

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 CP 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 CP 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 CP. Danger of violation of the rights of the defense (Art. 48(2) CFR). Accurate grounds for such decisions.

Second institutional aspect: the system of appeals against EP 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 prosecute.

B) Specific competence of the Court of Justice:

a) a category of « *procedural acts* »: appeals against decisions to dismiss proceedings if « *contested directly on the basis of Union law* » (v. art. 39 reg. EPPO: seven compelling reasons).

a.1) *Something* of the competence of the Court in case of dismissal for an eighth reason 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 reg. EPPO. Role of national procedural law?

System of appeals - General competence of the Court of Justice (Art. 42)

- b) «*Non procedural acts* » acts of the EPPO:
 - b.1) access to personal data by « *interested* » parties
 - b.2) administrative decisions (ex.: removal of DEP ex art. 17.3)
 - c) Compensation for damages (Art. 268 TFEU)
 - d) Personal disputes (Art. 270 TFEU)
 - e) Removal of the European Chief Prosecutor or European Prosecutors. (direct competence ex art.14 and 16)
- C) Competence of the Court of Justice in the matter of references for a preliminary ruling under Art. 267 TFEU:**
- a) questions of validity, if «*directly based on Union law*» (e.g.: reg. EPPO, internal reg. ex art.21, norms reg. DEP ex art.114);
 - b) questions of interpretation, with express reference to art. 22 and 25 of Reg. EPPO «*with regard to possible conflicts of competence*» between the EPPO and national prosecutors.

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

- **A) Offences falling within EPPO competence** Commission proposal = exclusive competence.
Final regulation text = concurrent competence
 - a) **Offences under the PIF Directive 2017/1371** (four types of fraud: subsidies, procurement, serious VAT fraud and customs fraud + money laundering, corruption of public officials, misappropriation)
 - b) participation in a **criminal organization**
 - c) **offences «*inextricably linked*» to PIF offences** (paragraph 54 explanatory statement: case law «*ne bis in idem*» = «*identity of material facts*»)
 - c.1) first exception: the maximum penalty provided for the related offence is higher than the maximum **penalty** provided for the PIF offence = Competence of the national public prosecutor
 - c.1.1) counter-exception: if the offence « *inextricably linked* » is « *instrumental* » to the commission of a criminal offence PIF = remains within the competence of the EPPO

Competence conflicts resolution (Art. 22 and 25)

- c.2) second exception: the «*actual or potential **damage***» alleged to be caused by a PIF offence to the EU budget is less than the damage caused «*to another victim*» (e.g.: MS) = competence for nation state
 - c.2.1) 1st counter-exception: the «*greatest damage*» criteria does not apply to offences related to: 1) fraud in EU grants, 2) fraud in procurement, 3) VAT fraud = EPPO competence
 - c.2.2) 2nd counter-exception: the EPPO is: a) «*in a better position*» to carry out investigations or prosecute and b) the national prosecutor's office has given its consent
- d) Two **exclusions** of EPPO competence = competence of national public prosecutor
 - d.1) offences resulting in damage of less than 10000 EUR
 - d.1.1) 1st counter-exception: «*repercussions at Union level*» = EPPO competence
 - d.1.2) 2nd counter-exception: crimes committed by EU officials = EPPO competence
 - d.2) **direct tax offences**, including «*offences inextricably linked to them*» (insidious addition: VAT fraud exceeding EUR 10 million?)=competence of national public prosecutor

Dispute resolution procedure (Arts. 25.6 and 42.2c)

- **B) Dispute resolution procedure (Art. 25.6)**
 - a) Commission proposal = Exclusive EPPO competence. Resolution of conflicts of competence = national «*judicial*» authority competence to resolve conflicts between 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 EPPO/National Proc.:
 - b.1) Art. 22.2 = participation in a criminal organization
 - b.2) art. 22.3 + art. 25.3.a) = related inextricable offences punished with harsher or easier penalties compared to PIF offences
 - b.3) Art. 22.3 + Art. 25.3.b) = offences inextricably linked to the damage caused, both to the EU budget and « *to other victims* » (MS)
 - b.4) art. 25.2 = PIF offences of less than 10,000 euro.
 - b.5) no mention of art. 22.1 (PIF or not?) = its inevitable application

Competence dispute resolution procedure (Arts. 26.5 and 42.2.c)

- c) Critical considerations
 - c.1) Articles 22 and 25 are difficult to interpret (exceptions and counter-exceptions + vague and questionable wording)
 - c.2) Damaging erosion of EPPO competences.
 - c.2) the transition from exclusive competence to concurrent competence between EPPO and national prosecutors would have required a complete review of the appropriateness of the entire procedure art. 26.5
 - c.3) the «*competent national authority*» pursuant to art. 26.5 is **not** a «*competence*» pursuant to art. 267 TFEU: the procedure is not contradictory and in many Member States the requirement of independence is missing

Role of national courts in resolving 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.c) Logical sequence of the two procedures:
 - d.1) the «*competent authority*» (Italy: Prosecutor General) decides which of the two Public Prosecutor's Offices (EU/National.) to attribute the proceedings
 - d.2) the unsuccessful prosecutor challenges the decision before a criminal court
 - d.3) the court seized may (or must) refer a question to the Court of Justice for a preliminary ruling on the interpretation of Articles 22 and 25 reg. EPPO

Role of the Court of Justice in resolving conflicts of competence (Art. 42.2.c)

e) Content of the interpreting judgment and its consequences

e.1) The EU Court confirms the interpretation of art. 22 and 25 reg. EPPO given by the competent national authority (PG) = the process can continue «*on safe tracks*»

e.2) The EU Court accepts the interpretation proposed by the unsuccessful Public Prosecutor's Office = the referring court will be required to **reassign** the disputed proceedings to the other Public Prosecutor's Office, which has been declared competent.

e.3) Problem: What about the «*investigative acts*» carried out by the incompetent prosecutor? Can they still be **used** by the other prosecutor? **Probably NO** = The procedural rules applicable to investigations carried out by the EPPO are not the same that govern the investigation of a national prosecutor

Conclusion

- A) EPPO's first year of operation : a crucial test
- B) Avoidance of competence conflicts with national public prosecutors (agreements)
- C) Accurate reconstruction of the applicable law in order to resist the inevitable challenges of the investigative acts
- D) Prospects for extending the EPPO's powers of action (Art. 86.4 TFUE) from fraud offences to the EU budget to terrorist offences (draft submitted by the Commission of the European Council in September of 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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