

**European Public Prosecutor's Office: lights and shadows  
of a complex architecture. Prosecuting crimes  
at the European level with an ambitious approach.**

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**Abstract**

*This paper aims to provide an overview of the European legislative framework regarding the newly established European Public Prosecutor's Office, highlighting some of the critical aspects in regard to its functioning and providing a comparative analysis of the Italian and Romanian legislation enacted to adapt the national legal system to the Council Regulation 2017/1939.*

**Keywords:** *criminal law, European law, EPPO, European Union, protection of the financial interest of the Union, competence*

Glossary of relevant acronyms and abbreviations

ECP	European Chief Prosecutor
EP	European Prosecutor
EDP	European Delegated Prosecutor
EPPO	European Public Prosecutor's Office
EU Reg.	Council Regulation <b>2017/1939</b>
I.R.	Internal Rules of the EPPO
PIF Convention	Convention on the Protection of Financial Interests of the Union
PIF Directive	Directive on the fight against fraud to the Union's financial interests by means of criminal law
TFEU	Treaty on the Functioning of the European Union

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## 1. Introduction. A new model

According to the so-called “assimilation principle”, elaborated by the European Court of Justice in the well-known *Greek maize* judgment, “Member States must ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive” in order to ensure the effectiveness of Union law<sup>3</sup>.

From that moment, the protection of the EU's financial interests and concerns over mismanagement and misappropriation of EU funds fostered a process of progressive integration amongst Member States<sup>4</sup>, crystallized in the Convention on the Protection of Financial Interests of the Union (**hereinafter** PIF Convention) of 26 July 1995<sup>5</sup> with its protocols, followed by the Directive on the fight against fraud to the Union's financial interests by means of criminal law (**hereinafter** PIF Directive) of 5 July 2017.

This integration process, whose cornerstones are cooperation between Member States and harmonization of the *definitions* of *criminal offences* and related sanctions, was further consolidated with the approval of the Council Regulation **2017/1939 (hereinafter EU Reg.)** of 12 October 2017 implementing enhanced cooperation<sup>6</sup> on the establishment of the European Public Prosecutor's Office (**hereinafter** EPPO) according to art. 86 of the Treaty on the Functioning of the European Union (**hereinafter** TFEU)<sup>7</sup>.

So far, 22 Member States have joined the enhanced cooperation mechanism: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia, Spain, Latvia and The Netherlands<sup>8</sup>.

The EU Reg. contains 120 articles. The first 42 describe the structure, organization and competence of the EPPO and specific rules of procedure on

<sup>3</sup> Case C-68/88, *Commission of the European Communities v. Hellenic Republic*, 21 September 1989, E.C.R. I-2965, §24.

<sup>4</sup> M. WADE, *EuroNEEDs - Evaluating the need for and the needs of a European Criminal Justice System - Preliminary Report*, Max Planck Institute for Foreign and International Criminal Law, 2011.

<sup>5</sup> 95/C 316/03.

<sup>6</sup> See art. 326 - 334 of the TFEU.

<sup>7</sup> Art. 86 TFEU, strictly linked with art. 83 TFEU related to the competence of the EU in the field of criminal law, provides that the Council “may” adopt a regulation for the establishment of EPPO “from Eurojust”. This “optional” legislative basis (*may* and not *shall*) is the result of a compromise between States and, as a matter of fact, slowed down the initial purposes leaving the decision to changeable political wills.

<sup>8</sup> Denmark and Ireland have an opt-out from the area of freedom, security and justice (AFSJ). The UK apart from having an opt-out, left the European Union. Hungary, Poland and Sweden have not joined yet for internal political reasons.

investigations. The subsequent 78 articles concern data protection, access to information and relationships with other European entities ("partners").

The EPPO was initially due to become operational in November 2020, but it was postponed to March 2021 due to the Covid-19 emergency and related delays by the Member States in fulfilling their obligations, such as the adoption of national regulations and communication of the candidates for the position of European Delegated Prosecutors. Recently, the ECP proposed the 1<sup>st</sup> of June 2021 as the date when the EPPO will start its investigative and prosecutorial tasks<sup>9</sup>.

The establishment of a supranational investigating body – after four years of negotiations since the initial proposal presented by the European commission in July 2013 - marks a turning point in the field of judicial cooperation, moving from an horizontal model between judicial authorities, to a partially vertical model where strategic decisions and criminal action are formally placed at the European level, while jurisdiction is still exercised by national Courts.

This is the point of arrival of a long process of proposals, second thoughts and setbacks, aimed at filling what has been defined as the "enforcement gap" and consequent risk of impunity for offences against the European budget, not adequately tackled by Member States and EU bodies (Eurojust, Europol and OLAF).

Without going into further details about the steps that led to the approval of the EU Reg., for reasons of brevity, it may be sufficient to observe that the initial proposal (theorized for the first time in 1997<sup>10</sup>) has turned towards a multilevel and more decentralised system, resulting in a considerable structural complexity of the "chain of command"<sup>11</sup> and a potential heterogeneity of the investigative tools by virtue of the constant reference of the EU Reg. to national legislation, in the absence of a full European harmonization of the criminal procedure<sup>12</sup>.

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<sup>9</sup> Start date of EPPO operations: European Chief Prosecutor proposes 1 June 2021 to the European Commission, published on the 7th of April 2021, available at [www.eppo.europa.eu](http://www.eppo.europa.eu).

<sup>10</sup> M. DELMAS-MARTY and J. VERVAELE (ed.), *The Implementation of the Corpus Juris in the Member States: penal provisions for the protection of European finances* (2000), vol. I. The Corpus Iuris formed the basis of the *Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European prosecutor*, COM (2001) 715 final, Brussels, which then led to the formulation of art. 86 TFEU.

<sup>11</sup> On the structural complexity, A. MARTINEZ SANTOS, *The Status of Independence of the European Public Prosecutor's Office and Its Guarantees*, in *The European Public Prosecutor's Office*, Springer, 2018, p.7-9; *The European Public Prosecutor's Office: Strategies for Coping with Complexity*, Study requested by the CONT Committee, Policy Department D for Budgetary Affairs, Directorate General for Internal Policies of the Union PE 621.806, 2019, p. 24 ff. A. WEYEMBERGH, C. BRIÈRE, *Towards a European Public Prosecutor's Office (EPPO)*, Study for the LIBE Committee, (2016), p. 15. On the risk of "fragmentation", K. LIGETI, A. MARLETTA, *The European Public Prosecutor's Office: what role for OLAF in the future*, in *European criminal procedure law in service of protection of European Union financial interests: state of play and challenges*, Croatian Association of European Criminal Law, 2016, p. 60.

<sup>12</sup> The idea of harmonizing the rules of criminal procedure was expressed in the studies financed by the Commission in the framework of the anti-fraud program "Hercule II" guided by a

The EPPO will largely rely on Member States, crucial to ensure the efficiency of the whole system.

### *1.1. Design of the EPPO. A single office with a decentralised structure.*

The EPPO is an “*indivisible Union body*” operating at two levels:

- a central level represented by the European Chief Prosecutor (ECP), head of the EPPO, supported by two Deputies, the “College of European Prosecutors<sup>13</sup>”, the “Permanent Chambers<sup>14</sup>”, and the “European Prosecutors<sup>15</sup>” (one per participating EU country),
- a decentralised level represented by the “European Delegated Prosecutors” (EDP) appointed in each of the 22 participating countries.

So far, the College of the European Public Prosecutor, on a proposal by the European Chief Prosecutor, created fifteen Permanent Chambers<sup>16</sup>, each composed of three European Prosecutors<sup>17</sup>.

The Permanent Chambers are bestowed with the power to adopt specific “core decisions”, listed in art. 10 EU Reg., related to the prosecution of cases which are allocated on a random, automatic and alternating basis, excluding the possibility of allocating a case to a Permanent Chamber of which the supervising EP is a permanent member<sup>18</sup>.

The EDPs are full members of the EPPO, but they can wear a “double hat”, remaining integrated in the judicial systems of their respective Member States and allowed to perform national investigations in relation to other offences, “to the extent that this does not prevent them from fulfilling their obligations under this Regulation”. The EU Reg. expressly provides that they will “have the same

professor of law at the University of Luxembourg, Ms Katalin Ligeti. Their conclusion, presented in November 2012, provided a complete set of “model rules” to serve as a basis for the investigative framework of the EPPO.

<sup>13</sup> The College of the EPPO is the management body of the Office, dealing with strategic matters, and shall consist of the European Chief Prosecutor and one European Prosecutor per Member State (art. 9 EU Reg.).

