

## THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE – FROM MYTH TO REALITY\*

BENCE UDVARHELYI

Assistant Lecturer, Department of Civil Procedure and International Law  
University of Miskolc, Faculty of Law  
jogbence@uni-miskolc.hu

### 1. Historical backgrounds of the European Public Prosecutor's Office

The idea of the *establishment of a unified European law enforcement body* has a long history. The European Public Prosecutor's Office (hereinafter referred to as: EPPO) was first mentioned in the so-called *Corpus Juris* project in 1997.<sup>1</sup> The *Corpus Juris*, which was

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<sup>1</sup> See in details: DELMAS-MARTY, Mireille: *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*. Economica, Paris, 1997, 13–144; DELMAS-MARTY, Mireille: A *Corpus Juris* szükségessége, legitimitása és megvalósíthatósága. *Magyar Jog*, 2000/11, 641–645; DELMAS-MARTY, Mireille – VERVAELE, John A. E. (ed.): *The Implementation of the Corpus Juris in the Member States. Vol. I*. Intersentia Publishing, Antwerp – Groningen – Oxford, 2000, 7–394; DONA, Gabriele: Towards a European Judicial Area? A *Corpus Juris* Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 6/3, 1998, 282–297; FARKAS Ákos: *Büntetőjogi együttműködés az Európai Unióban*. Osiris Kiadó, Budapest, 2001, 50–69; HECKER, Bernd: *Europäisches Strafrecht*. Springer Verlag, Berlin – Heidelberg, 2012, 485–488; HOLÉ Katalin: Gondolatok az Európai Ügyészségről. In: Gellér Balázs (szerk.): *Györgyi Kálmán ünnepi kötet*. KJK-Kerszöv Kiadó, Budapest, 2004, 311–319; KAIÁFA-GBANDI, Maria: Das *Corpus Juris* und die Typisierung des Straffphänomens im Bereich der Europäischen Union. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2/1999, 162–180; KISS Anna: *Corpus Juris*. A büntetőeljárás egységes szabályai az Európai Unió pénzügyi érdekei sértő bűncselekmények esetén. In: Irk Ferenc (szerk.): *Kriminológiai és Kriminológiai Tanulmányok XXXV*. Országos Kriminológiai és Kriminológiai Intézet, Budapest, 1998, 297–315; LÉVAI Ilona: *Corpus Juris Europae*. Európai büntetőjog és Ügyészség az EU pénzügyi érdekei védelmére? *Európai Tükör*, 1998/4, 71–88; RASNER, Andreas: *Erforderlichkeit, Legitimität und Umsetzbarkeit des Corpus Juris Florenz*. Duncker & Humblot GmbH, Berlin, 2005, 65–73, 132–234; SPINELLIS, Dionysios D.: Das *Corpus Juris* zum Schutz der finanziellen Interessen der Europäischen Union. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2/1999, 144–161; VAN DEN WYNGAERT, Christine: Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire? In: Walker, Neil (ed.): *Europe's Area of Freedom, Security and Justice*. Oxford University Press, Oxford – New York, 2004, 215–224; WATTENBERG, Andreas: Der »Corpus Juris« – Tauglicher Entwurf für ein einheitliches europäisches Straf- und Strafprozeßrecht? *Strafverteidiger*, 2/2000, 95–103; WHITE,

presented by a working group of European criminal lawyers<sup>2</sup> set up at the request of the European Parliament and the European Commission, focused on the protection of the financial interests of the European Union, and contained both substantive and procedural criminal law provisions. The Corpus Juris determined eight criminal offences affecting the financial interests of the Union and envisaged the establishment of a European Public Prosecutor's Office for the prosecution of these crimes. The thought of the EPPO was later taken over by the *European Commission* which issued a *Green Paper about the establishment of a European Prosecutor* in 2001.<sup>3</sup>

Despite of these efforts, the European Public Prosecutor's Office has only become reality with the *Treaty of Lisbon* which created an explicit legal basis for the establishment of the EPPO. According to *Article 86 TFEU*, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union. The regulations shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of

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Simone: *Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption*. Kluwer Law International, The Hague – London – Boston, 1998, 179–186.

