

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: NEW ACTOR IN EU CRIMINAL LAW / Dominika Becková

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Abstract: *The European Public Prosecutor's Office was established under enhanced cooperation in 2017, as a new body in the institutional system of the European Union. The establishment of the European Public Prosecutor's Office changes the EU criminal law in a significant way, as it is the first body of the European Union, which will undertake its own investigations of criminal offences affecting the financial interests of the EU, carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States.*

Key words: *European Public Prosecutor's Office; EPPO; EPPO Regulation; Competence; EU criminal law; Crimes affecting the EU's financial interests; PIF Directive; Lisbon Treaty; Article 86 TFEU; European Union law*

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1. INTRODUCTORY REMARKS

The issue of criminal law protection of the budget and the financial interests of the European Union has been the topic of many discussions for nearly 30 years.¹ One of the most significant changes in the Union criminal law came during the year 2017, when Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of

¹ The idea of the establishment the European Public Prosecutor was firstly launched in the *Corpus iuris* project in 1990s, but it remained controversial for a large number of Member States. This attempt was followed by the Green-Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM (2001) 715), which was adopted on 11 December 2001, later the topic appeared also at the Convention for an EU Constitution. The Treaty of Lisbon has brought many changes to EU Criminal Law, mainly the legal basis for the future European Public Prosecutor's Office (scope of competences), but it does not directly set up EPPO. The last attempt on the field of the establishment of the EPPO was a Council Regulation on the Establishment of the European Public Prosecutor's Office. COM (2013) 534 final.

the European Public Prosecutor's Office („the EPPO Regulation”)² has been passed. The European Public Prosecutor's Office became a new body of the Union with an extremely hard task – to fight crimes against the EU budget and protect the Union's financial interest through the provisions of criminal law. Until now, criminal policy has been applied exclusively on the national level by Member States' bodies without their practice being controlled, replaced or applied in parallel by any body of the European Union. The establishment of the European Public Prosecutor's Office signifies the turning point in the protection of the financial interests of the European Union, as this new Union's body has the power to investigate and prosecute criminal offences affecting the financial interests of the EU.

The establishment of the European Public Prosecutor's Office together with the establishment of minimum rules concerning the definition of criminal offences affecting the Union's financial interests, strengthen the protection of the EU budget in line with the *acquis* of the Union in the field of criminal policy. According to this fact, the EPPO is a new body in the legal environment of the EU, it has to define precisely its competences set out in Article 86 of the Treaty on the Functioning of the European Union and in the EPPO Regulation, as well as their exercise in practice. The material competence of the EPPO is laid down in Art. 22 EPPO Regulation, according to which the EPPO is competent in the offences affecting the financial interests of the Union that are provided in the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law („the PIF Directive”), as implemented in national law. The legal framework for the investigations and prosecutions on behalf of the EPPO is the EPPO Regulation, as a partly harmonised criminal procedural law, and national laws of Member States will apply only in cases when a matter is not regulated by the EPPO Regulation.

This article's general aim is to clarify the task and the competence of the European Public Prosecutor's Office in the European Union law. To reach this aim, it is necessary to focus on the provisions of the Treaty on the Functioning of the European Union (provisions about judicial cooperation in criminal matters), as they are the cornerstone of nowadays EU criminal law. The second part of this article deals with the question of the material competence of the EPPO and its limitation. This part also takes a closer look at the exercise of the competence of the EPPO.

2. THE TREATY FRAME

The constitutional changes in the concept of the EU criminal law could be found in the Treaty of Lisbon, which is also known as the reform treaty. The Lisbon Treaty abolished the pillar structure and completed the absorption of the third pillar – cooperation in the fields of justice and home affairs into the first pillar (nowadays the only one existing). The entry into force of the Treaty of Lisbon opened the possibility to improve the integration in judicial cooperation in criminal matters in the EU. The provisions of Art. 82 – 86 TFEU provide for the harmonisation of criminal law, changes in the existing European criminal law institutional system, changes in the powers of European criminal law bodies, as well as they provide the possibility to establish new bodies to the institutional system, specifically the EPPO. The opportunity to establish a new body to combat crimes affecting the financial interests of the Union presents the most significant change in existing EU criminal law and poses a challenge for the EU itself and its Member States. Article 86 TFEU provides the legal basis for the establishment of

² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

the European Public Prosecutor's Office. Article 86 TFEU does not directly set up the European Public Prosecutor's Office but left its establishment to the existing EU institutions and the Member States.³ Although Art. 86 TFEU does not directly establish the EPPO, it provides for three types of special procedures for the EPPO subsequent establishment. Firstly, the Council may establish the European Public Prosecutor's Office from Eurojust by regulation adopted under a special legislative procedure. Secondly, in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council and in a case of a consensus in the European Council, the draft has to be adopted by the Council. The last option, the one used for the establishment of the EPPO in 2017, in case of disagreement in the European Council, at least nine Member States can establish enhanced cooperation based on the draft regulation.

Article 86 TFEU is just setting up the basic mandate of the EPPO which is responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices in offences against the Union's financial interests.⁴ The mandate of the EPPO can be extended by a decision of the European Council to combat serious crimes having a cross-border dimension and affecting more than one Member State.⁵ Judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgments and judicial decisions. The provisions on the minimal harmonised rules of criminal law refer to criminal areas listed in Art. 82 and 83 TFEU.⁶ The problem is that the above-mentioned list of criminal areas does not explicitly include the crime of fraud against the Union's financial interests, the crime the EPPO has the competence to investigate and prosecute as the only body of the EU. The provisions about combatting fraud or other illegal activities affecting the financial interests of the EU can be found in Art. 325 TFEU which establishes the guidelines for building the legal architecture that will protect the EU's financial interests (Marín, 2020). Based on this provision, the EU and the Member States have to take measures to counter fraud or any other illegal activities affecting the EU's financial interests, whereas the measures taken in the Member States have to be the same as they take to counter fraud affecting their own financial interests. There is no doubt, that Member States have a key role in the process of fighting fraud by taking effective measures to protect the EU budget. By comparison with Art. 82 – 83 TFEU (harmonisation of laws in criminal matters) and Art. 325 TFEU (measures to combat fraud) it can be seen that the legislator aimed to separate a special group of crimes, where the Union can approximate the criminal laws of the Member States and the crimes of fraud affecting the Union's budget, as the crime of fraud affecting the financial interests of the EU is serious. Article 325 TFEU contains a legal basis to take measures in order to assure an effective deterrent and protection and can be qualified as a special provision to the general provision of Art. 83 TFEU (Vervaele, 2018).

The legislator decided to give an option to the EU institutions and the Member States to establish a special criminal law enforcement body of the Union – the European Public Prosecutor's Office - with competence to fight directly against crimes affecting the

³ Article 86 par. 1 TFEU.

⁴ Article 86 par. 2 TFEU.

⁵ Article 86 par. 4 TFEU.

⁶ The approximation of the laws and regulations of the Member States concerns the areas of mutual admissibility of evidence between the Member States, the rights of individuals in criminal procedure, the rights of victims of crime or other specific aspects of criminal procedure which the Council has identified by a decision (Art. 82 par. 2 TFEU). The area of crimes, where the minimum rules concerning the definition of criminal offences and sanctions can be adopted, are due to Art. 83 TFEU terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime.

Union's financial interests through the criminal law. The Art. 86 TFEU is not defining the institutional structure of the EPPO, the appointment of its members, its competence, or its rule of procedure. The institutional design of the EPPO determines its status and powers, its relations with national authorities and existing EU institutions and bodies and makes the transfer of sovereignty visible for the Member States (Ligeti and Weyembergh, 2015). The problem in this context is that The Treaty on the Functioning of the European Union is limited just to stating that the general rules applicable to the EPPO, the conditions governing the performance of its functions and the rules of procedure applicable to its activities shall be the object of the regulation on the establishment of the EPPO. The missing institutional context of the EPPO in primary law of the EU caused problems and long discussions with the aim to find the proper way. The result came in 2017 when the EPPO was established by the Council Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. Based on Art. 3 of the EPPO Regulation the EPPO is a new body of the EU with a legal personality. The EPPO, as presented and set-up in the EPPO Regulation will not only be a new actor in the Union's judicial landscape, but it also brings an entirely new and different approach in fighting crimes in the European Union (Csonka, Juszcak and Sason, 2017).

3. THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS COMPETENCE

The establishment of the European Public Prosecutor's Office is the result of the obligation of the Union and the Member States to protect the Union's financial interests against criminal offences which cause significant financial damage. The experiences with combatting crimes affecting the financial interest of the Union, in which the Member States had exclusive competence to fight against them showed, that the aim should be better achieved at the Union level. Because of this fact – to achieve better results and more effective investigation and prosecution – the main task of the EPPO is to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union.⁷ Due to the fact, that the EPPO has direct power of investigation and prosecution, it will dramatically increase the number of prosecutions of crimes affecting the Union's financial interests, increase the deterrent effect for potential criminals and solve the problems of different applicable legal systems (Maesa, 2017).

3.1. *Material competence of the EPPO*

The material competence of the EPPO, set in Art 22 EPPO Regulation, covers criminal offences affecting the financial interests of the EU as provided for in the PIF Directive,⁸ and as implemented by national law.⁹ The PIF Directive establishes minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests.¹⁰ Harmonized offences include procurement and non-procurement fraud, customs revenue fraud, VAT revenue fraud, active and passive corruption, or money laundering.

⁷ Article 4 EPPO Regulation.

⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law.

⁹ Article 22 par. 1 EPPO Regulation.

¹⁰ The PIF Directive contains definitions of criminal offences with regard to fraud affecting the Union's financial interests in two main categories – fraud affecting the Union's financial interests (Article 3) and other criminal offences affecting the Union's financial interests (Article 4).

The Union's legislator provides the definitions of criminal offences affecting the financial interests of the EU in the PIF Directive, but the Union does not have the competence to set legally binding definitions of criminal offences. The scope of the PIF Directive is to serve as a reference frame with harmonized financial criminal offences (Kuhl, 2017). The concrete definitions of criminal offences which fall within the material competence of the EPPO, are required to be set by the Member States in their national laws (criminal law), by which the PIF Directive will be transposed into national law. The transposition of the PIF Directive and its rules will not be homogenous, and the result will be that the original mandate of the EPPO will not be homogenous either (Marin, 2020).

In addition to investigations and prosecution of criminal offences defined in PIF Directive the EPPO also has the competence to investigate and prosecute the offences regarding participation in a criminal organisation,¹¹ if the focus of the criminal activity of a criminal organisation is to commit any of the offences defined in the PIF Directive.¹² Moreover, the competence of the EPPO is also given for any other offence that is inextricably linked to criminal offences affecting the financial interests of the EU as defined in the PIF Directive.¹³ In this case, the EPPO can exercise its competence only when two conditions are simultaneously fulfilled: (1) there exists an inextricably link¹⁴ between a criminal offence defined in the PIF Directive and other criminal offence, and (2) the maximum sanction provided by national law for an offence defined in the PIF Directive is higher than the maximum sanction for an inextricably linked offence.¹⁵

The EPPO regulation also contains negative definition of the competence of the EPPO. The EPPO does not have the competence to investigate and prosecute criminal offences relating to national direct taxes including offences inextricably linked to them.¹⁶

In connection with the competence of the EPPO, it is necessary to keep in mind the possibility of an option to extend the competence of the EPPO. The possibility of extending the competence of the EPPO is connected with serious crimes having a cross-border dimension.¹⁷ The decision to extend the powers of the EPPO has to be adopted by the unanimous decision of the European Council. The first attempt to extend the competence of the EPPO came soon after the establishment of the EPPO, on 12 September 2018, when the European Commission presented an initiative to extend the competence of the EPPO to cross-border terrorist crimes as part of the comprehensive and strengthened European response to terrorist threats.¹⁸

The material competence of the EPPO in every single case is according to Art. 23 EPPO Regulation determined by its territorial and personal competence. The EPPO is competent for the criminal offences referred to in Art. 22 where these offences (a) were committed in whole or in part within the territory of one or several Member States,¹⁹ (b)

¹¹ Criminal organisation for the purpose of the EPPO Regulation is criminal organisation as defined in Framework Decision 2008/841/JHA.

¹² Article 22 par. 2 EPPO Regulation.

¹³ Article 22 par. 3 EPPO Regulation.