<sup>14</sup> The Permanent Chambers shall be chaired by the European Chief Prosecutor or one of the Deputy European Chief Prosecutors, or a European Prosecutor appointed as Chair in accordance with the internal rules of procedure of the EPPO. In addition to the Chair, the Permanent Chambers shall have two permanent Members (art. 10 EU Reg.).

<sup>15</sup> Art. 12 EU Reg.

<sup>16</sup> The allocation of cases between the Permanent Chambers should be based on a system of a random distribution so as to ensure, to the extent possible, an equal division of workload.

<sup>17</sup> The European Prosecutors should act as liaison between the central office and the decentralised level in their Member States, facilitating the functioning of the EPPO as a single office. The supervising European Prosecutor should also check any instruction’s compliance with national law and inform the Permanent Chamber if the instructions do not do so.

<sup>18</sup> Art. 19 EU Reg.

powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment". The "double hat" status raises some concerns as to whether the EDP (and therefore the EPPO in general) will act independently<sup>19</sup>. This assessment may be postponed until the EPPO becomes operational.

The EDPs will conduct their investigations within the framework of national criminal proceedings, under the "monitoring and directing"<sup>20</sup> of the Permanent Chamber, to which the case is assigned to, and under the "supervision"<sup>21</sup> of the EP of the country in which the investigation is conducted according to art. 12 EU Reg. (who will be familiar with the applicable law and guarantee the necessary knowledge of the national language(s) and legal expertise from their Member State of origin).

This kind of "control" will offer the EDPs a margin of action and a certain share of initiative in the conduct of their investigations.

In the most serious cases, the supervising EP can decide to conduct the investigations himself (herself).

So far, 17 Member States have sent to the ECP their candidates for the position of EDPs (Belgium, Bulgaria, Croatia, Czechia, Estonia, France, Germany, Latvia, Lithuania, Malta, Netherlands, Portugal, Romania, Slovakia, Spain) and the College has already appointed 75 EDPs<sup>22</sup>. This number however is still below the 140 EDPs required for the full operationalisation of the EPPO.

## 1.2. Which crimes? and how to investigate them?

In order to properly define the competence of the EPPO, it is necessary to mention art. 86(1) TFEU ("*in order to combat crimes affecting the financial interests of the Union, the Council (...) may establish a European Public Prosecutor's Office from Eurojust*") and art. 325 TFEU ("*The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be*

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<sup>19</sup> As K. LIGETI and M. SIMONATO point out "the double hat delegate is confronted with the dilemma of serving two masters simultaneously", in *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service*, 2013, 4 *New Journal of European Criminal Law*, p 16. See also H. SATZGER, *The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could Be Avoided*, in P. Asp (ed), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2015, as cited in M. PAJČIĆ, *How Independent Is The European Public Prosecutor's Office "De Facto"?*, in *Hrvatski ljetopis za kaznene znanosti i praksu* (Zagreb), vol. 27, broj 1/2020, p. 98.

<sup>20</sup> According to Recital 23 EU Reg. 'Monitoring and directing' should be understood as referring to the powers to monitor and direct individual investigations and prosecutions.

<sup>21</sup> According to Recital 23) EU Reg. 'Supervision' should be understood as referring to a closer and continuous oversight of investigations and prosecutions, including, whenever necessary, intervention and instruction-giving on investigations and prosecution matters.

<sup>22</sup> The information remains available as of 3<sup>rd</sup> of May 2021, available at [www.eppo.europa.eu](http://www.eppo.europa.eu).

such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies"). These two provisions set the goal to achieve. However, the final result is not that "single legal area" indicated by the Commission's proposal (art. 25(1)) because, notwithstanding the definition of a European body, the EPPO largely relies on national laws, which will play a relevant role in the frame of the functioning of the Office.

Indeed, according to art. 22(1) EU Reg., the EPPO has material competence for the investigation and indictment of criminal offences against the financial interests of the EU (provided for in the PIF Directive<sup>23</sup>) "as implemented by national law"<sup>24</sup>, in particular:

- frauds relating to expenditures and revenues affecting funds or assets from the EU budget or budgets managed by the EU, or on its behalf, as described by art. 3(2)(a), (b), (c) PIF Directive<sup>25</sup>;

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<sup>23</sup> According to art. 2(1) PIF Directive *Union's financial interests' means all revenues, expenditure and assets covered by, acquired through, or due to: i) the Union budget; ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.*

<sup>24</sup> This supposes that the transposition of the Directive's will not be homogeneous. So, there will be procedural differences in the criminal investigation (such as the ones regulating gathering and use of evidence, or requirements for the application of pre-trial measures, or participation of victims or other parties in the criminal proceeding) depending on the State where the EPPO investigates and there will be differences in the criminal sanctions, depending on the transposition of the PIF Directive in the prosecuting State.

<sup>25</sup> According to art. 3(2) PIF Directive *"For the purposes of this Directive, the following shall be regarded as fraud affecting the Union's financial interests: a) in respect of non-procurement-related expenditure, any act or omission relating to i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; ii) non-disclosure of information in violation of a specific obligation, with the same effect; or iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted; b) in respect of procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to: i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; ii) non-disclosure of information in violation of a specific obligation, with the same effect; or iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;; c) in respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to: i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; ii) non-disclosure of information in violation of a specific obligation, with the same effect; or iii) misapplication of a legally obtained benefit, with the same effect; d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to: i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds".*

- VAT frauds (art. 3(2)(d) PIF Directive) if the conduct is connected with the territory of two or more Member States and involves a total damage of at least EUR 10 million;
- money laundering involving property derived from the criminal offences covered by the PIF Directive (art. 4(1) PIF Directive);
- active<sup>26</sup> and passive<sup>27</sup> corruption against the EU budget and misappropriation of EU funds perpetrated by officials (national or European) (art. 4(1)(2) PIF Directive).

Moreover, the EPPO shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, focused on committing the offences referred to in art. 22(1) EU Reg.<sup>28</sup>; and for any other criminal offence that is inextricably linked to criminal conduct (so called “ancillary offences”<sup>29</sup>) that falls within the scope of art. 22(1), provided that the requirements enshrined in art. 25(3) EU Reg. are satisfied<sup>30</sup>.

Criminal offences in respect of national direct taxes, including offences inextricably linked thereto, are excluded from the EPPO competence<sup>31</sup>.

The EU Reg. also provides for cases where the exercise of competence is differently shaped depending on the circumstances guaranteeing a balance between the centralised model put forward by the Commission and the less integrated model preferred by Member States.

Indeed, where a criminal offence that falls within the scope of art. 22 caused or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the EPPO may only exercise its competence if: a) the case has repercussions

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<sup>26</sup> “Active corruption” means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

<sup>27</sup> “Passive corruption” means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

<sup>28</sup> Art. 22 (2) EU Reg.

<sup>29</sup> J. ÖBERG observes that the Commission argued that the principle of *ne bis in idem* requires an extension of competence beyond the PIF offences to prosecute other offences where these are inextricably linked to one of the PIF offences. Parallel prosecution of PIF offences and inextricably linked offences based on identical facts by both the EPPO and the national prosecution service would defeat the purpose of the EPPO Regulation, in *The European Public Prosecutor: Quintessential Supranational Criminal Law?*, Maastricht Journal of European and Comparative Law, 2021.

<sup>30</sup> Art. 22 (3) EU Reg.

<sup>31</sup> Art. 22 (4) EU Reg.

at Union level which require an investigation to be conducted by the EPPO; or b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence<sup>32</sup>.

On the contrary, there are some circumstances that exclude the competence of the EPPO in cases in which it could theoretically exercise it:

- the EPPO shall refrain from exercising its competence and shall refer the case to the competent national authorities if the maximum sanction provided for by national law for an offence falling within the scope of art. 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3), unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1); or there is a reason to assume that the damage to the Union's financial interests does not exceed the damage to another victim<sup>33</sup>.

- the College may issue "general guidelines" allowing the Permanent Chambers to refer a case to the competent national authorities, when the damage to the financial interests of the Union is less than EUR 100 000, and when there is no need to investigate or to prosecute a case at Union level and it would be in the interest of the efficiency of investigation or prosecution<sup>34</sup>.

As for the territorial and personal competence of the EPPO, art. 23 EU Reg. rules that the offences referred to in art. 22 shall be committed:

- a) in whole or in part within the territory of one or several Member States
- b) by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
- c) outside the territories referred to in point (a) 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.

According to art. 25 EU Reg., the EPPO exercise its competence through the EDPs:

- by initiating an investigation<sup>35</sup> or by deciding to use its right of evocation when an investigation has already been initiated by national authorities<sup>36</sup>;
- subsequently, by proposing to the Permanent Chamber to bring a case to judgment<sup>37</sup>, unless it decides to dismiss the case<sup>38</sup>;

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<sup>32</sup> Art. 25 (2) EU Reg.