- <sup>2</sup> The leader of the group was Mireille Delmas-Marty (France), the members of the group were Enrique Bacigalupo (Spain), Giovanni Grasso (Italy), Nils Jareborg (Sweden), John R. Spencer (United Kingdom), Dionysios Spinellis (Greece), Klaus Tiedemann (Germany), Christine van der Wynagaert (Belgium).
- <sup>3</sup> Green paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor [COM(2001) 715., 2001. 12. 11.]. See in details: BRÜNER, F. H. – SPITZER, H.: Der Europäische Staatsanwalt – ein Instrument zur Verbesserung des Schutzes der EU-Finzen oder ein Beitrag zur Verwirklichung eines Europas der Freiheit, der Sicherheit und des Rechts? *Neue Zeitschrift für Strafrecht*, 8/2002, 393–398; FIJNAUT, C. – GROENHUIJSEN, M. S.: A European Public Prosecution Service: Comments on the Green Paper. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10/4, 2002, 321–336; KISS Anna: Eurojustból Európai Ügyész? In: Virág György (szerk.): *Kriminológiai Tanulmányok 46*. Országos Kriminológiai Intézet, Budapest, 2009, 117–125, 129–130; LIGETI Katalin: The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined? *European Criminal Law Review*, Vol. 1/2, 2011, 127–131; NÜRNBERGER, Silke: Die zukünftige Europäische Staatsanwaltschaft – Eine Einführung. *Zeitschrift für das Juristische Studium*, 5/2009, 497–502; RADTKE, Henning: The Proposal to Establish a European Prosecutor. In: Husabo, Erling Johannes – Strandbakken, Asbjorn (ed.): *Harmonization of Criminal Law in Europe*. Intersentia Publishing, Antwerp – Oxford, 2005, 103–118; SATZGER, Helmut – ZIMMERMANN, Frank: The Protection of EC Financial Interests by Means of Penal Law. In: Bassiouni, M. Cherif – Militello, Vincenzo – Satzger, Helmut (ed.) *European Cooperation in Penal Matters: Issues and Perspectives*. Casa Editrice Dott. Antonio Milani, Padova, 2008, 182–187; ZÖLLER, Mark A.: Eurojust, EJM und Europäische Staatsanwaltschaft. In: Böse, Martin (Hrsg.): *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*. Nomos Verlagsgesellschaft, Baden-Baden, 2013, 825–826, 829–840; ZWIERS, Martijn Willen: *The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System*. Intersentia Publishing, Cambridge – Antwerp – Portland, 2011. 355–385.

evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Based on the legal basis of Article 86 TFEU, the European Commission issued a *Proposal for a regulation on the establishment the European Public Prosecutor's Office* in 2013.<sup>4</sup> However, according to Article 86 TFEU, the regulation could only be adopted unanimously by the Council after obtaining the consent of the European Parliament. During the long negotiations, it became clear that the unanimity required for the adoption of the regulation cannot be achieved. Article 86 TFEU, however, allows that 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. In that case, the procedure in the Council shall be suspended. Within four months of this suspension, in case of a consensus, the European Council shall refer the draft back to the Council for adoption, while in case of disagreement, at least nine Member States are entitled to establish *enhanced cooperation* on the basis of the draft regulation concerned. On the 3<sup>rd</sup> April 2017, 16 Member States announced their intention to establish the EPPO through enhanced cooperation. The Council finally adopted the *Regulation establishing the European Public Prosecutor's Office* on the 12<sup>th</sup> October 2017.<sup>5</sup> The *enhanced cooperation* currently involves 22 Member States<sup>6</sup>; only Denmark, Great-Britain and Ireland, which has a special position in the area of freedom, security and justice as well as Poland, Hungary and Sweden will not take part in the operation of the European Public Prosecutor's Office.<sup>7</sup>

## 2. The status of the European Public Prosecutor's Office

According to the EPPO Regulation, the European Public Prosecutor's Office is an *indivisible Union body* operating as *one single Office with a decentralised structure*.<sup>8</sup> The EPPO has *legal personality*.<sup>9</sup>

The European Public Prosecutor's Office is required to respect the *principles of rule of law and proportionality* in all its activities. The EPPO has to conduct its investigations in an *impartial manner*. The EPPO is *independent*, it can neither seek nor take instructions

<sup>4</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM(2013) 534 final, 17.7.2013] (hereinafter referred to as: EPPO Proposal)

<sup>5</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017, p. 1–71] (hereinafter referred to as: EPPO Regulation)

<sup>6</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain

<sup>7</sup> However, according to some points of view, the non-participation in the EPPO cannot be sustained for a long time and the 'coercive powers' of the legal integration in connection with the nature of these transnational offences will force the non-participating Member States to join the enhanced cooperation. See in details: KARSAI Krisztina: A kívülmaradás lehetetlensége – az Európai Ügyészség működésének várható hatásai a kimaradó tagállamokban. *Magyar Jog*, 2018/12, 670–678; KARSAI Krisztina: External Effects of the European Public Prosecutor's Office Regime. *Miskolci Jogi Szemle*, 2019/2. különszám, 1. kötet, 461–470.

