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Joint position of Bundesrechtsanwaltskammer (The German Federal Bar) and Deutscher Anwaltverein (German Bar Association)

on the creation of a European Public Prosecutor's Office

distribution list

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- Council of Bars and Law Societies of Europe (CCBE)
- European Criminal Bar Association (ECBA)
- Brussels Representation of the German Federal Association of Liberal Professions

Germany:

- Bundesministerium des Innern
- Bundesministerium der Justiz
- Rechtsausschuss, Innenausschuss des Deutschen Bundestages
- Vorsitzender des Rechtsausschusses des Deutschen Bundestages, Siegfried Kauder

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- Vorsitzender des Innenausschusses des Deutschen Bundestages, Wolfgang Bosbach
- Landesjustizministerien
- Rechts- und Innenausschüsse der Landtage
- Bundesgerichtshof
- Bundesanwaltschaft

- Vorstand des Deutschen Anwaltvereins
- Landesverbände des Deutschen Anwaltvereins
- Vorsitzende der Gesetzgebungsausschüsse des Deutschen Anwaltvereins
- Strafrechtsausschuss des Deutschen Anwaltvereins
- Geschäftsführender Ausschuss der Arbeitsgemeinschaft Strafrecht des Deutschen Anwaltvereins
- Vorsitzende des Strafrechtsausschusses des KAV, BAV
- Vorsitzende des FORUM Junge Anwaltschaft des DAV

- Deutscher Strafverteidiger e. V., Herr Mirko Roßkamp
- Regionale Strafverteidigervereinigungen
- Organisationsbüro der Strafverteidigervereinigungen und -initiativen

- Arbeitskreise Recht der im Bundestag vertretenen Parteien
- Deutscher Richterbund

- Strafverteidiger-Forum
- Neue Zeitschrift für Strafrecht, NStZ
- Strafverteidiger

- Prof. Dr. Jürgen Wolter, Universität Mannheim
- ver.di, Bereich Recht und Rechtspolitik
- Deutscher Juristentag (Präsident und Generalsekretär)
- Prof. Dr. Schöch, LMU München

Position

The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) and the German Bar Association (Deutscher Anwaltverein, DAV) appreciate the opportunity to submit their position on the creation of a European Public Prosecutor's Office to combat crimes affecting the financial interests of the EU:

I.

The German Federal Bar and the German Bar Association have doubts as to the sustainability of many if not most of the reasons cited in favour of establishing a European Public Prosecutor's Office. Many, if not most of the substantive problems can and must be solved in another way.

1. The need for a European Public Prosecutor's Office has not been proven. Protection of the EU taxpayer's money, taken as an abstract goal, is not sufficient to qualify as an objective, and neither do the anecdotal cases cited by OLAF suffice.
2. Great damage caused by fraud, for which Commission documents such as COM(2011) 293 final, p. 3, footnote 2, or COM(2011) 595 final provide at best provisional proof, primarily call for a strengthening of fraud prevention. What is needed most urgently is a crime-proofing of the law and of collecting and spending practices regarding European Union funds. In order to protect European Union funds, prosecution is secondary, the establishment of a European Public Prosecutor's Office is at best tertiary.
3. The argument that the Member States prosecute crimes against the financial interests of the European Union insufficiently or less insistently than those against their own financial interests, which is why the European Union has to take prosecution in its own hands, is not supported by facts as presented by, for example, the OLAF Annual Report 2010, pp. 41-44. If there were evidence for deficiencies, the respective Member States would have to be asked to improve prosecution, if necessary by way of infringement proceedings. This argument also runs counter to the principle of mutual trust, which is referred to frequently in other contexts, a principle which does not only apply to relations between the Member States, but also between the Union and the Member States.
4. The argument that crimes against the European Union's financial interests with a cross-border dimension can only be fought effectively by a European Public Prosecutor's Office is refuted in the daily practice of police, customs and judicial cooperation between the Member States and their coordination through Eurojust, in particular in the area of financial crime.
5. Experiences gained with Europol and Eurojust so far by no means indicate that a European Public Prosecutor's Office would be seized with a sufficient number of cases and sufficiently "suitable" cases.
6. In 'mixed' cases, which occur frequently, where national as well as EU financial interests are concerned, conflicts of competence and complaints regarding competence are to be expected, which hamper effective prosecution.

II.

BRAK and DAV are opposed to a further enlargement of Europe-wide prosecution by establishing a European Public Prosecutor's Office as long as the important procedural rights of accused persons in criminal proceedings – at least to the extent provided for by the Stockholm Programme, but in particular the right to a lawyer at every stage of proceedings, if necessary in different (i.e. all) Member States concerned; legal aid, absolute confidentiality of the relationship between the defence lawyer and his client and the (absolute) right to remain silent - have not gained validity as legally binding measures (by way of a Directive) and do not apply all over Europe.

III.

BRAK and DAV should like to warn against a hasty establishment of a European Prosecutor's Office that has not been given sufficient thought.

