosecutor’s Office and shall not seek to influence it in the exercise of its tasks.*
3. *The European Public Prosecutor shall be accountable to the European Parliament, the Council and the European Commission for the general activities of the European Public Prosecutor's Office, in particular by giving an annual report in accordance with Article 70*.”

actual implementation to article 47 of the Charter of Fundamental Rights of the EU[10]. Furthermore, the both of them contain a non-regression clause, giving in this way a direct implementation to Article 52, par.3 of the Charter of Fundamental Rights of the EU. To this regard, it is important to textually quote the standard wording utilized by the European Legislators in order to express this principle in the concerned matter[11].

The EU Legislators intended not only strengthen some defence Rights, but bind the states to the actual respect of these rights, in their potentially wider extent.

**4. b.**

A further quotation must be done before trying to examine the most relevant articles of the Proposal. I'm referring to the final document adopted by the 6^ Meeting of the Network of the Prosecutor general of the Supreme Courts of the EU (hold in Krakow, May 2013). As regards the creation of EPPO, this important assembly expressed a strong recall regarding the necessity that:

" *rules should be provided on admissibility of evidence and*"

"*resolution of possible conflicts of jurisdiction*".

**4. c.**

Finally, must be mentioned two recent decisions taken by the two European Courts: as regards the Court of Justice of the European Union, it deals with the Judgment of the Court (Fourth Chamber) of 6 June 2013, in case C-648/11, The Queen, on the application of MA and Others v Secretary of State for the Home Department[12]. While, as for the Court of Strasbourg, I am referring to the Case of Camilleri v. Malta (Application no. 42931/10) Judgment - 22 January 2013, 27/5/2013[13].

The first Decision substantially resolved (what must be considered as) a negative conflict of competence or jurisdiction, while the Decision of the ECHR concerned a case of (what must be considered as) a situation of "forum-shopping", internal to an only one State.

This being a general sketch of what I was able to identify as the state of the art in this matter, I

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[10] *Article 47 - 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.*

[11] Directive 2010\64, article 2.5. reads: "*Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings*".

While Directive 2012\13's article 8.2. reads "*Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive*".

[12] http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-648/11&td=ALL

[13] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116076#{"itemid":["001-116076"]}

will try to comment the essential points of the Proposal, in the light of these indications.

**5.**

I put in the title of this document the words “Guaranties, accountability, controls, responsibilities” because this seemed to me the possible and correct approach to a Document related (I quote the Recommendation 19/2000 of the Council of Europe) to "*public Authorities who on behalf of society and in the public interest, Ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system*."

I will try to examine the issue of the Guarantees with a double reference: to the institutional position of the Chief Prosecutor, his\her Deputies and the European Delegated Prosecutors, and to the persons involved in the institutional activities of the EPPO, during the pre-trial and the trial phases.

**5.a.**

According to the Proposal, the European Public Prosecutor Office is independent; as regards its members the Proposal uses the classical wording that we find also in the Statute of the ICC: neither seek nor take instructions from anyone, fully independency for all of them by their national authorities. Instead, the internal relationships between the Prosecutor and the Deputies or the Delegates have a hierarchical character.

As regards the institutional condition of the members of international judicial organs similar to EPPO, the cultural and political debates have since a long time identified two tools aimed to strengthen the real independency of their members; they are represented by two peculiarities:

- the mandate must have a reasonable length, and
- can not be renewed.

Now, the Proposal doesn’t contain an only one solution as regards the issue of this aspect of the independency. Indeed, the Prosecutor and the Deputies are appointed for eight years and are not renewable; instead, the European Delegate Prosecutors’ mandate is of five years and can be renewed.

A further discrepancy regards the mechanisms and the guarantees related to the dismissal. Indeed, while the Chief Prosecutor and the Delegates can be dismissed according to a mechanism that offers them several guarantees, there including a substantial publicity of the procedures; instead, as far as the European Delegated Prosecutors are concerned, the Proposal merely says that they may be dismissed by the Chief Prosecutor.

Even as regards these (very sensitive) issues can be useful to look at the Statute of the ICC.

Indeed, we can see that all the Judges and the Prosecutors are elected with a mandate of nine years that can not be renewed; the dismissal of all the Judges and all the Prosecutors is submitted

to a formal procedure, common to all of them; it is to the Assembly of the State Parties to decide, at the issue of this procedure. And the only existing difference is that for the dismissal of a judge is needed a particularly high majority of the votes, while this percentage goes diminishing according to the "rank" of the involved person.

In my opinion, article 10 of the Proposal should be amended in this sense.