<sup>8</sup> Article 8(1) of the EPPO Regulation

<sup>9</sup> Article 3(2) of the EPPO Regulation

from any person, any Member State of the European Union or any institution, body, office or agency of the Union. The EPPO is *accountable* to the European Parliament, to the Council and to the European Commission for its general activities, and is required to issue *annual reports* to the European Parliament and to national parliaments, as well as to the Council and to the Commission.<sup>10</sup>

The European Public Prosecutor's Office has to ensure that its activities respect the *rights enshrined in the Charter of the Fundamental Rights of the EU*.<sup>11</sup> In this respect, the activity of the EPPO has to be carried out in full compliance with the *rights of suspects and accused persons*, including the *right to a fair trial* and the *rights of defence*. The suspected or accused person have the *procedural rights* provided for in the EU law during the criminal proceedings of the EPPO, e.g. the right to interpretation and translation; the right to information and access to the case materials; the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention; the right to remain silent and the right to be presumed innocent; and the right to legal aid.<sup>12</sup>

### 3. The competence of the European Public Prosecutor's Office

#### 3.1. General tasks of the EPPO

According to *Article 86(2) TFEU*, the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests as determined by the regulation establishing the EPPO.

This provision of the Treaty is reiterated by the EPPO Regulation, according to which the European Public Prosecutor's Office is responsible for *investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union*<sup>13</sup> which are provided for in Directive (EU) 2017/1371<sup>14</sup>

<sup>10</sup> Articles 5-7 of the EPPO Regulation

<sup>11</sup> Article 5(1) of the EPPO Regulation

<sup>12</sup> Article 41 of the EPPO Regulation

<sup>13</sup> According to Article 2(3) of the EPPO Regulation, the financial interests of the Union means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them.

<sup>14</sup> 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 interests by means of criminal law [OJ L 198, 28.7.2017, p. 29–41] (hereinafter referred to as: PIF Directive). See in details: JACSÓ Judit: *Europäisierung des Steuerstrafrechts am Beispiel der gesetzlichen Regelungen in Deutschland, Österreich und Ungarn*. Bibor Verlag, Miskolc, 2017, 114–131; JACSÓ Judit – UDVARHELYI Bence: Új irányelv az uniós csalások elleni büntetőjogi védelemről. *Magyar Jog*, 2018/6, 327–337; KALIFA-GBANDI, Maria: Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. In: Farkas Ákos – Dannecker, Gerhard – Jacsó Judit (ed.): *Criminal Law Aspects of the Protection of the Financial Interests of the European Union*. Wolters Kluwer Hungary, Budapest, 2019, 36–51; MADAI Sándor: Nem csalás, de ámtítás? Dogmatikai megjegyzések a PIF Irányelvhez. *Miskolci Jogi Szemle*, 2019/2. különszám, 2. kötet, 131–140;

and determined by the EPPO Regulation. In that respect the EPPO *undertakes investigations, carries out acts of prosecution and exercises the functions of prosecutor* in the competent courts of the Member States, until the case has been finally disposed of.<sup>15</sup>

### 3.2. The material scope of competences of the EPPO

The material competence of the European Public Prosecutor's Office can be divided into three main categories.<sup>16</sup> Firstly, the EPPO can be competent in respect of the *criminal offences affecting the financial interests of the Union* that are provided for in the PIF Directive, as implemented by national law. It means that the competence of the EPPO covers the criminal offences defined in the PIF Directive, i.e. *fraud affecting the Union's financial interests, money laundering, active and passive corruption and misappropriation*, irrespective of whether the same criminal conduct could be classified as another type of offence under national law. However, in connection with *VAT-fraud* referred to in Article 3(2)(d) of the PIF Directive, the EPPO can only be competent when the intentional acts or omissions are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million.<sup>17</sup>

Secondly, the EPPO is also competent for *offences regarding participation in a criminal organisation*<sup>18</sup> if the focus of the criminal activity of such a criminal organisation is to commit any of the criminal offences affecting the financial interests of the European Union.