¹⁴ The term inextricably link should be considered in light of the relevant case-law of the Court of the Justice of the European Union, for which the relevant criterion is the identity of the material facts, so it should be understood in the sense of existence of a set of concrete circumstances which are inextricably linked together in time and space (Recital 54 EPPO Regulation).

¹⁵ Article 25 par. 3 let. a EPPO Regulation.

¹⁶ Article 22 par. 4 EPPO Regulation.

¹⁷ Article 86 par. 4 TFEU.

¹⁸ Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competence of the European Public Prosecutor's Office to cross-border terrorist crimes. COM/2018/641 final.

¹⁹ For the purposes of the EPPO Regulation Member State is a Member State participating in enhanced cooperation.

were committed by a national of a Member State, provided that the Member State has jurisdiction over such offences when committed outside its territory, or (c) were committed outside the territories of Member States by a person who was subject to the Staff Regulations or the Conditions of Employment, at the time of the offence, provided that the Member State has jurisdiction for such offences when committed outside its territory. The EPPO will have the competence to investigate and prosecute criminal offences in cases, in which the European (territorial or personal) link to the committed offence exists. On the other hand, the territorial and personal competence of the EPPO has to be read and applied in connection with the idea, that the EPPO should exercise its competence as broadly as possible so its investigations and prosecutions may extend to offences committed outside the territory of the Member State.²⁰

3.2. Shared competence

The European Public Prosecutor's Office is an indivisible body of the Union operating as a single Office. The EPPO can perform effectively its task – to investigate, prosecute and bring to judgment the perpetrators of criminal offences affecting the financial interest of the Union - only when the EPPO and the competent national authorities will support and inform each other.²¹ Sound communication and cooperation between the EPPO and the national authorities are fundamental to ensure real protection of the Union's financial interests and effective enforcement system (Csonka, Juszcak and Sason, 2017). For the EPPO, to become an effective player in the area of EU criminal law, it is necessary to have up to date information about the criminal offences affecting the financial interests of the EU. Due to these reasons, the institutions, bodies, offices and agencies of the EU and the relevant authorities of the Member States have the obligation to report to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence.²² The mutual exchange of information of importance, as well as the principle of loyalty, are both instruments necessary for the effective investigation and prosecution of crimes at the Union's level.

Based on the reported criminal conduct the EPPO has to decide whether there are grounds to initiate its investigation, to exercise its right of evocation, or whether there are no grounds to initiate its investigation. If the EPPO decides to exercise its competence, the national authorities will not exercise their own competence in respect of the same criminal conduct.^{23 24} The system provided by Art. 86 TFEU and the EPPO Regulation is a system of shared competences between the EPPO and national authorities in the fight against crimes affecting the financial interests of the EU, based on the mere right of evocation of the EPPO (Rafaraci, 2019). Right of evocation of the EPPO,²⁵ is the result of negotiations and it replaced the concept of exclusive competence of the EPPO. In cases, where the EPPO decides to exercise its right of evocation, the competent national authorities of the Member States have to stop their investigation and transfer the case to the EPPO.

Even when the criminal offence falls within the material competence of the EPPO, the EPPO does not exercise its competence unless the criminal offence involves damage

²⁰ Recital 64 EPPO Regulation.

²¹ The relation between the EPPO and the Member States, especially their national authorities involved in the criminal matters, is governed by the principle of sincere cooperation.

²² Article 24 par. 1 EPPO Regulation.

²³ Article 25 par. 1 EPPO Regulation.

²⁴ Article 25 par. 2 EPPO Regulation.

²⁵ Article 27 EPPO Regulation.

to the Union's financial interests higher than EUR 10,000.²⁶ The EPPO also refrains from exercising its competence over criminal offences affecting Union's financial interests in two other cases.²⁷ Firstly, if the criminal offence defined in the PIF Directive is inextricably linked to another offence, decisive criteria are sanctions and damage caused. If the maximum sanction provided for by national law for a criminal offence defined in the PIF Directive is equal to or less severe than a maximum sanction for an inextricably linked offence, the EPPO shall not exercise its competence. The exception to this rule is the situation when an inextricably linked offence has been instrumental to commit the criminal offence defined in the PIF Directive. The second case, when the EPPO refrains from exercising its material competence, is the case when the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused or likely to be caused to another victim. As highlighted above, it is clear that in some situations the competence of the EPPO and the competence of the Member State (its national prosecution authorities) can come into conflict, as both of them have the competence to investigate the cases under some conditions or circumstances, whereas not all of them are clear yet. In such a case, the specified national authority is the one with the right to decide who has the power to investigate and prosecute the case. To any conflict of competence between the EPPO and the competent national authorities, the Court of Justice of the EU has jurisdiction to give preliminary rulings concerning the interpretation of Article 25.²⁸