But there is a further issue.

If the Delegates Prosecutors are submitted to the mechanism of the confirmation\not confirmation at the expiring of their mandate, as well as to the possibility of a not controllable decision of dismissal.

We must wonder if this regulation doesn't **give the Chief Prosecutor a power too large and indeterminate.** We must wonder if there isn't a patent and objective risk of a "not-responsible" exercise of a power that is very sensitive. The issues of the appointment, of the confirmation, of the dismissal are too crucial to be resolved solely on the basis of the provisions of Article 72.d. of the Proposal.

With my last comment I was facing one of the two aspects of the discretionary power of the PP, one related to the extent of his powers in relation to other prosecutors.

The second aspect is related to the treatment of the rights of the persons involved in the criminal proceedings.

The risk of arbitrariness and hence the need for clear rules that make it controllable - by a judge - the legitimacy of the decisions taken by the PP in the exercise of its powers arise, here, in even clearer terms.

**A very large and indeterminate power** is given to an only one person.

We must wonder if such situation is consistent with the checks and balances principle, which is on the very basis of the modern Democracies.

**5.b**

The second part of this paragraph is, thus, dedicated to the problem of the guarantees related to the persons involved in the institutional activities carried out by the EPPO.

As already observed, EPPO doesn't have its own Judge. Indeed, according to article 25.1 of the Proposal,

*1. For the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence.*

While examining this issue, a further article of the Proposal must be quoted:

*Article 11*

***Basic principles of the activities of the European Public Prosecutor's Office***

*1. The European Public Prosecutor's Office shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union.*

*2. The actions of the European Public Prosecutor's Office shall be guided by the principle of proportionality as referred to in Article 26(3).*

*3. The investigations and prosecutions of the European Public Prosecutor's Office shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. The applicable national law shall be the law of the Member State where the investigation or prosecution is conducted. Where a matter is governed by national law and this Regulation, the latter shall prevail.*

I intentionally emphasized certain words because I want to put a question.

In the first part of this intervention I have dwelt long enough to examine and comment the Stockholm Program and the Directives issued by the EU in order to implement it; we are in front of a quite long list of rights destined to be better protected thanks to these EU norms. Our States have the duty to insert in their criminal procedure codes each one of these regulations.

Now, is it conceivable that the institutional activities of the EPPO shall be governed only by the Regulations contained in the Proposal? That they do not include all the Rights listed in the Stockholm Program?

And what will happen, if a State didn't implement the Stockholm Program rules, while another State correctly carried out its duties as a member to the EU? which will be the choice of EPPO for carrying out some acts of investigation potentially performable in both the States?

If we compare the list of the rights contained in the Proposal with the adjourned version of the Stockholm Program list, we can verify that there isn't a perfect coincidence.

Maybe, the wording of article 32 can be changed by inserting a kind of general clause, whose essential contents could be that in criminal proceedings conducted by EPPO, the rights of private parties are governed by the rules adopted by the EU in these matters.

A further remark.

The legal rules issued by the EU, to recognize certain rights to the persons involved in criminal proceedings are not only those contained in the Stockholm Program. Even though the quote may seem inappropriate and improper, we must remember the Directive 2012\29 related to the victims of crimes[14]. Of course the definition of victim, in the meaning considered by this Directive can not be referred to the European Union, but the situation is not that simple. Indeed, we can not ignore that article 13 of the Proposal enlarges the competence of EPPO by giving it the possibility to investigate and prosecute different nature's crimes[15], the ones inextricably linked to the criminal offences considered in article 12. One can not exclude that a crime affecting the financial interests of the EU, when committed in a context of organized criminality, could be connected to a different and serious crime, maybe even against the life or the integrity of a person. In this hypothesis the same problems arise again; the problems I have already mentioned before. Will EPPO remain

[14] Directive 2012/29/EU of the European Parliament and of 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

[15] ***Ancillary competence***

*1. Where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the European Public Prosecutor's Office shall also be competent for those other criminal offences, under the conditions that the offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts.*

bound only to the respect of the rules contained in the Proposal or will it actually respect the rights of the victims in the terms described in Directive 2012/29/EU ?

My conclusions related to this important issue, is that the wording of article 32 could be changed by inserting a kind of general clause, whose essential contents could be that in criminal proceedings conducted by EPPO, the rights of private parties are governed by the rules adopted by the EU in these matters.

The existence of such a general clause could be able to reduce the risks of the "forum shopping"; and would represent a response to the further crucial issue I will try to comment in the next paragraph: the admissibility of evidence.