Thirdly, the competence of the EPPO also covers any *other criminal offence* that is *inextricably linked to the aforementioned crimes against the financial interests of the Union*. In this case, however, the EPPO refrains from exercising its competence if the maximum sanction provided for by national law for an offence affecting the financial interests of the Union is equal to or less severe than the maximum sanction for an inextricably linked offence, unless the latter offence has been instrumental to commit the former offence; or if there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence affecting the financial interests of the EU does not exceed the damage caused, or likely to be caused to another victim. However, in the latter case, the EPPO may – with the consent of the competent national authorities – still exercise its competence if it appears that the EPPO is better placed to investigate or prosecute.<sup>19</sup>

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UDVARHELYI Bence: *Az Európai Unió anyagi büntetőjoga a Lisszaboni Szerződés után*. Patrocínium Kiadó, Budapest, 2019, 205–215.

<sup>15</sup> Article 4 of the EPPO Regulation

<sup>16</sup> Article 22(1)-(3) of the EPPO Regulation. For the critical analysis of the competence of the EPPO see in details: BÉKÉS Ádám – GÉPÉSZ Tamás: *Az Európai Ügyészség hatásköri szabályozása. Iustum aequum salutare*, 2019/2, 42–49; VERVAELE, John A. E.: *The material scope of competence of the European Public Prosecutor's Office: Lex incerta and unpraevia? ERA Forum*, Vol. 15/1, 2014, 92–96.

<sup>17</sup> See: Article 2(2) of the PIF Directive

<sup>18</sup> See: Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, p. 42–45]

<sup>19</sup> See Article 25(3)-(4) of the EPPO Regulation

Furthermore, the EPPO Regulation also stipulates that the EPPO does not have competence for criminal offences in respect of *national direct taxes including offences inextricably linked thereto*. The structure and functioning of the tax administration of the Member States shall not be affected by the Regulation.<sup>20</sup>

In connection with the aforementioned three categories of criminal offences, the European Public Prosecutor's Office can exercise its competences in the following cases: a) if the crime concerned was *committed in whole or in part within the territory of one or several Member States*; b) if it was *committed by a national of a Member State*, provided that a Member State has jurisdiction for such offences when committed outside its territory; c) if it was *committed outside the aforementioned territories by a person who was subject to the Staff Regulations or to the Conditions of Employment*, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.<sup>21</sup>

### **3.3. The possibility of the extension of the competences of the EPPO**

Although the European Public Prosecutor's Office primarily serves for the fight against criminal offences affecting the financial interests of the European Union, Article 86(4) TFEU provides the opportunity to the European Council to *extend the powers of the EPPO to other serious crimes having a cross-border dimension*. In this case, the European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

The question of the extension of the competences of the European Public Prosecutor's Office to other criminal offences has already arisen at the level of the EU institutions. In 2018, the European Commission issued a Communication in which it recommended the European Council to use its competence under Article 86(4) TFEU and adopt a decision amending Article 86(1)-(2) TFEU to extend the competence of the European Public Prosecutor's Office to *terrorist offences affecting more than one Member State* as part of the comprehensive and strengthened European response to terrorist threats. In its justifications, the European Commission highlighted that there are number of gaps in the current anti-terrorism legal, institutional and operational framework, in particular, there is no common Union approach to the investigation, prosecution and bringing to judgment of cross-border terrorist crimes. Pursuant the Commission, the EPPO can address the existing gaps and could bring added value to combating terrorist crimes. After the possible positive decision of the European Council, the EPPO Regulation is also required to be amended by the European Commission.<sup>22</sup>

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<sup>20</sup> Article 22(4) of the EPPO Regulation

<sup>21</sup> Article 23 of the EPPO Regulation

<sup>22</sup> See: Communication from the Commission to the European Parliament and the European Council: A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes [COM(2018) 641 final, 12.9.2018]

#### 4. The structure and organization of the European Public Prosecutor's Office

The structure of the European Public Prosecutor's Office was significantly modified during the negotiations of the EPPO Regulation. The *office model* of the Commission, which was mostly based on the concepts of the Corpus Juris and the Green Paper, was substituted by the *college model* supported by the Council and the Member States.<sup>23</sup> It also has to be mentioned that a third model, the *network model* was presented by Polt Péter, Prosecutor General of Hungary which could serve as an adequate alternative and could solve several problematic points of the aforementioned two systems.<sup>24</sup> However, the European Union chose the college model in the EPPO Regulation.