<sup>33</sup> Art. 25 (3) EU Reg.

<sup>34</sup> Art. 34 (3) EU Reg.

<sup>35</sup> Art. 26 EU Reg.

<sup>36</sup> Art. 27 EU Reg.

<sup>37</sup> Art. 36 EU Reg.

- finally, by exercising the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of<sup>39</sup>.

Chapter V, section 2, of the EU Reg. is dedicated to the "Rules on investigation measures and other measures".

In cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the EDPs are entitled to order or request the investigation measures listed in art. 30 EU Reg., still governed by national laws, such as to search any premises, any other personal property or computer system; take any conservatory measures necessary to preserve evidence; obtain the production of any relevant object or document, stored computer data, banking account data and traffic data; freeze instrumentalities or proceeds of crime, where there is risk of dissipation; intercept electronic communications; track and trace an object by technical means, including controlled deliveries of goods.

The abovementioned investigation measures may be subject to conditions in accordance with the applicable national law if it contains restrictions that apply with regard to:

- certain categories of persons or professionals who are legally bound by an obligation of confidentiality;
- production of document, stored computer data, banking account data and traffic data;
- interception of electronic communications or track and trace of objects (in particular, Member States may limit the application of these measures to specific serious offences by notifying the EPPO of the relevant list of specific serious offences in accordance with Article 117).

Moreover, the handling EDP may order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable and, where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling EDP is located, the latter shall issue or request the competent authority of that Member State to issue an European Arrest Warrant in accordance with Council Framework Decision 2002/584/JHA<sup>40</sup>.

## **2. The exercise of competence of the EPPO. Internal rules of procedure.**

The exercise of competence of the EPPO represents the most important way in which the office becomes active and is able either to start an investigation on

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<sup>38</sup> Art. 39 EU Reg.

<sup>39</sup> Art. 4 EU Reg.

<sup>40</sup> Art. 33 EU Reg.

its own or to have an already pending investigation within one of the Member States transferred to an EDP.

More detailed provisions about the functioning of the EPPO are provided by the Internal Rules of procedure of the EPPO<sup>41</sup> (I.R.), adopted by the College upon submission by the ECP, published on the Official Journal of the European Union on the 21<sup>st</sup> of January 2021, complement to the EU Reg.

### *2.1. From registration of information to opening of the investigation.*

Title III of the I.R. is dedicated to the “operational matters”. It is of particular interest for the purposes of this paper.

Art. 38 I.R. governs the registration of the information received by the EPPO in accordance with art. 24 EU reg., as well as acquired by the EPPO *ex officio*, specifying a detailed list of elements that shall be included compulsorily<sup>42</sup> or to the extent available<sup>43</sup> and the verification procedure of these information for the purpose of assessing whether there are grounds to exercise the competence of the EPPO<sup>44</sup>.

Based on the Member State(s) where the focus of the criminal activity is, respectively where the bulk of the offences, if several, was committed - the Case Management System shall notify the appropriate EP<sup>45</sup>, who shall assign the verification to a EDP for the purpose of initiating an investigation<sup>46</sup> or for the purpose of evocation<sup>47</sup>, using all sources of information available to the EPPO as well as any sources available to the EDP, in accordance with applicable national law<sup>48</sup>.

Information reported by private parties which manifestly does not refer to a criminal conduct in respect of which the EPPO may exercise its competence shall be referred by an EDP or an EP to the competent national authorities without undue delay, in line with art. 24(8) EU Reg. or returned to the reporting party and/or deleted<sup>49</sup>.

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<sup>41</sup> 2021/C 22/03.

<sup>42</sup> Art. 38 (2) I.R.

<sup>43</sup> Art. 38 (3) I.R.

<sup>44</sup> Art. 39 and 40 I.R.

<sup>45</sup> Where multiple EPs have been notified, or the notified EPs considers that another EP is better placed to make the assignment, they shall consult and decide together. In case no agreement is reached, the ECP shall make a decision.

<sup>46</sup> Art. 40 (1) I.R.

<sup>47</sup> Art. 40 (2) I.R.

<sup>48</sup> Art. 38 (5) I.R.

<sup>49</sup> Art. 38 (7) I.R.

The EDP shall finalise the verification related to the evocation of an investigation at least 2 days before the expiration of the deadline prescribed by art. 27(1) EU Reg.<sup>50</sup> (when it concerns a decision on evocation the deadline can be extended by up to 5 days). Where the EDP does not issue a decision within the time limit, it shall be treated as a consideration not to evoke a case, and art. 42 shall be applied accordingly<sup>51</sup>.

The verification related to initiating an investigation shall be finalised no later than 20 days following the assignment, extended upon request<sup>52</sup>.

Where, following the verification, the EDP decides to exercise EPPO's competence by initiating an investigation or evoking a case, a case file shall be opened and it shall be assigned an identification number in the Index of the case files<sup>53</sup>.

The corresponding reference in the Index shall contain a series of elements, listed in art. 41(2) I.R., related to suspected, accused or convicted persons; natural persons who reported or are victims; contacts or associates of suspected, accused or convicted persons.

On the 14th of October 2020 was adopted a Regulation amending Council Regulation (EU) 2017/1939 as regards the categories of operational personal data and the categories of data subjects whose operational personal data may be processed in the index of case files by the EPPO<sup>54</sup>.

In particular, it enlists the categories of data subjects and categories of operational personal data referred to in art. 49 (3) I.R., diversified as to whether they concern:

- suspected, accused, or convicted persons in the criminal proceeding of the EPPO;
- contacts or associates of one of the persons above;
- natural persons who reported or are victims of offences that fall within the competence of the EPPO.

The list of data for the last two categories is more restricted than the one for the first category of persons and it is clarified that they may be processed in the index, limited to what is necessary and proportionate in order for the EPPO to perform its investigative and prosecutorial tasks.

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<sup>50</sup> Art. 27 EU reg. "Upon receiving all relevant information in accordance with art. 24(2), the EPPO shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than 5 days after receiving the information from the national authorities and shall inform the national authorities of that decision. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time limit by a maximum period of 5 days, and shall inform the national authorities accordingly".

<sup>51</sup> Art. 40 (4), (6), (7) I.R.

<sup>52</sup> Art. 40 (4) I.R.

<sup>53</sup> Art. 45 EU Reg.

<sup>54</sup> C/2020/6797 final (annex to the EU Reg.).

Articles 45 and 46 I.R. regulate the “monitoring” and “directing” of the investigations by the Permanent Chamber, where the first includes the right to have access at any time to the information from the case file as stored in the Case Management System and request a EDP to provide information on an ongoing investigation or prosecution; while the second includes instructions to the handling EDP to take or refrain from taking specific measures with an obligation for the handling EDP to report on the corresponding follow-up.

It should be noted that if the EDP deems that the implementation of an instruction received from the monitoring Permanent Chamber would be contrary to Union law, or applicable national law, he/she shall immediately inform the Permanent Chamber, proposing to amend or revoke the instructions received<sup>55</sup>.

Where, following the verification, the EDP considers not to initiate an investigation or not to evoke a case, he/she shall record the reasons in the Register and the Case Management System shall assign its review to a Permanent Chamber whose permanent members do not include the supervising European Prosecutor<sup>56</sup>.

The review of the consideration not to evoke a case shall be conducted before the expiration of the deadline prescribed by art. 27(1) EU Reg. and the review of the consideration not to initiate an investigation shall be conducted no later than 20 days following the assignment to the Permanent Chamber<sup>57</sup>.

After the review, the Permanent Chamber may instruct the EDP to start an investigation or to evoke the case. If the Permanent Chamber does not instruct the EDP before the expiration of the time limit for the review, the consideration of the EDP shall be deemed as accepted. Where possible, the authority or person who reported the criminal conduct shall be notified of the decision<sup>58</sup>.

## ***2.2. “Work method” of the handling EDP, reallocation of cases and assignment of measures to another EDP.***

The EDP who decided to initiate or to evoke the investigation shall also be handling it, eventually with the support of other EDPs of the same State.

Without prejudice to the provisions of the national law applicable to the case, the I.R. prescribe a uniform “work method” for the EDPs:

- the case files – physical and in electronic format – shall be organised and managed in accordance with the I.R. in order to ensure the proper functioning of the EPPO as a single office<sup>59</sup>;

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<sup>55</sup> Art. 47 I.R.

<sup>56</sup> Art. 42 I.R.

<sup>57</sup> Art. 42 (4) I.R.

<sup>58</sup> Art. 42 (5) and (6) I.R.

<sup>59</sup> Art. 43 I.R.