When the EPPO decides to initiate an investigation or exercise its right of evocation, the competent national authorities of the Member State have to be informed as soon as possible. The investigation of the EPPO is then initiated and handled by the European Delegated Prosecutor.²⁹ The European Delegated Prosecutor is responsible for investigations and prosecutions of the criminal offences against the Union's financial interest and for bringing cases to judgment, as he performs his tasks under the direction and supervision of the central Office of the EPPO. During the investigations, the European Delegated Prosecutor acts on behalf of the EPPO and has the same powers as a national prosecutor in respect to investigations, prosecutions and bringing cases to judgment.³⁰ The European Delegated Prosecutor is acting on behalf of the EPPO, investigating and prosecuting the criminal offences which fall within the material competence of the EPPO, but the European rules governing investigation and prosecution of these criminal offences do not exist. Because of missing European rules, the European Delegated Prosecutor undertakes all necessary procedures and measures under the national law. The problem of these situations is that national criminal laws of the Member States are different (e.g. competences of the prosecutors, their positions, different transposition of the PIF Directive). These differences may at the end lead to a different exercise of the EPPO's competence at the national level.

4. CONCLUSIONS

The EPPO regulation represents a move towards the EU Criminal law and paves the way for a new era of criminal justice cooperation in the EU (Ligeti and Weyembergh, 2015). By the establishment of the European Public Prosecutor's Office under the

²⁶ In situations like this, the EPPO can exercise its competence only if the case has repercussions at Union level which required the investigation by the EPPO or if the case involves EU officials or other servants.

²⁷ Article 25 par. 3 EPPO Regulation.

²⁸ Article 42 par. 2 EPPO Regulation.

²⁹ The European Delegated Prosecutor is a prosecutor at the national level of participating Member States, who is simultaneously a member of the EPPO.

³⁰ Article 13 EPPO Regulation.

enhanced cooperation, the Member States proved their real interest to build an effective legal system to protect the financial interest of the European Union and its budget (Iancu and Jigau, 2019). The establishment of the single European Public Prosecutor's Office represents a conceptual change which means a shift from a system based exclusively on mutual recognition of investigation measures adopted by national authorities to a completely new European mechanism of investigation and prosecution of criminal offences by the independent European Public Prosecutor's Office with power to take decisions, which are directly enforced in the Member States (Met-Domestici, 2017).

The adoption of the EPPO Regulation represents an effort to establish harmonized rules in the area of fighting against the financial interests of the European Union. The EPPO Regulation determines its competence, its institutional structure and exercise of its competence. The EPPO regulation itself determines its competence in general terms, but its text does not contain definitions of the criminal offences affecting the financial interests of the EU. The legislator of the EPPO Regulation decided to make reference to the PIF Directive and the national implementing provisions in the question of definitions of the criminal offences. The EPPO proposal does not only lack common definitions of the criminal offences affecting the financial interests of the Union, but it also refrains from defining the concrete powers of the EPPO in the investigation and the prosecution (Lohse, 2015). In this context, the EPPO Regulation sets up a mixed model consisting of minimum European criminal rules but the exercise of powers of the EPPO in the Member States will be based on national criminal laws. Despite the fact, that the competence of the EPPO is regulated by the provisions of the European Union law, the EPPO will exercise its competence mostly under the provisions of national criminal laws.

Nowadays it is not possible to make a clear conclusion on the true added value of the EPPO, as the EPPO is still in its setting-up phase. The competence of the EPPO opens a space for this new body of the Union to protect the financial interests and the budget of the Union effectively, in cooperation with the competent national authorities. The material competence of the EPPO and its exercise, as well as problems connected to shared competence, will raise when the EPPO will assume the investigative and prosecutorial tasks.

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