##### 4.1. Office model according to the EPPO Proposal

The original EPPO Proposal of the European Commission envisaged the *office model* according to which the European Public Prosecutor's Office would have comprised the European Public Prosecutor, his Deputies, the staff supporting them in the execution of their tasks, and the European Delegated Prosecutors located in the Member States.<sup>25</sup>

According to the EPPO Proposal, the head of the European Public Prosecutor's Office is the *European Public Prosecutor*, who directs its activities and organises its work. The European Public Prosecutor is assisted by *four Deputies* in all his duties who act as a replacement when he is absent or prevented from attending to them. The European Public Prosecutor and its Deputies are appointed by the Council – acting by simple majority – with the consent of the European Parliament for a non-renewable term of eight years. The investigations and prosecutions of the European Public Prosecutor's Office are carried out by the *European Delegated Prosecutors* under the direction and supervision of the European Public Prosecutor. Each Member State has at least one European Delegated Prosecutor who are appointed by the European Public Prosecutor from a list of at least three candidates, for a renewable term of five years. The European Delegated Prosecutors act under the exclusive authority of the European Public Prosecutor and follow his instructions, guidelines and decisions when they carry out investigations and prosecutions assigned to them. The European Delegated Prosecutors may also exercise their function as national prosecutors.<sup>26</sup>

<sup>23</sup> See in details: CSORDÁS NAGY Krisztina: Az Európai Ügyészség jövője. *Ügyészek Lapja*, 2016/3-4, 121–126; PETRUS Szabolcs: Európai Ügyészség. *Európai Jog*, 2017/4, 33; POLT Péter: Critics and alternatives towards an enhanced protection of the financial interests of the EU. In: Farkas Ákos – Dannecker, Gerhard – Jacsó Judit (ed.): *Criminal Law Aspects of the Protection of the Financial Interests of the European Union*. Wolters Kluwer Hungary, Budapest, 2019, 512–513.

<sup>24</sup> See in details: POLT Péter: Európai Ügyész: Tendenciák és lehetőségek. *Európai Jog*, 2015/6, 2–5.

<sup>25</sup> Article 6(1) of the EPPO Proposal

<sup>26</sup> Articles 6 and 8-10 of the EPPO Proposal

#### 4.2. College model according to the EPPO Regulation

Compared with the office model of the Commission, the finally accepted college model of the EPPO is a more decentralised structure where the decision-making powers are closer to the Member States.<sup>27</sup> According to the EPPO Regulation, the European Public Prosecutor's Office can be divided into a *central level* and a *decentralised level*. The central level consists of a Central Office at the seat of the EPPO, which includes the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. The decentralised level consists of European Delegated Prosecutors who are located in the Member States.<sup>28</sup>

The head of the European Public Prosecutor's Office is the *European Chief Prosecutor*, who is responsible to organise the work of the EPPO, direct its activities, and take decisions in accordance with the EPPO Regulation and the internal rules of procedure of the EPPO. Furthermore, the European Chief Prosecutor represents the EPPO vis-à-vis the institutions of the Union and of the Member States, and third parties. The European Chief Prosecutor is appointed by the European Parliament and the Council – by simple majority – by common accord for a non-renewable term of 7 years. The Council acts by simple majority. The Chief Prosecutor has to be selected from among candidates who are active members of the public prosecution service or judiciary of the Member States, or active European Prosecutors; whose independence is beyond doubt; who possess the qualifications required for appointment to the highest prosecutorial or judicial offices in their respective Member States; and have relevant practical experience of national legal systems, financial investigations and of international judicial cooperation in criminal matters, or have served as European Prosecutors, and who have sufficient managerial experience and qualifications for the position. Two *Deputy European Chief Prosecutors* has to be appointed to assist the European Chief Prosecutor in the discharge of his duties and to act as replacement when he is absent or is prevented from attending to those duties. The Deputy European Chief Prosecutors are appointed from the European Prosecutors by the College for a renewable mandate period of 3 years.<sup>29</sup>

The *European Prosecutors* are appointed by the Council, acting by simple majority, for a non-renewable term of 6 years. The Council may decide to extend the mandate for a maximum of 3 years at the end of the 6-year period. Every 3 years a partial replacement of one third of the European Prosecutors take place. Before the appointment in the Council, the Member States are required to nominate three candidates who are active members of the public prosecution service or judiciary of the relevant Member State; whose independence is beyond doubt; who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience. Among these candidates, the Council selects and appoints the European Prosecutor of each Member State.<sup>30</sup>

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<sup>27</sup> POLT (2015): *Op. cit.* 3.