- during the investigations, the handling EDP shall draw up and maintain a progress report about the investigative measures planned and performed, as well as their results; any changes in the scope of the investigation concerning the suspect(s), the offence(s) under investigation, the damage caused and the victim(s); the gathering of important evidence; requests for review of any act or decision<sup>60</sup>; a brief description of the content of communications, acts or decisions addressed to a Member State or to a person subject to the jurisdiction of a Member State<sup>61</sup>.

Until the end of the investigation, a case can be reallocated:

- to another EDP of the same State upon proposal of the supervising EP (art. 49 I.R.);
- to another EDP in another Member State upon proposal of the handling EDP or the supervising EP or any permanent member of the monitoring Permanent Chamber (art. 50 I.R.).

Cross-border investigations are governed by art. 33 EU Reg. and art. 53 I.R. providing that, where a measure needs to be undertaken in a Member State other than the Member State of the handling EDP, the latter can assign the necessary measure to an EDP located in the Member State (so called "assisting EDP") where the measure needs to be carried out. However, the justification and adoption of such measures shall be governed by the law of the Member States of the handling EDP.

The assignment shall be registered in the Case Management System, which shall notify the concerned European Prosecutors, and shall contain all the elements necessary to allow the assisting EDP to undertake the measure, indicating a time limit for the execution of the assignment.

With regard to the laws governing the investigation measure requested, art. 31 EU. Reg. provides that:

- if judicial authorisation for the measure is required under the law of the Member State of the assisting EDP, the latter shall obtain that authorisation in accordance with the law of that Member State.

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<sup>60</sup> According to art. 48 I.R. "Where the national law of a Member State provides for the internal review of acts within the structure of its own prosecutor's office, all requests for the review of an act undertaken by the European Delegated Prosecutor shall be inserted in the Case Management System which shall notify the supervising European Prosecutor and the monitoring Permanent Chamber".

<sup>61</sup> Art. 44 (1) I.R. Similarly, according to art. 60 I.R., during the proceedings before national courts in line with art. 36 of the EU Reg., "the European Delegated Prosecutor shall draw up a report containing any significant developments of the proceedings and shall update it periodically. The report shall be registered in the Case Management System and all updates shall be notified to the members of the Permanent Chamber".

- where the law of the Member State of the assisting EDP does not require such a judicial authorisation, but the law of the Member State of the handling EDP requires it, the authorisation shall be obtained by the latter and submitted together with the assignment<sup>62</sup>.

The assisting EDP is left with a margin of discretion as he can inform his supervising EP or the handling EDP when the assignment is incomplete, contains manifest errors; or when the measure cannot be undertaken within the time limit set out; or when an alternative but less intrusive measure would achieve the same results; or the assigned measure does not exist or would not be available in a similar domestic case under the law of his Member State<sup>63</sup>. However, with regard to the last circumstance, even if the assigned measure does not exist in a purely domestic situation, the EDPs concerned may, in agreement with the supervising EPs concerned, have recourse to legal instruments on mutual recognition or cross-border cooperation when available in a cross-border situation<sup>64</sup>. This recalls the procedure provided for the European Investigating Order (hereinafter EIO), even if an alignment with the EIO Directive was expressly rejected during negotiations, leaving a doubt on whether the judicial control performed in the Member State of the assisting EDP will be more extensive allowing a denial of the authorisation on grounds for non-execution not provided by the EIO Directive, under art. 11<sup>65</sup>.

Moreover, nothing is provided for the case where a judicial authorisation is required under the law of the Member State of the assisting EDP but the requirements to concede the authorisation (and consequent defence guarantees) are different from the ones provide by the law of the Member State of the handling EDP (where the obtained evidence is supposed to be used during the proceeding before national courts). Indeed, art. 32 EU Reg. only specifies that formalities and procedures expressly indicated by the handling EDP shall be complied with unless contrary to the fundamental principles of law of the Member State of the assisting EDP.

Art. 51 I.R. governs the merging or splitting of cases falling under the criteria of art. 26(5)(b) and (6) EU Reg, that is until a decision to prosecute under art. 36 EU Reg. is taken, taking due account of the current state of the investigations,

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<sup>62</sup> Recital n. 72) EU Reg. *“Where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained, but in any case, there should be only one authorisation. If an investigation measure is finally refused by the judicial authorities, namely after all legal remedies have been exhausted, the handling European Delegated Prosecutor should withdraw the request or the order”*.

<sup>63</sup> Art. 31 (5) EU Reg.

<sup>64</sup> Art. 31 (6) EU Reg.

<sup>65</sup> Directive 2014/41/EU of 3 April 2014, OJ L 130, 01.05.2014. A. WEYEMBERGH, C. BRIÈRE, *Towards a European Public Prosecutor’s Office (EPPO)*, Study for the LIBE Committee, (2016), p. 31-32.

and if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling EDP in accordance with paragraph 4 of this art. 26 EU Reg.

If we consider that, as a general rule, a case is open and handled by an EDP of the State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed, the reallocation of the split case to another EDP or the reallocation of the merged cases to one EDP – deviating from the general rule - shall take into account the following criteria in order of priority: 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.

### 2.3. Exercise of jurisdiction

#### 2.3.1 General aspects

Art. 25 EU Reg. stipulates the applicable norms in the matter of exercising of the competence by the EPPO, providing, according to para. 1, two options for the EPPO. Firstly, the new European office has the option of initiating an investigation, when there is no national criminal investigation pending in any of the state in respect to the specific criminal deeds. Secondly, the EPPO has the ability to use its right of evocation, in accordance with art. 27 EU Reg. In either of the cases, if the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.

The EPPO will have the ability to exercise its competence in the parameters set forward by art. 22 EU Reg., on material competence, as well as art. 23 EU Reg., on territorial and personal competence of the EPPO, as presented above. As such, *ab initio*, the EPPO is not empowered to exercise its competence outside its material, territorial and personal competence, irrespective of other factors.

Nevertheless, even if the conditions of art. 22 and 23 of the EU Reg. are met, the EPPO shall refrain from exercising its competence and shall, after the consultation with the competent national criminal investigation bodies, refer the case to the latter, without undue delay, if one of the following conditions are met:

1. On the matter of inextricably linked offences – if the maximum sanction provided for by national law for an offence falling within the scope of art. 22(1) EU Reg. is equal to or less severe than the maximum sanction for an inextricably linked offence, as per art. 22(3) EU Reg., unless the latter offence has been instrumental to commit the offence falling within the scope of art. 22(1) EU Reg..

2. On the matter of the damage caused or likely to be caused to another victim, if there is reason to assume that the damage caused or likely to be caused

to the Union's financial interest by an offence as referred to in art. 22 EU Reg. does not exceed the damage caused, or likely to be caused to another victim.

According to the last premise of art. 25(3) EU Reg., the EPPO shall exercise its competence in the above-mentioned situation, but only in the case provided above in 2, if the offence affecting the Union's financial interest is one provided by the national law in the implementation of art. 3 parag. (2) let. a), b) and d) of the PIF Directive. Similarly, for the same premise, the EPPO may exercise its competence for offences referred to in art. 22 EU Reg., other than the ones provided above, if it appears that the EPPO is better placed to investigate or prosecute and only with the consent of the competent national authorities.

The referrals and transfer of proceedings to the national authorities will be done according to art. 34 EU Reg and art. 57 I.R.

Art. 25(5) EU Reg. imposes the obligation of the EPPO to inform the competent national authorities of any decision to exercise or to refrain from exercising its competence without undue delay. The EPPO will also be able to exercise its competence regarding an offence that falls within the scope of art. 22 EU Reg. that caused or is likely to cause damage to the Union's financial interest of less than EUR 10 000, only under certain limited conditions, as provided by art. 25(2) EU Reg.

In addition to the primary legislation, the I.R. dedicate two articles on the decision of the EPPO to initiate an investigation or to evoke a case. As such, as per art. 41 I.R., if the decision is to exercise EPPO's competence, a case file shall be opened and it shall be assigned an identification number in the index of the case file. A permanent link to the related initial registration of information will be automatically created by the Case Management System (hereinafter CMS)<sup>66</sup>. Parag. (2) provides the data that the Index shall contain, to the extent available. Moreover, the CMS shall notify the supervising EP and the ECP and shall randomly assign the monitoring of the investigation to a Permanent Chamber, as per art. 19 EU Reg.