**6.**

**6.a**

Article 28 of the Proposal regulates the dismissal of the case.

A first remark.

We know that in the national European systems there very different solutions as regards the discontinuing of the case, according to the type of prosecution they have, mandatory or discretionary. The Recommendation 19\2000 by the Council of Europe[16] had looked for a compromise formula, in the possible extent, respectful of the rights of the victims, stating that:

*"34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution".*

We must not forget that EPPO will have also an ancillary competence; as regards these positions, the text of article 28.4 only provides for an information to the injured party[17] and only in a particular hypothesis.

This formula should be improved and rendered more effective.

First of all, the right of the injured person to receive a compensation can't be treated in a different way according to the "informant role" played by this person. But, before this issue there is another one: we can't understand which will be the juridical effects of this information.

In my view, if these doubts are not clarified, it would better to eliminate this paragraph of article 28..

**6.b.**

[16] See, above, note 7.

[17] *Where the investigation was initiated on the basis of information provided by the injured party, the European Public Prosecutor's Office shall inform that party thereof.*

The second remark is related to a sort of contradiction, present in paragraph 2 of article 28. It deals with the "minor offences".

In these situations, EPPO is empowered to discontinue the case[18].

EPPO will intervene only on serious cases; is it conceivable that a case could be dismissed because it represents a "minor offence"? and why a "minor offence" will not sent back to the national judicial authorities, to be criminally prosecuted? Why this form of immunity?

We are in front of a new situation of **a power too large and indeterminate**.

It seems quite impossible to conceive which would be the guidelines aimed to regulate in advance the indispensable limit, and render controllable the exercise of this power, that risks only to create situations of arbitrariness. Maybe, the best solution would be the elimination of this norm.

**7.**

The questions of the admissibility evidence – and of the conflicts of competence.

**7.a**

They are the two questions that were worrying the Conference of the EU Prosecutors general[19].

As regards the first problem, we can make a reference to the Statute and the Rules of procedure and evidence of the International Criminal Court. And the first remark that can be formulated concerns the existence, in the Statute, of the procedure regulated by article 56, the one related to the "*Role of the Pre-Trial Chamber in relation to a unique investigative opportunity*". In any case of a "proof under risk of dispersion", it is possible, for the Prosecutor, to invest the Pre-trial Chamber by requesting it to gather this proof in a form that respects the right to the defence of the accused person; and that gives the Trial Chamber the possibility to use this proof as it is, of course, after an evaluation on the fairness of this decision.

Maybe article 30 of the Proposal could be modified by inserting a reference to these mechanisms.

Some further amendment to the present text of article 30 could insert an explicit reference to:

- the European Convention on Human Rights;
- to the case-law, of the two European Courts, the CJEU and the Court of Strasbourg, on the matter of the admissibility of the evidence gathered by respecting the right to the defence;
- above all, to a clause of no-regression, in some extent similar to the one I was quoting here

[18] *a) the offence is a minor offence according to national law implementing Directive 2013/XX/EU on the fight against fraud to the Union's financial interests by means of criminal law;*

[19] See, above, paragraph 4.b.

in paragraph **4.a**., that is to say: "*Nothing in this Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection".*

**7.b**

I want to purposely avoid the use of the sentence "forum shopping".

But I can not avoid a remark: can the choice of the "forum" be entrusted only to one of the parties of the criminal trial?

Is that a fair mechanism?

And, by a different point of view, can we think that the "chosen judge" shall not be empowered to evaluate and adjudicate about his\her competence or jurisdiction?

Whatever the technical expressions that we can read in a document like the Proposal, there is no law that could prevent a court from assessing whether its competence or its jurisdiction on the case that is presented to that Court exist or does not exist.

And what will happen in cases of a conflict, could it be positive or negative?

**7.c.**

In these situations, we are used to expect the solution of the conflict by a "superior" judge.

And, as regards the activities of the EPPO, who and where will be this judge? Does it exist, this Court?

Is there and who will be the Judge of "*Die Mühle von Sanssouci*"?

Will this Judge only evaluate (and solve) the pure issue of the competence or this decision is such as to imply different consequences, consequences related to some Human Right?

Is there a possible, specific role for the Court of Justice of EU?

After a perusal of the Proposal, I was able to find out a reference to the Court of Luxembourg only in the following articles:

- art. 8.4., as regards the Prosecutor dismissal procedure, and
- art. 69, par. 2 and 5, related to the liability regime.