<sup>28</sup> Article 8(2)-(4) of the EPPO Regulation

<sup>29</sup> Articles 11 and 14-15 of the EPPO Regulation

<sup>30</sup> Article 16 of the EPPO Regulation



The *College of the EPPO* consists of the European Chief Prosecutor and one European Prosecutor per Member State. The College is chaired by the European Chief Prosecutor and takes decisions by simple majority; each member has one vote. The College is responsible for the general oversight of the activities of the EPPO, it takes decisions on strategic matters, and on general issues arising from individual cases in order to ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the Member States. However, the College does not take operational decisions in individual cases.<sup>31</sup>

The *Permanent Chambers* are set up by the College of the EPPO.<sup>32</sup> Each Permanent Chamber has three members and are chaired by the European Chief Prosecutor; one of the Deputy European Chief Prosecutors; or a European Prosecutor. The Permanent Chambers take decisions by simple majority, each member has one vote and the Chair has a casting vote in the event of a tie vote. The tasks of the Permanent Chambers are to monitor and direct the investigations and prosecutions conducted by the European Delegated Prosecutors and to ensure the coordination of investigations and prosecutions in cross-border cases as well as the implementation of decisions taken by the College. In this context, the Permanent Chambers decide on the following issues: a) the carrying of a case to judgment; b) the dismissal of a case<sup>33</sup>; c) the application of a simplified prosecution procedure; d) the referral of a case to the national authorities; e) the reopening of an investigation; f) the instruction of the European Delegated Prosecutors to initiate an investigation or to exercise the right of evocation; g) the reference of strategic matters or general issues arising from individual cases to the College; h) the allocation and reallocation of a case; i) the approval of the decision of a European Prosecutor to conduct the investigation himself. The Permanent Chambers can also give instructions – in compliance with applicable national law – to the handling European Delegated Prosecutor through the European Prosecutor who is supervising the investigation or the prosecution, where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO.<sup>34</sup>

The *European Prosecutors* supervise the investigations and prosecutions of the European Delegated Prosecutors on behalf of the Permanent Chamber. The supervising European Prosecutors can also give instructions to the handling European Delegated Prosecutor. Furthermore, they function as liaisons and information channels between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin, they monitor the implementation of the tasks of the EPPO in their Member States, and ensure that all relevant information from the Central Office is provided to European Delegated Prosecutors and vice versa.<sup>35</sup>

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<sup>31</sup> Article 9 of the EPPO Regulation

<sup>32</sup> Article 9(3) of the EPPO Regulation

<sup>33</sup> In connection with the first two decision-making tasks, Article 10(7) of the EPPO Regulation allows the Permanent Chambers to delegate them to the European Prosecutor supervising the case, if such delegations can be duly justified with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, with regard to an offence that has caused or is likely to cause damage to the financial interests of the Union of less than EUR 100.000. The decision to delegate decision-making power may be withdrawn at any time.

<sup>34</sup> Article 10 of the EPPO Regulation

<sup>35</sup> Article 12 of the EPPO Regulation

The decentralised level of the European Public Prosecutor's Office consists of the *European Delegated Prosecutors*. Each Member State have two or more European Delegated Prosecutors, who are appointed by the College based on the nomination of the Member States and upon a proposal by the European Chief Prosecutor for a renewable term of 5 years. The European Delegated Prosecutors has to be active members of the public prosecution service or judiciary of the respective Member States, their independence has to be beyond doubt and they are required to possess the necessary qualifications and relevant practical experience of their national legal system. The European Delegated Prosecutors act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment. The European Delegated Prosecutors are responsible for the investigations and prosecutions that they have initiated, that have been allocated to them or that they have taken over using their right of evocation; and for bringing a case to judgment, in particular to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law. The European Delegated Prosecutors have to follow the direction and instructions of the Permanent Chambers as well as the instructions from the supervising European Prosecutor. The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations.<sup>36</sup>