Article 42 of the I.R. is more complex and regulates the interaction between different components of the European institution in the case of a decision not to initiate an investigation or not to evoke a case. It provides for an almost automatic review of this decision by the competent Permanent Chamber that has

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<sup>66</sup> Article 44 EU Reg., entitled **CMS** provides that the EPPO shall establish a case management system, which shall be held and managed in accordance with the rules established in the EU Reg. and I.R.. Among the purposes of the CMS, the EU Reg. list the support of the management of the investigations and prosecutions conducted by the EPPO, in particular by managing internal information workflows and by supporting investigative work in cross-border cases, ensuring secure access to information on investigation and prosecution at the Central Office and by the European Delegated Prosecutors, etc. The internal rules of procedure of the EPPO also dedicates art. 61 to Rules regarding the right of access to the Case Management System.

the ability, as per parag. (5) to instruct the EDP to start an investigation or to evoke the case. As such, if the EDP considers not to initiate an investigation or not to evoke a case, they will record the reasons in the Register. As per the 2nd thesis of art. 42(1) I.R., the considerations shall be notified to the assigning EP and the CMS shall assign its review to a Permanent Chamber. The Permanent Chamber shall have the power to ask for assistance from the staff of the EPPO to further inform their decision, as per art. 42(3) I.R. The Permanent Chamber will also have to review the considerations of the EDP before the expiration of the deadline prescribed by art. 27(1) EU Reg. In the case of the decision of the EDP not to start an investigation, the Permanent Chamber shall conduct its review no later than 20 days following the assignment of the case to the Permanent Chamber, as per art. 42(4) I.R. The Permanent Chamber is also empowered to ask the ECP to extend the time available for the review, in the limits of art. 27(1) EU Reg.

If the Permanent Chamber does not instruct the EDP before the expiration of the time limit for the review, the consideration of the EDP shall be deemed as accepted. If possible, the authority or person who reported the criminal conduct shall be notified of the decision, in accordance with art. 42(6) I.R. Last but not least, as per art. 42(7) I.R., if the decision not to start an investigation is based on the fact that the reported criminal conduct falls outside the competence of the EPPO, the originally received information, along with, where permissible, any information discovered during the verification by the EPPO, shall be referred to the competent national authorities.

### *2.3.2. Right of evocation*

The EU Reg. covers in art. 27 the right of evocation, as the right of the European institution to demand the transfer of a file from the competent authorities of the Member States and continue the already pending criminal investigation. This right, in itself, represent one of the two ways in which the EPPO can exercise its competence.

It must be noted that, most probably, after the operationalisation of the EPPO, the exercise of the right of evocation might represent the main tool in the exercise of competence and might ensure the efficiency of the European criminal investigation body.

Considering the general obligation of the judicial and law enforcement authorities of the Member States to inform, without undue delay, the EPPO, if the European institution could exercise its competence in respect to the investigated criminal offences, as provided by art. 24(2) EU Reg., the EPPO shall take its decision on whether to exercise its right of evocation. This decision should be made as soon as possible from the moment the EPPO receives the above-mentioned information, but no later than 5 days. The EPPO shall also inform the

national authorities of this decision. In specific cases, the European Chief Prosecutor may take a reasoned decision to prolong the time limit by a maximum period of 5 days.

During the above-mentioned period of time, according to art. 27(2) EU Reg., the national authorities shall take any urgent measures necessary, under national law, to ensure effective investigation and prosecution. Moreover, the national authorities must abstain from taking any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation (e.g. closing the case, indictment submission to the court). If the EPPO decides to exercise its right of evocation, the competent authorities within the Member States shall transfer the file to the EPPO and abstain from carrying out further acts of investigation in respect of the same offence, as per art. 27(5) EU Reg.

The right of evocation may be exercised only by a European Delegated Prosecutor from any Member State whose competent authorities have initiated an investigation in respect of an offence that falls within the scope of the material, personal and territorial competence of the EPPO, as per art. 27(6) EU Reg.

According to art. 27(7) EU Reg., in the cases where the EPPO decides not to exercise its right of evocation, the national authorities remain bound to inform the European institution of any new facts that could give the EPPO reasons to reconsider its decision. The EPPO has the right to change its initial decision after receiving such new facts and if the national investigation has not already been finalised.

A special procedure is provided by art. 27(8) EU Reg. in respect to offences which caused or are likely to cause damage to the Union's financial interest of less than EUR 100 000. As such, if 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, it shall issue general guidelines<sup>67</sup> allowing the EDP to decide, independently and without undue delay, not to evoke the case.

#### *2.4. Conflict of competence*

It was a long conversation regarding who should be the competent national or European authority<sup>68</sup> that should decide in cases of conflict of competence

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<sup>67</sup> As per art. 27(8), 2<sup>nd</sup> thesis EU Reg., the guidelines shall specify, with all necessary details, the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to fully recover the damage to the Union's financial interests. The general procedure for the adoption of guidelines is provided in art. 11 I.R.

<sup>68</sup> It must be considered that the European Court of Justice shall have jurisdiction, in accordance with art. 267 TFEU, to give preliminary rulings specifically concerning the

between the EPPO and the national criminal investigation bodies. To detriment of an European authority or a centralized point of view on the national authority that should decide in these case, the EU Reg. stipulates in art. 25(6) that the competent authority should be national and it should be represented by the authority competent to decide on the attribution of competence concerning prosecution at national level. Moreover, the EU Reg. clearly stipulates that the Member States have the duty to specify the national authority which will decide on the attribution of competence.

From our perspective, these legal provisions come with a series of relevant questions and further discussion. Firstly, we observe that this authority will be entitled to decide on cases of disagreement between the EPPO and the national prosecution authorities only when the question is whether the criminal conduct falls within the scope of art. 22(2) EU Reg.

As such, this determination will take into consideration if the focus of the criminal activity of the criminal organisation is to commit any of the offences referred to in art. 22(1) EU Reg. The same authority will be competent to determine if a criminal conduct falls within the scope of art. 22(3) EU Reg. regarding the case of inextricably linked criminal offences. Similarly, a decision could also be taken in connection with art. 25(2) EU Reg., on the conditions in which the EPPO may exercise its competence for a criminal offence that caused or is likely to cause damage to the Union's financial interest of less than EUR 10 000, as well as art. 25(3) EU Reg., regarding the cases when EPPO shall refrain from exercising its competence.

Therefore, the competent national authority to decide on the conflicts of competence will have to decide the following:

a) In the case of art. 22(2) EU Reg., whether the conduct represents indeed a participation in a criminal organisation<sup>69</sup>, and moreover, an aspect that might raise more issues, whether the focus on the criminal activity of such organisation is to commit any of the offences referred to in 22(1) EU Reg.

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interpretation of art. 22 and art. 25 of the EU Reg. in relation to any conflict of competence between the EPPO and the competent national authorities, as per art. 42 (2) let. c) EU Reg.

<sup>69</sup> As defined in Framework Decision 2008/841/JHA, and as implemented in national law. According to the Framework Decision, a criminal organisation means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; As for the notion of structured association, by art. 1 para. (2) of the above-mentioned act it is defined as an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

An approach for the interpretation of the above concepts has been offered in previous works<sup>70</sup>, in order to determine the latter aspect, respectively whether the focus of the criminal activity of a criminal organisation is to commit offences impacting the EU budget.

- b) If we are in the presence of an inextricably linked offence, as provided by art. 22(3) EU Reg. and recitals (54)<sup>71</sup> – (56)<sup>72</sup>;
- c) If the conditions of art. 25(2) EU Reg.<sup>73</sup> are met;
- d) If the conditions of art. 25(3) EU Reg. are met, according to the above analysis.

Moreover, the EU Reg. seems to recognize that there cannot be any kind of conflict of competence between the national criminal investigation bodies and the EPPO in respect to the offences provided by art. 22(1) EU Reg.<sup>74</sup>. Therefore, in

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<sup>70</sup> A case by case approach analysis performed both by the EPPO and the national investigation bodies, considering some clear examples of the EPPO competence regarding such conducts if:

1. The majority of the organisation members carries out its activity with the purpose to commit offences provided by art. 22(1) EU Reg.;
  2. The main damage caused by the acts of the organisation is impacting the financial interest of the Union;
  3. The main scope of the organisation is to defraud the EU budget – aspect that could ultimately be determined via the subjective representation of its members
- in A. SANDRU, M. MIHAI, D. HERINEAN, O. PREDESCU, *Parchetul European. Reglementare. Controverse Explicatii.*, Ed. Universul Juridic, Bucuresti, 2021, p. 76-77.

<sup>71</sup> Recital (54) EU Reg. (...) *The notion of ‘inextricably linked offences’ should be considered in light of the relevant case-law which, for the application of the ne bis in idem principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space.*

<sup>72</sup> Recital (56) EU Reg. *However, the EPPO should also have the right to exercise competence in the case of inextricably linked offences where the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be ancillary in nature because it is merely instrumental to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof.*

<sup>73</sup> If a criminal offence that falls within the scope of art. 22 EU Reg. caused or is likely to cause damage to the Union’s financial interest of less than EUR 10 000, however:

- a) The case has repercussions at the Union level which require an investigation to be conducted by the EPPO; or
- b) Officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence.