If we examine the whole Document COM(2013) 534 final, we can identify two further quotations of the CJEU:

- in paragraph 3.3.5. of the *Explanatory Memorandum*, which refers to the possibility (or, better, duty), for the national courts to submit to CJEU questions of interpretation, according to article 267 of the Treaty[20];

[20] *3.3.5. Chapter V: Judicial review - In accordance with Article 267 of the Treaty, national courts are able or, in certain circumstances, bound to refer to the Court of Justice questions for preliminary rulings on the interpretation or the validity of provisions of Union law which are relevant for the judicial review of acts of investigation and prosecution of the European Public Prosecutor's Office.*
*This may include questions on the interpretation of this Regulation. Since the European Public Prosecutor's Office will be considered a national authority for the purpose of judicial review, national courts will only be able to refer questions on*

- and in *Considerandum* 11, related to the accountability and the possible removal of the European Prosecutors[21].

No references can be found to article 263 of the Treaty, in particular to the paragraph where is enshrined the principle of the legal remedy, as a general rule for the EU:

"*Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".*

**7.d.**

In order to offer some arguments aimed to give a first possible response to these issues, I come back to the two Judgments I have quoted in paragraph **4. c.**

**7.d.1.**

First I consider the Judgment of the Court of Justice of the European Union[22].

The question of interpretation that had been proposed asked - basically - the Court to resolve a negative conflict of competence among authorities of different States, regarding who had to intervene as regards the treatment of some personal rights. It dealt with to identify the State bound to adopt acts of an administrative nature, but this decision obviously was such as to imply all the juridical consequences that such acts could involve, so even those of their judicial review.

In particular, having to interpret the Regulation (EC) n. 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a national of a third country, the Court of Justice of the EU has resolved the conflict, indicating the criterion for the allocation of jurisdiction in the following terms: "The Member State responsible for examining the asylum application of an unaccompanied minor who has submitted questions in several Member States is the one in which such a minor is finding himself after having submitted the application."

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*interpretation to the Court of Justice regarding its acts. The preliminary rulings procedure will thus ensure that this Regulation is applied uniformly throughout the Union, whereas the validity of the acts of the European Public Prosecutor's Office may be challenged before national courts in accordance with national law.*

[21] *(11) Strict accountability is a complement to the independence and the powers granted to it under this Regulation. The European Public Prosecutor is fully accountable for the performance of his/her duties as the head of the European Public Prosecutor's Office and as such he/she carries an overall institutional accountability for its general activities before the Union institutions. As a result, any of the Union institutions can apply to the Court of Justice of the European Union with a view to his/her removal under certain circumstances, including in cases of serious misconduct. This accountability should be combined with a strict regime of judicial control whereby the European Public Prosecutor's Office can only use coercive investigation powers subject to prior judicial authorisation and the evidence presented to the trial court should be subject to verification by that court as to its compliance with the Charter of Fundamental Rights of the European Union.*

[22] Fourth Chamber, of 6 June 2013, in case C-648/11, The Queen, on the application of MA and Others vs. Secretary of State for the Home Department.

This classic example of a resolution of a conflict of jurisdiction seems to be considered as a "precedent" case law that can be evoked in the matter - just as delicate – of the conflicts on the jurisdiction between different national criminal courts, implicated in an EPPO'S investigation.

**7.d.2**

The second Judgment is the one by the European Court of Human Rights in a case concerning Malta[23].

The applicant had alleged the violation both of article 6 and 7 of the Convention. But the Court of Strasbourg deemed that it was no use to examine the possible violation of the right to the fair trial, because, logically, there was first a patent violation of article 7.

The proposed question can very simply be described.

In Malta there are two different kind of Penal Courts, the Court of magistrates, competent for petty crimes and minor offences; and the Criminal Court whose competence is related to the most serious crimes. Mr Camilleri had been indicted along with another person for having perpetrated – the both of them, together – a crime of drug traffic. The PP, according to a choice he was empowered to take, decided to submit the accomplice of Mr Camilleri to the Court of magistrates, while Mr Camilleri himself in front of the Criminal Court, because of his criminal record. The consequence of this decision by the PP was that for the maximum punishment applicable to Mr Camilleri was a life imprisonment, while for his accomplice this maximum was of only four years.

I want to quote the more relevant paragraphs of the reasoning:

*"41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.*

*42. omissis*

*More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.*

*43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria)*."

I come back to an analysis of the Proposal.

The criteria for identifying the competent Court are listed in Article 27.

In the list there isn't any order of priority among the various criteria.

[23] Camilleri v. Malta (Application no. 42931/10) Judgment - 22 January 2013, 27/5/2013.