## 5. Procedural rules of the European Public Prosecutor's Office

According to the EPPO Regulation, all institutions, bodies, offices and agencies of the Union as well as the competent national authorities have to *report* to the European Public Prosecutor's Office without undue delay any criminal conduct in respect of which the EPPO could exercise its competence. Furthermore, when a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence, it has to *inform* the EPPO without delay. The obligation of information also applies to the EPPO, since in case of a criminal offence that does not fall in the competence of the EPPO, it is required to inform the competent national authorities and forward all relevant evidence to them.<sup>37</sup>

Based on the aforementioned information, the European Public Prosecutor's Office can exercise its competence by two way: either by *initiating an investigation* or by deciding to *use its right of evocation*. If the EPPO decides to exercise its competence, the competent national authorities cannot exercise their own competence in respect of the same criminal conduct.<sup>38</sup>

In case of the criminal offences falling within the competence of the EPPO, the procedure of the EPPO is *mandatory*. However, due to the pressure of Member States, important *exceptions from the obligatory prosecution* were introduced in the EPPO Regulation. On the one hand, in case of a criminal offence that caused or is likely to cause damage to the Union's financial interests of less than EUR 10.000, the EPPO may only

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<sup>36</sup> Articles 13 and 17 of the EPPO Regulation

<sup>37</sup> Article 24 of the EPPO Regulation

<sup>38</sup> Article 25(1) of the EPPO Regulation. See also Article 27(5) of the EPPO Regulation

exercise its competence if the case has repercussions at Union level which require an investigation to be conducted by the EPPO; or if officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence. On the other hand, in case of a criminal offence which caused or are likely to cause damage to the Union's financial interests of less than EUR 100.000 and the College considers that – with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case – there is no need to investigate or to prosecute at Union level, the European Delegated Prosecutors may decide – based on the guidelines of the College – not to evoke the case.<sup>39</sup>

The *investigation is initiated by a European Delegated Prosecutor* if there are reasonable grounds to believe that a criminal offence within the competence of the EPPO is being or has been committed. As a general rule, the criminal procedure can be initiated and handled by the European Delegated Prosecutor of the Member State where the focus of the criminal activity is or where the bulk of the offences has been committed. Another European Delegated Prosecutor can only initiate an investigation where a deviation from the aforementioned rule is duly justified, based on the following criteria: a) the place of the suspect's or accused person's habitual residence; b) the nationality of the suspect or accused person; c) the place where the main financial damage has occurred. If no investigation has been initiated, the Permanent Chamber to which the case has been allocated has to instruct a European Delegated Prosecutor to initiate an investigation. Furthermore, the Permanent Chamber – taking into account of the current state of the investigations – can also decide to reallocate the case to other European Delegated Prosecutor; or to merge or split cases, if these decisions are in the general interest of justice.<sup>40</sup>

During the investigation phase, the European Delegated Prosecutor handling the case can either *undertake the investigation or other measures on his own*; or *instruct the competent authorities in the Member State* who has to follow all instructions and undertake the measures assigned to them. The handling Delegated Prosecutor has to report to the competent European Prosecutor and to the Permanent Chamber any significant developments in the case. In exceptional cases, the supervising European Prosecutor may also decide to conduct the investigation personally – either by undertaking the investigation measures or by instructing the competent authorities –, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution because of the seriousness of the offence, and its possible repercussions at Union level; or if the investigation concerns officials or other servants of the Union or members of the institutions of the Union. The EPPO Regulation also list the *types of investigation measures* which the European Delegated Prosecutor are entitled to order or request: a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; b) obtain the production of any relevant object or document; c) obtain the production of stored – encrypted or decrypted – computer data; d) freeze instrumentalities or proceeds of crime; e) intercept electronic

<sup>39</sup> Articles 25(2) and 27(8) of the EPPO Regulation. See also Article 34(3) of the EPPO Regulation

<sup>40</sup> Article 26 of the EPPO Regulation

communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using; f) track and trace an object by technical means, including controlled deliveries of goods.<sup>41</sup>