<sup>74</sup> The criminal offences affecting the financial interest of the Union that are provided for in the PIF Directive, as implemented under national law. For the case of offences provided in point (d) of art. 3 para. (2) of the PIF Directive, as implemented by the national law, EPPO will be competent when the intentional acts or omissions defined in the provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million.

such situations, the EPPO will have full control over the exercise of competence, without giving any kind of legal remedy for national authorities to contest this competence and/or have it reviewed.

However, even if no legal remedy is provided by art. 25 EU Reg., we must not forget about the art. 42 of the EU Reg.<sup>75</sup>, on the matter of judicial review. We strongly believe that such a judicial review, operated primarily by the competent national courts, has the ability to control and change (or rather censor) the initial decision of the EPPO regarding the exercise of competence, in the case of criminal offences provided by art. 22(1) EU Reg.

Moreover, it seems apparent from the provision of art. 25(6) EU Reg. that the national legislator should establish the competence of deciding on conflict of competence to the national authorities competent to decide on the attribution of competences concerning prosecution at national level<sup>76</sup>. Although it is probable that the (initial) attribution of competences in matters of prosecution will be decided in the Member States by a prosecution body, rather than a court of justice, the final say on the competence is clearly subject to judicial review and, as such, will ultimately be decided by a court. Especially for Member States where the non-competence of the criminal investigation bodies could impact the validity of procedural acts and the admissibility of evidence, we think that the national authorities could also take into consideration the designation of a court in order to deal with conflicts of competence between the EPPO and national prosecution bodies.

In any case, it seems that the EU Reg. also leaves a strong attribution to the Court of Justice of the European Union, by explicitly providing that the Court of Justice shall have jurisdiction, in accordance with art. 267 TFEU, to give preliminary rulings concerning the interpretation of art. 22 and 25 EU Reg. in relation to any **conflict of competence** between the EPPO and the competent national authorities. Yet again, in matters of utmost importance, it seems that the European legislator allows for dual solutions to the issues that will face the EPPO after its operationalisation. It remains to be seen how active the Court of Justice will be in trying to prevent a complex issue such as conflicts of competence and the ways in which the relevant national authorities will interpret the norms of the EU Reg.

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<sup>75</sup> Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.

<sup>76</sup> For example, in Romania and Italy, the option was obvious for the authorities, both Member States providing that highest prosecutor in the national hierarchical system should decide the conflict of competence between national authorities and the EPPO. To this extent see art. 6 para. (3) of the GEO no. 8/2019.

### 3. Critical aspects

#### 3.1. Forum shopping

Forum shopping has always been an intriguing aspect, especially problematic in cases of international law or in the context of the European Union<sup>77</sup>, stemming from the possibility of the application of multiple legal systems for a specific case<sup>78</sup>. As such, depending on the EDP that carries out the criminal investigation in respect to offenses against the financial interest of the Union, different material and procedural rules might apply, with direct consequences on aspect such as: the limits of punishment<sup>79</sup>, the rights of the involved parties<sup>80</sup>, investigative measures<sup>81</sup>, the admissibility of evidence, etc.

For the EPPO, art. 26(4) EU Reg. is the main legal provision that determine problematic aspects in respect to forum shopping. It provides that, as a rule, the criminal investigation shall be initiated and handled by an EDP from the Member State where the focus of the criminal activity is. In the case of several connected offences within the competences of the EPPO, the case shall be instrumented by the EDP from the Member State where the bulk of the offences have been committed. Strong criticism has already been expressed<sup>82</sup> in respect to the non-defined and inherently interpretable notions of “*focus of the criminal activity*” and “*bulk of the offences*”.

However, the provision allows an EDP from a different Member State that has jurisdiction for the case to initiate (or be instructed by the competent

<sup>77</sup> K. KARSAI, *External Effects of the European Public Prosecutor's Office Regime*, 12.10.2019, University of Szeged, available at [www.ssrn.com](http://www.ssrn.com).

<sup>78</sup> The following article also takes into consideration the possibility not only of the prosecution, but also of the defendants in respect to forum shopping.

M. LUCHTMAN, *Choice of forum and the prosecution of cross-border crime in the European Union – What role for the legality principle?* in M. LUCHTMAN (ed.), *Choice of forum in cooperation against EU financial crime – Freedom, security and justice and the protection of specific EU-interests*, The Hague: Eleven 2013, p. 3-61.

<sup>79</sup> Concerns have been raised even in respect to bringing cases to courts in Member States that provide the most severe criminal sanctions. See for example: F. FALLETI, *The European Public Prosecutor's Office and the Principle of Equality*, published in *Eucrim* magazine, issue no. 1/2017, p. 25-27.

<sup>80</sup> As per art. 41(3) EU Reg., “*Without prejudice to the rights referred to in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the EPPO shall have all the procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.*”

<sup>81</sup> For example, the following article provides clear differences between the Member States on the issue of maximum duration of telephone tapping (per judicial authorisation or in total) in T. HUISJES, *A European Prosecutor: Three Scenarios to Prevent Forum Shopping for Evidence*, 2018, available at [www.eulawenforcement.com](http://www.eulawenforcement.com)

<sup>82</sup> EPPO for Dummies: The EPPO goes forum shopping, Student posts, 2017, available at [www.eulawenforcement.com](http://www.eulawenforcement.com).

Permanent Chamber to initiate) an investigation where a deviation from the rule above is duly justified, taking into account the following criteria, in their respective order of priority:

- 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.

A similar conclusion in regard to the uncertainty of the meaning of "*duly justified*" can be drawn.

However, considering the above, we think that the concerns related to forum shopping might be solved by an unique and coherent interpretation of these notions by the EPPO and a general conduct that allows for the creation of clear guidelines that determine the competent EDPs to initiate and conduct a specific investigation. Other innovative solutions<sup>83</sup> were proposed, especially in the matter of evidence collection and admissibility.

### ***3.2. Inequality of arms between EDPs and defence lawyers in cross-border investigations.***

The transnational character of investigations (collection of evidence in several States) highlights the age-old problem of the asymmetry between the prosecution and the defence.

Indeed, for a defence lawyer to conduct autonomous investigation abroad to gather evidence that can be presented to the Court not only can entail financial and technical barrier<sup>84</sup> but also, in some Member States, might not be allowed<sup>85</sup>.

Art. 37 EU Reg. provides that "*evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the*

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<sup>83</sup> "Evidence collection should consider the legal rules, which have impact in the admissibility of evidence, in all participating Member States, in order to set a clear common standard for all future EPPO proceedings (cf. Art. 37 of the EPPO Regulation EU/2017/1939) irrespective of the geographical area of investigation. That would be the appropriate instrument to avoid any danger of forum shopping and related legal objections by the concerned parties, for example in terms of use of evidence in a trial at a later stage of the proceeding" in *European Criminal Bar Association, Notes on the Internal Rules of Procedure of the European Public Prosecutor's Office*, available at [www.ecba.org](http://www.ecba.org).

<sup>84</sup> E. SELLIER, A. WEYEMBERGH, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*. Study requested by the LIBE Committee, 2018, p. 76.

<sup>85</sup> For example in Italy, the defence lawyer cannot carry out autonomous investigations outside the Italian territory, rather he/she should request to the national prosecutor to conduct a rogatory or use, when available, instruments of judicial cooperation related to the collection of evidence in other countries (such as EIO). Also in the Netherlands, the defence must file an application to the national authorities of the country of prosecution for them to send a letter of request to the foreign authorities asking for further inquiries to be carried out. M. VAN WIJK, *Cross-border evidence-gathering: Equality of arms in the EU?*, 2017, p. 127.

*evidence was gathered in another Member State*"<sup>86</sup>. It seems to allow the defendant to present evidence collected abroad.

However, from other provisions of the EU Reg. it can be inferred that the most plausible interpretation is that art. 37 refers to evidence presented by the defendant but gathered abroad by the EDP *motu proprio* or upon the request of the defence.

Indeed, art. 41(3) EU Reg. provides that the EPPO can be requested to obtain investigative measures "on behalf of the defence".

If this interpretation is confirmed by the practice of the EPPO, one may observe that the choice to proceed with the request for an investigative measure abroad is still left to the discretion of the handling EDP, without considering the further criticality for the defence forced to make an early discovery of his strategy with evident inequality of arms.

The principle according to which the public prosecution carries out the investigations by collecting all the relevant evidence both against and in favour of the accused (recognized also by art. 5 and Recital 65 EU Reg.<sup>87</sup>) does not seem to help as it often proves not to be applied in practice at the national level. The EPPO could surprise us, by guaranteeing the application of this principle to the investigations conducted by the EDPs, through its power of monitoring, directing and supervising or by publishing guidelines defining minimum standards on procedural rights of the defence in cross-border investigations. Let's give it the benefit of the doubt.