In the list there isn't any reference to a further, legitimate, criterion for the forum-choice: EPPO could be bound to submit the case for the judgment, to the Court of the Country that has better implemented in its internal laws the EU regulations aimed to the protection of the persons involved in criminal trials.

In fact, according to the Proposal, EPPO will have an unlimited and not regulated possibility to choose the most "functionally appropriate" criterion, from time to time.

It is not, this, too wide a choice?

And there is a further problem to be considered, that of a possible, but not impossible pathology. What will happen if EPPO, despite the clear provisions contained in Articles 26 and 30 of the proposal, decides to present the accused before the Court of a Country that has not included in its laws the "rights" listed in Article 26? Or, simply, decides to submit the accused person to the Court of the Country where the penalties are the more severe. As the Malta Prosecutor did with Mr Camilleri.

We are in front of (pathologic but non unconceivable) initiatives that will infringe the EU legality, but - from a formal point of view – such an act of indictment before that certain national court will be perfectly legitimate, according to the internal law.

I'd try to be as complete as possible in the analysis I am carrying out on the basis of the Camilleri Judgment.

Article 27 of Proposal is the one related to the Prosecution and then to the crucial issue of the identification of the National Court to be chosen. In fact, these norms empower the European Prosecutor to carry out a dual choice:

- first he\she can decide what will be the State, and then
- will be able to identify the fittest Judge or Court inside this State.

The situation considered by the European Court of Human Rights is, here, multiplied to the nth power.

Must we conclude that this violation of the European law will not have any "legal remedy"?

The indicted will not be entitled to submit any claim?

According to my point of view, this Judge can be identified in the Court of Justice of the European Union.

The judge of the "European" legality.

And the legal basis can be identified in Article 263 of the Treaty on the Functioning of the European Union I have already quoted.

In my view, the Articles of the Proposal should be amended. The choice of the Judge can not be remitted to an only one of the Parties. No EU regulation will be able to prevent the National Courts from being the Judges of their own competence.

And, as a conclusion of this part of my intervention, I want to recall my previous remark: the principle of checks and balances can not give an only one person such wide a power.

**7.e.**

Can we imagine which could be the possible consequences of this “legal empty space”? Could it regard the lack of legal solutions for the conflicts of jurisdiction or the possible abuses in the “choice of the fittest national Court”? The lack of any legal remedy, I mean.

Since here we are dealing with Human Rights, there would be an intervention by the other European Court, the Court of Strasbourg.

We know that - up to now – the E.U is not a member to the ECHR.

But we know, as well, the very consolidated jurisprudence of the Court related to the responsibility of the Member States in case of a violation of a protected right when it stems from the application of a Treaty signed after this State had became a member to the ECHR.

I textually quote the reasoning of two different Judgments.

The first one is related to my own Country, the second one to Germany:

*“Furthermore, the Court observes that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States’ responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States”*[24].

*“Thus the Contracting States’ responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States (see, mutatis mutandis, Matthews v. the United Kingdom [GC], no. 24833/94, §§ 29, 32-34, ECHR 1999-I). The Court reiterates in this respect that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the object and purpose of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. In determining whether granting an international organisation immunity from national jurisdiction is permissible under the Convention, a material factor is whether reasonable alternative means were available to protect effectively the rights under the Convention (see Waite and Kennedy, cited above, §§ 67-68)*[25].

Just some conclusive comments.

In front of the situations I was defining as pathologies, if inside the EU structures, inside the EU Jurisdictional System no remedy is offered to the concerned person as regards these acts that

[24] GRAND CHAMBER - Case of Hirsi Jamaa and Others v. Italy - (Application no. 27765/09) - 23 February 2012

[25] Case of Prince Hans-Adam II lo Liechtenstein v. Germany - (Application no. 42527/98) - 12 July 2001

are addressed to or against that person and his\her Rights, the consequence will be that that person will be entitled to submit an application according to articles 34 and 35 of ECHR.

The “only-territoriality principle” of the EU to the ends of the institutional activities of EPPO can not represent a “*fictio juris*”.

The predictability of that negative consequence of a crime that is represented by the penalty is a right according to article 7 of ECHR. Malta is the smallest Member-State of the EU; and we have seen in which way the Court of Strasbourg is interpreting the right to the predictability of the penal sanction.

If we relate this principle to the enormous “judicial space” of the EU, where each one of the States have its own complex system of laws, different penalties, different internal Courts, different internal Courts empowered to apply penalties of a very different gravity, we can but reach a conclusion on the indispensable necessity that the very crucial issue I am examining could find a solution, actually respectful of Human Rights.

Genova – Venezia, September-October 2013