

# Institutional Aspects of the European Public Prosecutor's Office: applicable law, judicial review, conflicts of competence

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# Art. 86 TFEU: establishment of a European Public Prosecutor's Office

## **Limits to the legislative power of the EU Council of Ministers:**

- a) Crimes affecting the financial interests of the Union;
- b) Functions of prosecution shall be exercised in the criminal courts of the Member States;
- c) The European Public Prosecutor's Office is established by regulation;
- d) The Regulation is adopted by the Council acting unanimously;
- e) The Regulation shall determine:
  1. the general rules (Statute) applicable to the EPPO,
  2. the performance of the EPPO's functions;
  3. general rules of procedure and admissibility of evidence;
  4. rules applicable to the judicial review of the EPPO's procedural acts.

# First institutional aspect: identification of the applicable law

**Relationship between EPPO Regulation and Member States' law (relationships of “vertical” nature): Art.5, par. 3. In order of priority:**

- a) rules of the EPPO Regulation;
- b) rules of national law;
- c) in the case of concurrent legislation: EU rules shall prevail.

**In case b):**

- 1) The principle of «*consistent (with EU law) interpretation*» does not apply;
- 2) The CFR is applicable by virtue of the «*institutional obligation*» provided by art. 51(1) of the same CFR and art. 5(1) of the EPPO Regulation.

# Classification into three groups of the EPPO Regulation's rules

## **A) Rules governing exhaustively a given activity of the EPPO**

- 1) Processing of information & automatic file management system (Art. 43-46)
- 2) Personal data protection (Art. 47-89)
- 3) Right of evocation (Art. 27)
- 4) Grounds for dismissal of the case (Article 39)

## **B) Rules of the Regulation which refer in full to the law of the Member States (enforcement of investigative acts)**

- 1) Urgent measures necessary to ensure effective investigations (Art. 28(2))
- 2) Arrest of the accused person or pre-trial detention (Art. 33(1))

# Third group of rules of the EPPO Regulation

## **C) Rules of the Regulation governing only part of a given category of EPPO investigative acts (EU law + national law)**

**1)** Investigative measures (IM) (Art. 30); six categories (e.g. intercepting electronic communication to and from the accused person), **but:**

a) MSs' «*specific restrictions*» applicable to professionals bound by an obligation of confidentiality;

b) MSs «*further restrictions*» applicable to three IM;

c) MSs may limit the application of two IM to «*serious offences*» ;

d) + any other IM of national law available «*in similar cases*».

**2)** Cross-border investigations (Arts. 31 and 32).

**3)** Simplified prosecution procedures (Art. 40) (ex «*criminal transaction*»)

# Third group of rules of the EPPO Regulation

**C.a) Articles of the Regulation referring to EU directives «*as implemented by national law*»**

**C.a.1) (Art. 22(1)) Material competences of the EPPO with reference to Directive PIF n. 2017/1371. Consequence: EPPO's «*variable-geometry*» competence.**

**1) Offences harmonized by the PIF Directive:**

a) (Art.3) Frauds related to 1) EU subsidies, 2) Public procurements, 3) EU budget “*own resources*” other than VAT (customs duties), 4) VAT revenue (only: a) VAT cross-border frauds; b) involving a “*total damage*” of at least EUR 10 million).

b) (Art. 4) Other offences: 1) Money laundering, 2) Active and passive corruption of public officials, 3) Misappropriation of EU funds or assets.

c) (Art. 5) Instigation, aiding and abetting in criminal offences a) and b).

# Articles of the EPPO Regulation referring to EU directives

- 2) First problem: identification of the rules of national law that transpose the PIF Directive 2017/1371. Were all PIF offences **already** correctly and fully provided for in the Criminal Code of the MS of the EDP (European Delegated Prosecutor)?
- 3) Second problem. Case of **incomplete** transposition of the PIF Directive into national law: conduct constituting a PIF offence is **not** provided for as an offence by the legislation of the MS of the EDP. It has to be strictly excluded a **direct** effect of Articles 3-4-5 of the PIF Directive (ECJ jurisprudence *Arcaro* and *Berlusconi* + Art. 49 of CFR).
- 4) Third problem. Case of **incorrect** transposition of the PIF Directive into national law (e.g.: excessively restrictive definition of «*civil servant*»). Also **excluded** any **direct** effect of the rules of the PIF Directive.

# Articles of the EPPO Regulation that refer to EU directives

## C.a.2) Reference to directives concerning the rights of defendants

1) Three levels of guarantees:

a) EU Charter of Fundamental Rights (CFR);

b) (art. 41 EPPO reg.) five EU directives on the rights of defendants «*as implemented in national law*»;

c) all procedural rights provided by national law.

2) In the event of incomplete or incorrect transposition the principle of **the direct effect** of the five EU directives applies as they award **rights**.

Can a EDP directly disregard an incompatible national rule and directly apply the provision of an EU directive? Probably yes: a) EPPO is an EU body; b) art. 5(3) of EPPO reg.: EU law shall prevail; c) the five directives award **rights** (do not impose obligations).