### *3.3. Vagueness of criteria and definitions related to the material competence of the EPPO*

Some criteria and definition in the European regulation concerning the exercise of competence seems vague and not sufficiently defined and will undoubtedly represent a test bench for the new institution once it becomes operational.

Indeed, there might be an issue of coordination between the notion of "criminal organization" focused on the commission of one of the offences within the competence of the EPPO<sup>88</sup> and the specific jurisprudential elaboration on the

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<sup>86</sup> Recital 80) EU Reg., anticipating the rule provided by the abovementioned art. 37, refers only to "the evidence presented by the EPPO" gathered in another Member State.

<sup>87</sup> The investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, either *motu proprio* or at the request of the defence.

<sup>88</sup> Art. 22 (2) EU Reg. that recalls art. 2 of the council framework decision 2008/841/GAI "Offences relating to participation in a criminal organization": "Each Member State shall take the

subject in each State member (especially in those countries, such as Italy, with a long experience with criminal organizations, which has led to a very detailed and elaborated jurisprudence<sup>89</sup>). Even the concept of "focus" of the criminal activity is hard to interpret.

The concept of "inextricably linked" offence, which extends the sphere of competence of the EPPO<sup>90</sup>, is not sufficiently determined. Indeed, although it is defined by recital 54 EU Reg., by referring to the jurisprudence of the EU Court of Justice concerning the *ne bis in idem* principle<sup>91</sup>, the concept of "connection" does not seem to coincide with the concept of *idem factum*<sup>92</sup>.

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*necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences: a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities; b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity".*

<sup>89</sup> F. GIUFFRIDA, *The European Public Prosecutor's Office: King without kingdom?*, 2017, p. 12. EU Reg. also states that the participation in a criminal organisation has to be understood "as defined in Framework Decision 2008/841/JHA, as implemented in national law". This Framework Decision was meant to reduce the diversity of national legislation on organised crime, but it failed in reaching this goal; its impact on national legislation has been indeed very limited, as acknowledged by the Commission in its recent Report on the implementation of the Framework Decision (Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime', COM(2016) 448).

final, 7 July 2016, p. 10).

<sup>90</sup> Art. 22 (3) EU Reg.

<sup>91</sup> Recital 54) EU Reg.: "The notion of 'inextricably linked offences' should be considered in light of the relevant case-law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space". The more relevant Judgement on the matter are, case C-436/04, *Van Esbroeck*; case C-467/04, *Gasparini*; case C-150/05, *Van Straaten*; case C288/05, *Kretzinger*; case C-617/10, *Fransson*. Moreover Recitals 55) and 56) provides that "The EPPO should have the right to exercise competence, where offences are inextricably linked and the offence affecting the Union's financial interests is preponderant, in terms of the seriousness of the offence concerned, as reflected in the maximum sanctions that could be imposed" and that "However, the EPPO should also have the right to exercise competence in the case of inextricably linked offences where the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be ancillary in nature because it is merely instrumental to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof".

<sup>92</sup> Recital 49) of the Preamble to one of the versions of the draft Regulation was more precise providing examples of inextricably linked offences (Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - Consolidated text, Council doc. 15200/16, 2 December 2016).

Equally undetermined is the notion of “*repercussions at Union level*” which allows the exceptional exercise of EPPO competence for those offences generally excluded for not having reached the damage threshold<sup>93</sup>.

Moreover, some criteria that exclude the competence of the EPPO in cases in which it would be generally competent<sup>94</sup> are vague, such as the assessment of the “*instrumentality*” of the crime inextricably linked to the commission of the crime falling within the scope of application of art. 22 or the assessment of the actual or potential damage to the interests of the Union compared to that of another victim, for which it is not clear whether, in establishing who suffered the greatest damage, one should reason in absolute or relative terms.

It should be also noted that the new website of the EPPO contains a section called “Report a crime”<sup>95</sup>, not yet active, which seems to create a direct link with the central authority coherently with art. 38(7) I.R. that expressly allows reports from private individuals. However, considering that the reports can possibly arrive from individuals of each Member State (according to different national rules<sup>96</sup>), and that exchange of information is one of the crucial aspects of cooperation between the EPPO and national authorities, it is legitimate to ask how this website section will be structured, what will the requirements of form and substance be and what documentation will have to be attached.

Conclusively, it is hoped that the above criteria, notions and requirements will be clarified through public guidelines, to guarantee an adequate level of legal certainty and foreseeability, possibly as a result of the dialogue between the Permanent Chambers, the supervising EPs and national authorities or through the interpretation of the Court of Justice of the European Union.

#### 4. Extension of EPPO competence

It is already clear that the extension of the EPPO competence is a much discussed aspect, even before the complete operationalisation of the new institution. It arises from the fact that there are different directions or dimensions

<sup>93</sup> Art. 25 (2) EU Reg.

<sup>94</sup> Art. 25 (3) EU Reg. stipulates that “*The EPPO shall refrain from exercising its competence in respect of any offence falling within the scope of Article 22 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 34 if: a) the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1); or b) there is a reason to assume that the damage caused or likely to be caused, to the Union’s financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim*”.

<sup>95</sup> <https://www.eppo.europa.eu/report-crime>.

<sup>96</sup> For example, in some Member States it is provided that national authorities (such as a national public prosecutor) shall always act as a filter with regard to information concerning crimes within the EPPO competence related to private individuals. In other Member States, it is provided that the information can be directly submitted to the EPPO.

in which the extension of competence could operate, respectively the territorial competence and the material competence.

Firstly, the extension of the territorial competence of the EPPO would entail going from 22 Member States to more, ideally 27. It is already widely known that some member states of the European Union refused to be subject to the EU Reg. even if the prosecutor's office was, as a design, meant to be operational across the European Union<sup>97</sup>. This aspect is already a major cause for concern<sup>98</sup>. In any case, we cannot accuse the European Union of any kind of wishful thinking considering the full reading of art. 86(1) TFEU<sup>99</sup> and the general provision on enhanced cooperation. Enhanced cooperation as a fundamental institution of the Union starting with the Lisbon Treaty entails that any member state should have the ability to join anytime any form of enhanced cooperation<sup>100</sup>.

Considering the above, it would be extremely important for the EPPO to create such an efficient, solid and principles based system of criminal investigation that can convince all of the Member States to join this form of enhanced cooperation.

Secondly, in respect to the extension of the material competence, the TFEU was able to exceed its adoption times and circumstances. As such, it provides in art. 86(4) that the European Council may adopt a decision amending art. 86(1) TFEU in order to extend the powers of the EPPO to include serious crimes having a cross-border dimension and amending accordingly art. 86(2) TFEU as regards the perpetrators of, and accomplices in, serious crime affecting more than one Member State. However, the extension of material competence can only be obtained if the European Council acts unanimously, after obtaining the consent of the European Parliament and after consulting the Commission.

As such, the EPPO has the ability, as envisioned by the TFEU, to extend its material competence for serious crimes that also have a cross-border dimension.

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<sup>97</sup> Art. 86 TFEU.

In order to combat crimes affecting the financial interest of the Union, the Council, by means of regulation adopted in accordance with a specific legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

<sup>98</sup> C. DI F. MAESA, *Repercussions of the Establishment of the EPPO via Enhanced Cooperation. EPPO's Added Value and the Possibility to Extend its Competence*, in *Eucrim* magazine issue no. 3/2017, p. 156-160.

<sup>99</sup> Art. 86 TFEU(...) in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

<sup>100</sup> *The cooperation must be open at any time to all Member States, in accordance with Article 328 TFEU* in P. CRAIG, G. DE BÚRCA, *EU Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 142

A series of opinion are already in favour of a gradual extension of the EPPO competence to terrorism, financial crimes, cybercrime, trafficking in human beings and in arms, environmental crimes<sup>101</sup>.

The European Union should remain aware of the intrinsic tendency of Member States to maintain their exclusive competence on aspect regarding the prevention and punishment of criminal conducts, that was, up until this moment, a clear prerogative of the national state and not of a union. To this extent, the European Union should be patient and find the appropriate timing in order to initiate a more concrete discussion<sup>102</sup> on the extension of the material competence of an European criminal investigation body.

Considering the above, it seems that the further extension the EPPO competence is a close catch-22<sup>103</sup> situation. If non-participating Member States were to join the current form of the EPPO, as a European criminal investigation body competent regarding offences against the Union's financial interest, it seems less likely that a unanimous decision of the European Council could be reached in order to extent the material competence. However, if the EPPO continues with the current participating Member States and if it proves its ability to effectively prevent and combat the criminal offences within its current competence, the participating Member States might be willing to further extend the material competence of the European institution<sup>104</sup>.