1. European Union citizens receive a bad image of the European Union if a European Public Prosecutor's Office is created before the steps contained in the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings have been completed and completely implemented into national law. Distrust and rejection can arise at every level.
2. Due to its transnational dimensions, a European Prosecutor's Office naturally will give rise to new, specific problems on the part of the defence, which we have not even begun to discuss as yet; problems which will have to be dealt with simultaneously under the aspect of the 'equality of arms' guaranteed under Article 6 ECHR and will have to be solved adequately, in conformity with the ECHR.
3. So far, the European Commission has taken no decision on a particular model for the European Public Prosecutor's Office. All the models under discussion – with a higher degree of centralisation or decentralisation, models with supranational procedural and investigation rules as opposed to models which refer to national law; models which are either linked to Eurojust or rather to OLAF – have their strengths and weaknesses a final assessment of which can only be made once the finished models are on the table.
4. How independent should a European Public Prosecutor's Office be?
5. In the absence of a concrete concept ('how?'), the question 'yes or no?' cannot be discussed, let alone decided.
6. Furthermore, numerous questions remain which seem to be of a technical nature, but are really essential for an effective and proportional functioning of a European Public Prosecutor's Office in accordance with the rule of law:
 - Should investigation orders adopted or obtained by the European Public Prosecutor's Office have immediate validity or should they be treated in accordance with the principle of mutual recognition?
 - How should investigation orders be treated which would be illegal or unconstitutional according to the law of the Member State in whose territory they are enforced?
 - Should 'investigation order shopping' be excluded and, if so, how?
 - How will the recognition of negative decisions (i.e. for the accused) in the EU be ensured?

- What should the relationship between a European Public Prosecutor's Office and national police authorities, who will enforce the investigation orders, look like?
- Is it practically feasible to apply European law to pre-trial investigations and national law to intermediate and main proceedings, as Article 86 TFEU seems to assume?
- Should the indispensable judicial control of investigation measures taken by a European Public Prosecutor's Office occur at national or at European level? If – as suggested frequently – a European court were to be declared competent: Is the Court of Justice of the European Union ready and able to exercise judicial review of investigation measures taken by a European Public Prosecutor's Office? If – as is to be expected – this is not the case: Are there any plans to establish a specialised court in accordance with Article 257 TFEU? Would it be possible to establish the necessary system of legal protection within the legal framework of Article 263 (4) TFEU, or would the Treaty have to be amended?

IV.

A European Public Prosecutor's Office must be a model by European as well as international standards of ensuring the highest level of rights of the accused and defence rights, and must be subject to tight political as well as judicial control. In the BRAK's and the DAV's view, the following cornerstones are indispensable:

1. Rights of the accused and defence rights must be guaranteed as soon as the decision is taken to launch a criminal prosecution and to start investigating an accused person; these rights must not depend on the communication of such a decision or any other type of formality.
2. The accused person must be informed of his rights orally as well as in writing by providing him with a letter of rights prior to the first examination on the matter in question, regardless of the fact whether the accused is provisionally detained or not.
3. The accused person's right to remain silent must be guaranteed comprehensively and there must be no coercion to make self-incriminating statements. No adverse inferences must be drawn from an accused person's choice to remain silent.
4. The accused person's access to a defence lawyer of his choice must be guaranteed comprehensively, regardless of the fact whether the accused is provisionally detained or not. If the accused wishes to consult a defence lawyer, this wish must be granted immediately and the examination of the accused must not be continued. The right of consultation includes the right to a personal and confidential meeting with the lawyer.
5. The accused person or his defence lawyer has the right to inspect the files of the European Public Prosecutor's Office. Where investigation is still underway, this right can only be limited for compelling reasons and only insofar as this is absolutely necessary. If the accused person is detained provisionally or under arrest, unrestricted inspection of files must in principle be granted.
6. The defence lawyer has a right to remain silent regarding anything that has come to his knowledge in his capacity as a defence lawyer, in the core area of his professional activity, irrespective of his client. The defence lawyer himself as well as his offices must not be searched for defence documents, nor must such documents be seized. In principle, it is not allowed to monitor telecommunications between the accused person and his defence lawyer. The protection of the confidential relationship between the accused person and his lawyer is absolute and there are no exceptions.

7. Communication between the accused person and his defence lawyer must not be monitored. Should there be a strong suspicion that the defence lawyer has participated in the offence or a subsequent lesser offence, this may lead to the respective lawyer being excluded by court decision and having him replaced by a reliable defence lawyer, but it must not lead to monitoring communication.
8. As early as possible, the accused person must have clarity as to the Member State and the national law he will be accountable to. This is the only way to ensure effective defence in pre-trial investigations.
9. A legal framework and, if necessary, an institutional framework has to be established for the defence in proceedings conducted by a European Public Prosecutor's Office. This framework at least includes
 - equality of the legal position of defence lawyers from all European Member States on the basis of the principle of mutual recognition,
 - the possibility to provide destitute accused persons with a defence lawyer at the cost of those Member States who participate in an Enhanced Cooperation by establishing a European Public Prosecutor's Office (European legal aid),
 - a 24-hours/7-days-a-week emergency service of defence lawyers who are qualified to defend in proceedings conducted by the European Public Prosecutor's Office; this service is to be established at the cost of and in every Member State participating in the Enhanced Cooperation;
 - the possibility for lawyers to follow continuing training leading to a „*Fachanwalt für Europäische Strafverteidigung*“ (specialised lawyer for European Criminal Defence).

10. In addition, the principle of a free legal profession that is independent from State interference must be upheld in proceedings conducted by a European Public Prosecutor's Office. Therefore, BRAK and DAV reject the introduction of publicly appointed European defence lawyers (modelled on the American public defenders) as well as a special system of admission for defence lawyers (modelled on defenders at the international criminal courts).

V.

The Federal Republic of Germany does not have to and does not need to participate in an Enhanced Cooperation which is realistically the only framework in which a European Public Prosecutor's Office can be established, since German law enforcement authorities prosecute crimes affecting the financial interests of the European Union sufficiently and appropriately.

According to the subsidiarity principle it would be questionable to render well-functioning German criminal proceedings more complicated by introducing a European actor who follows a European legal regime and has as yet to ascertain his role.

On the other hand, the introduction of a European Public Prosecutor's Office by at least nine Member States will indeed impact on Germany's administration of criminal justice, which is why the German delegation should intensively participate in the negotiations.