3) Importance of the principle of «*consistent interpretation*» by ECJ.



# Identification of the applicable law: which of several national laws is applicable?

**B) Relations of a «horizontal» nature: which of several different MSs' laws is applicable to a given case?**

**B.a) Initiation of investigations (Art. 26 EPPO reg. )**

**1)** EDP of the MS where «*Focus of the criminal activity*» is.

**2)** In case of several connected offences: EDP of the MS where «*the bulk of the offenses has been committed* ».

**3)** Three possible exceptions: a) MS of residence of the accused person; b) MS of nationality of the AP; c) MS of the «*main financial damage*».

**4)** Exceptions «*in the general interest of justice*»: a) reallocate the case to a EDP of another MS; b) merger or splitting of cases.

# Which of several national laws is applicable?

**B.b)** Prosecution before national Courts (Art. 36 EPPPO reg. ).

**1)** General rule: the PC (Permanent Chamber) shall bring the case to prosecution before a criminal Court in the MS of the *“handling”* EDP.

**2)** Exception: on the basis of the same criteria set out in Art. 26(4) and (5) (residence or nationality of the accused person, etc. ), the PC may bring the case to prosecution in a MS other than the one of the EDP who conducted the investigation (*“sufficiently justified grounds”*).

**3)** Second exception: where several EDPs have conducted investigations against the same persons, the PC may join the cases and bring them to prosecution before a court of a single MS if it has jurisdiction for each of those cases.

**4)** Wide discretion left to the PC. Danger of violation of the rights of the defense (Art. 48(2) CFR). Accurate grounds for such decisions.

# Second institutional aspect: judicial review of EPPO acts (Art. 42 reg. EPPO)

## **A) General rule: Review by the criminal courts of the Member States of:**

a) the « *procedural acts* » of the EP;

b) « *intended to produce legal effects vis-à-vis third parties* », including the decision to choose the MS in which to bring the case to prosecution.

## **B) Specific jurisdiction of the Court of Justice:**

a) a category of EPPO « *procedural acts* »: applications against decisions to dismiss a case if such decisions are « *contested directly on the basis of Union law* » (v. art. 39 reg. EPPO: seven mandatory grounds for dismissing a case).

a.1) What about the competence of the Court in case of dismissal for an eighth ground not provided for by art. 39 (ex.: exclusion of punishability)?

a.2) Concrete meaning of the expression « *contested on the basis of Union law* » ex art. 42(3) EPPO reg.. Do MSs' rules of proceedings still play a role?

# Judicial review - Competence of the Court of Justice (Art. 42)

- b) «*Non procedural acts* » of the EPPO:
  - b.1) access to personal data by « *interested* » parties
  - b.2) administrative decisions (ex.: dismissal of EDP ex art. 17(3))
  - c) Disputes related to compensation for damages (Art. 268 TFEU)
  - d) Disputes concerning staff related matters (Art. 270 TFEU)
  - e) Dismissal of the European Chief Prosecutor or European Prosecutors (specific competence ex art.14 and 16 EPPO reg.).
- **C) Jurisdiction of the Court of Justice to give preliminary rulings in accordance with Art. 267 TFEU:**
  - a) questions of validity of EPPO acts (e.g.: provisions of the EPPO reg., EPPO internal rules of procedure ex art.21 reg., rules on employment of EDP ex art.114 reg.); only for decisions to dismiss a case: if «*directly based on Union law*»
  - b) questions of interpretation of EU law provisions, with express reference to art. 22 and 25 of Reg. EPPO «*in relation to possible conflicts of competence*» between the EPPO and Member States' public prosecutors.

# Third institutional aspect: resolution of conflicts of competence (Art. 22 and 25)

- **A) Offences falling within EPPO competence**

Commission proposal = exclusive competence.

**Final EPPO regulation text = shared competence**

a) **Offences under the PIF Directive 2017/1371** (four types of fraud: EU subsidies, EU public procurement, serious VAT fraud and customs fraud + money laundering, active and passive corruption of public officials, misappropriation)

b) participation in a **criminal organization**

c) **offences «inextricably linked» to PIF offences** (EPPO reg. ground n. 54: ECJ case law on the «*ne bis in idem*» principle = «*identity of material facts*»)

c.1) first exception: the maximum **sanction** provided for the *inextricably linked* offence is higher than the maximum sanction provided for the PIF offence = competence of the Member State's public prosecutor

c.1.1) counter-exception: if the offence «*inextricably linked*» is «*instrumental*» to commit a PIF criminal offence = remains within the competence of the EPPO