In case of *cross-border investigations*, the European Delegated Prosecutors has to act in close cooperation by assisting and regularly consulting each other. If a measure needs to be undertaken in another Member State, the European Delegated Prosecutor can decide on the adoption of the necessary measure and assign it to the other Delegated Prosecutor located in the Member State where the measure needs to be carried out. The handling European Delegated Prosecutor may assign any measures, which are available to him. The assisting Delegated Prosecutor has to undertake the assigned measure, or instruct the competent national authority to do so. If the European Delegated Prosecutors cannot resolve the matter within 7 working days, the matter has to be referred to the competent Permanent Chamber, which hears the Delegated Prosecutors concerned and decides without undue delay, whether and by when the assigned or a substitute measure has to be undertaken by the assisting European Delegated Prosecutor. The assigned measures have to be carried out in accordance with the law of the Member State of the assisting European Delegated Prosecutor.<sup>42</sup>

If the handling European Delegated Prosecutor considers the investigation to be completed, he submits a report to the supervising European Prosecutor, which contain a summary of the case and a draft decision about the prosecution before a national court or about the referral or the dismissal of the case. The supervising European Prosecutor forwards the documents to the competent Permanent Chamber accompanied by his own assessment.<sup>43</sup>

Based on the report of the Delegated Prosecutor, the Permanent Chamber can make two types of decision. On the one hand, the Permanent Chamber may decide to *bring the case to judgement*. As a principle, the Permanent Chamber has to bring the case to prosecution in the Member State of the handling European Delegated Prosecutor. However, if there are sufficiently justified grounds, the Permanent Chamber can decide to bring the case to prosecution in another Member States, i.e. in the Member States where the suspect's or accused person's habitual residence can be found; in the Member States of the nationality of the suspect or accused person; or in the Member State where the main financial damage has occurred. For the criminal procedure, the law of the Member States concerned has to be applied. On the other hand, the Permanent Chamber may decide to *dismiss the case* if the prosecution has become impossible based on the following grounds: a) the death of the suspect or accused person or winding up of a suspect or accused legal person; b) the insanity of the suspect or accused person; c) amnesty granted to the suspect or accused person; d) immunity granted to the suspect or accused person, unless it has been lifted; e) expiry of the national statutory limitation to prosecute; f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts; g) the lack of relevant evidence. In this case, the EPPO is required to officially notify the competent national authorities and inform the relevant institutions, bodies, offices and agencies of the Union,

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<sup>41</sup> Articles 28 and 30 of the EPPO Regulation

<sup>42</sup> Articles 31-32 of the EPPO Regulation

<sup>43</sup> Article 35(1) of the EPPO Regulation

as well as the suspects or accused persons and the victims of the crime. The dismissed cases may also be referred to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-up.<sup>44</sup>

If the applicable national law provides for a *simplified prosecution procedure* aiming at the final disposal of a case on the basis of terms agreed with the suspect, the handling European Delegated Prosecutor can propose to the competent Permanent Chamber to apply that procedure. The Permanent Chamber can decide on the proposal considering the following grounds: a) the seriousness of the offence, based on in particular the damage caused; b) the willingness of the suspected offender to repair the damage caused by the illegal conduct; c) the use of this procedure would be in accordance with the general objectives and basic principles of the EPPO as set out in this Regulation. The College can adopt guidelines on the application of those grounds.<sup>45</sup>

## 6. Closing thoughts

According to the EPPO Regulation, the European Public Prosecutor's Office shall assume the investigative and prosecutorial tasks conferred on it on a date to be determined by a decision of the European Commission, which shall not be earlier than 3 years after the date of entry into force of the Regulation.<sup>46</sup> According to the plans of the Commission, the EPPO will begin its operation at the end of 2020; the first European Chief Prosecutor was already appointed.<sup>47</sup>

Naturally, there has been and still are vivid debates among the EU institutions, the Member States and in the legal literature in connection with the structure, the competences, the procedural rules of the EPPO as well as the cooperation between the EPPO and the non-EPPO Member States. However, it can be stated that the European Public Prosecutor's Office has now become a reality, and we are convinced that it can contribute in a better and more effective protection of the financial interests of the European Union.

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<sup>44</sup> Articles 36 and 39 of the EPPO Regulation

<sup>45</sup> Article 40 of the EPPO Regulation

<sup>46</sup> Article 120(2) of the EPPO Regulation

<sup>47</sup> See: Decision 2019/1798 of the European Parliament and of the Council of 14 October 2019 appointing the European Chief Prosecutor of the European Public Prosecutor's Office [OJ L 274, 28.10.2019, p. 1–2]