# Resolution of conflicts of competence (Art. 22 and 25)

- c.2) second exception: if “*there is a reason to assume that the **damage** caused or likely to be caused*» by a PIF offence to the EU budget is less than the damage caused «*to another victim*» (e.g.: a MS) = competence for MSs’ public prosecutors
  - c.2.1) 1st counter-exception: the «*more serious damage*» criterion does not apply to offences related to: 1) fraud in EU subsidies, 2) fraud in EU public procurements, 3) VAT fraud = EPPO competence.
  - c.2.2) 2nd counter-exception: the EPPO is: a) “*better placed*” to investigate or prosecute and b) the MS’s prosecutor’s office has given its consent.
- d) Two **exclusions** of EPPO competence = competence of MSs’ public prosecutors
  - d.1) offences having caused a damage of less than 10.000 EUR.
    - d.1.1) 1st counter-exception: «*repercussions at Union level*» = EPPO competence
    - d.1.2) 2nd counter-exception: offences committed by EU officials = EPPO competence
  - d.2) offences in respect of **MSs’ direct taxes**, including «*offences inextricably linked*» to them (dangerous addition: what about VAT fraud exceeding EUR 10 million linked to the evasion of direct taxes? ) = competence of MSs’ public prosecutors.

# Procedure for the resolution of conflicts of competence (Arts. 25(6) and 42(2)(c))

- **B) Procedure for the resolution of conflicts of competence (Art. 25(6))**
  - a) Commission proposal = Exclusive EPPO competence. Resolution of conflicts of competence = MS' «*judicial*» authority competent to resolve conflicts between public prosecutors of the same MS.
  - b) Final text reg. EPPO: deleted the adjective «*judicial*» and expressly mentioned the **four rules** of the reg. to be applied to resolve conflicts of competence between EPP and MSs' public prosecutors:
    - b.1) Art. 22(2) = participation in a criminal organization
    - b.2) art. 22(3) + art. 25(3)(a)) = “*inextricably linked*” offences punished with more severe or less severe sanctions compared to PIF offences
    - b.3) Art. 22(3) + Art. 25(3)(b)) = “*inextricably linked*” offences having caused a damage, both to the EU budget and «*to another victim*» (e.g.: a MS).
    - b.4) art. 25(2) = PIF offences having caused a damage of less than 10.000 euro.
    - b.5) no mention of art. 22(1) (PIF offence or not? ) = its application is inevitable

# Procedure for the resolution of conflicts of competence (Arts. 26(5) and 42(2)(c))

- c) Some critical remarks:
  - c.1) Articles 22 and 25 are difficult to interpret (exceptions and counter-exceptions + vague and questionable expressions)
  - c.2) Negative erosion of EPPO competences.
  - c.2) The shift from exclusive EPPO competence to shared competence between EPPO and MSs' prosecutors would have required a complete review of the entire procedure ex art. 26(5): is that still appropriate?
  - c.3) the «*competent national authority*» pursuant to art. 26(5) may **not** be a «*court or tribunal*» pursuant to art. 267 TFEU: the procedure may not provide for a contradiction between the parties and in some MSs such an authority lacks the requirement of independence.



# Role of Member States' courts in deciding conflicts of competence (Art. 42.2.c)

- d) Questions referred to the Court of Justice for a preliminary ruling. Parallelism between Art. 25(6) and Art. 42(2)cc)). Logical sequence of the two procedures:
  - d.1) the «*competent authority*» (in Italy: General Prosecutor by the Supreme Court) decides which of the two Public Prosecutor's Offices (EU or MS' ) to attribute the case.
  - d.2) the losing prosecutor challenges the decision before a MS' criminal court
  - d.3) such a MS' court may, or has to, refer a question to the Court of Justice for a preliminary ruling concerning the interpretation of Articles 22 and 25 of EPPO reg.

# Role of the Court of Justice in resolving conflicts of competence (Art. 42(2)(c))

e) Content of the ECJ judgment and its consequences:

e.1) The ECJ confirms the interpretation of art. 22 and 25 reg. EPPO given by the “*competent national authority*” (in Italy: GP) = the trial can continue «*on safe tracks*» .

e.2) The ECJ accepts the interpretation proposed by the losing Public Prosecutor’s Office = the referring court will be required to **reassign** the disputed case to the other Public Prosecutor’s Office, which has been declared competent by the ECJ.

e.3) Problem: What about the «*investigation measures*» carried out by the incompetent prosecutor? Can they still be **used** by the other (declared competent) prosecutor? **Probably NO** = The procedural rules applicable to investigations carried out by the EPPO are not the same that apply to investigations carried out by a MS’ public prosecutor.

# Conclusion

- A) EPPO's first year of operation : a crucial test.
- B) Conflicts of competence with MSs' public prosecutors should be avoided as far as possible (agreements).
- C) EPPO will have to identify very carefully the applicable law in order to resist the inevitable challenges of its investigative acts before MSs' criminal courts.
- D) Prospects for extending the EPPO's powers of action (Art. 86(4)TFUE) to terrorist crimes (proposal submitted by the Commission to the European Council in September 2018).

«The Common European House is open to all, to all those who want to share their destiny, to be both stronger and more supportive » (J. Delors, 1995)

**Thank you for your attention!**

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