It is precisely the current political context that brings a large responsibility in the hands of the EPPO. It is only by ensuring the effective protection of the European Union's financial interest, coupled with an undisputable and exemplary conduct in carrying out the investigations, while providing legal rights and remedies to the people involved in the criminal procedure, that the

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<sup>101</sup> A. JUSZCZAK, E. SASON, *Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? What future for the EPPO in the EU's Criminal Policy?* In *Eucrim* magazine, issue no. 1/2019, p. 66-74; C. DI F. MAESA, *Repercussions of the Establishment of the EPPO via Enhanced Cooperation. EPPO's Added Value and the Possibility to Extend its Competence*, in *Eucrim* magazine, issue no. 3/2017, p. 156-160; A. NATO, *The European Public Prosecutor's Office between counter-terrorism and strengthening of the European citizens' safety* in *Civitas Europa* no. 2/2016, p. 317-338; C. DI F. MAESA, *EPPO and environment crime: May the EPPO ensure a more effective protection of the environment in the EU*, 2018, in *New Journal of European Criminal Law*.

<sup>102</sup> The European Commission already revealed its intention to adopt a legislative proposal in order to expand the EPPO competence by 2025, especially in the field of economic and financial law. F. VERBRUGGEN, V. FRANSSSEN, A. L. CLAES, A. WERDING, *Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?* in the *European Law Blog*, 18.11.2019, available at [www.europeanlawblog.eu](http://www.europeanlawblog.eu)

<sup>103</sup> Defined by the Merriam-Webster Dictionary as a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule, available at [www.merriam-webster.com](http://www.merriam-webster.com).

<sup>104</sup> In this case, considering that non-participants Member States would fall outside the competence of the EPPO, they would not have clear arguments to oppose the extension of the material competence of the EPPO, as they are not directly impacted.

EPPO might prove to be a successful project and extend its competence, sometime down the line.

## 5. Comparative analysis. EPPO operationalisation in Italy and Romania

The context of the article, its date of publication and the fact that the two authors are law practitioners in two different Member States where the EPPO will carry out its activities, allows us to present the implementation and steps taken towards the operationalisation of this newly created institution in Italy and Romania.

### 5.1. Italian perspective

On the 15th of July 2020, Legislative Decree no. 75/2020 was published in the Italian Official Gazette, aimed at implementing the PIF directive in the national criminal law system.

Under article 4 of the "European Delegation Law 2018" (Law 117 of October 4, 2019), published on the 29th of January 2021, the Council of Ministers enacted the legislative decree n. 9/2021, which entered into force the 6th of February, in order to adapt the national legislative framework to the European Council Regulation 2017/1939.

The legislative decree does not provide any amendment to the code of criminal procedure nor to other Italian laws. As the EU Reg. is directly applicable, the legislative decree mainly concerns the status of the EP and EDP, their powers, and regulates the procedure for the recruitment and appointment, imposing the following requirements:

- third professional evaluation for EDPs and fourth for the EP;
- maximum age of 58 years old;
- the requirements provided by art. 16 EU Reg.;
- adequate knowledge of English<sup>105</sup>;
- experience in the investigation and prosecution of crimes against the public administration, economic and financial crimes (white-collar crimes) and in the field of judicial cooperation.

A central role is attributed to the General Public Prosecutor of the Court of Cassation with regard to conflicts of competence between EPPO and national prosecutors.

The legislative decree also regulates communications to Prosecutors regarding crimes within the EPPO competence. In particular, art. 14 rules that any communication concerning offences in relation to which the EPPO could exercise

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<sup>105</sup> The CSM has indicated the B1 level as a minimum.

its competence are submitted directly or transferred, not only to the EDP, but also to the national public prosecutor (territorially competent).

When the national prosecutor becomes acquainted with the commission of a crime against the EU budget, and:

- the EPPO has not yet communicated that it is going to exercise its competence and
- in case it is necessary to perform urgent investigations or
- in case there is a concrete risk that a delay would jeopardize the investigations,

the national prosecutor registers the *notizia criminis* in the Italian ordinary registry according to art. 335 of the Italian Code of Criminal Procedure (c.p.p.) and informs the EPPO that they will open a preliminary investigation.

If the above requirements are not met, the *notizia criminis* will be registered in another registry (sort of a “limbo”), created ad hoc for the EPPO, where it will remain in a suspended state until the EPPO decides whether it wants to exercise its competence or not. In any event, after 30 days in the ad hoc registry, if the EPPO has not exercised its competence, the public prosecutor should move the proceeding to the Italian ordinary registry according to art. 335 c.p.p. and must inform the EPPO.

The Italian government has opted for a delocalization of the EDPs, independent but integrated in the existing offices, without creating a central office as initially proposed. This decision was adopted after a census of the proceedings concerning the offences against the EU budget opened between 2016 and 2019 (approximately 1500<sup>106</sup>, based on a list of approximately 30 different crimes that meet the definition<sup>107</sup>). The analysis showed a distribution all over the Italian territory but especially in the South of Italy (approximately 50% of those proceeding were opened in Sicily, Calabria and Puglia regions).

On the 23rd of March 2021, the Consiglio Superiore della Magistratura (hereinafter CSM)<sup>108</sup> approved the proposal submitted by the Ministry of Justice to appoint 20 EDPs<sup>109</sup> and their territorial distribution (nine offices)<sup>110</sup>, specifying that

<sup>106</sup> This number is underestimated because of a lack or partiality of the answers given by the prosecutors’ offices and because of the inadequacy of the actual IT management system which allows the identification only of the type of crime but not of other relevant information such as the gravity threshold, elements of transnationality, complete list of victims of the crime including European Union or other European and national institutions dealing with European funds).

<sup>107</sup> Several types of fraud, tax offences, smuggling, corruption, money laundering, misappropriation (related to individual and where provided to legal persons).

<sup>108</sup> A self-governed elective Board which is in charge of all decisions concerning Judges and Prosecutors, such as recruitment, assignments, transfers, promotions, and disciplinary actions.

<sup>109</sup> According art. 13 (2) EU Reg.

<sup>110</sup> Three EDPs in Roma (competent for the crimes committed in the Districts of Roma, Perugia, Cagliari and L’Aquila), three EDPs in Milano (competent for the crimes committed in the Districts of

it will might be necessary to request a renegotiation of the agreement with the ECP if the choices made about territorial distribution turn out to be inadequate.

In addition, the CSM proposed to the Ministry of Justice to allow EDPs to delegate their functions to other national prosecutors for urgent purposes or to attend hearings as the Italian EDPs will operate in more than two districts (in some cases even four districts), therefore on a vast territory.

Moreover, taking into account art. 4 EU Reg. which provides that the EDPs "*exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of*"<sup>111</sup>, the Minister of Justice announced the intention to formulate to the ECP a proposal for an additional agreement, aimed at designating two additional EDPs, chosen in the General Prosecutor's Office of the Court of Cassation, since the national framework allows only those magistrates to appear before the Court of Cassation.

On the 25<sup>th</sup> of March 2021, the ECP confirmed to the Minister of Justice that, under the budgetary proposal of the European Commission adopted on 24 June 2020, the EPPO will be able to start its operations with 20 full time EDPs in Italy, distributed across nine territorial offices.

On the 1<sup>st</sup> of April 2021, the CSM opened the selection procedure indicating the 10<sup>th</sup> of April 2021 as deadline for candidate submissions. On the 20<sup>th</sup> of April 2021, the CSM designated 15 PED to be communicated to the ECP (for seven out of nine offices), with the 5 others to be designated later on. All candidates have been accepted by the College.

## 5.2. Romanian perspective

On the legislation for the application of the EU Reg., Romania adopted two major primary legislative acts, respectively GEO nr. 8/2019<sup>112</sup> and Law no. 6/2021<sup>113</sup>. Firstly, GEO no. 8/2019 establishes the procedures for the designation, in the name of Romania, of the candidates for the function of European

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Milano and Brescia), two EDPs in Napoli (competent for the crimes committed in the Districts of Napoli and Salerno), two EDPs in Bologna (competent for the crimes committed in the Districts of Bologna, Ancona and Firenze), two EDPs in Palermo (competent for the crimes committed in the Districts of Palermo, Catania, Caltanissetta and Messina), two EDPs in Venezia (competent for the crimes committed in the Districts of Venezia, Trieste and Trento), two EDPs in Torino (competent for the crimes committed in the Districts of Torino and Genova), two EDPs in Bari (competent for the crimes committed in the Districts of Bari, Lecce and Campobasso), two EDPs in Catanzaro (competent for the crimes committed in the Districts of Catanzaro, Reggio Calabria and Potenza).

<sup>111</sup> Recital 3) EU Reg. "*The functions of prosecutor in competent courts apply until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any legal action or remedies available until that decision has become definitive*".

<sup>112</sup> Published in the Official Monitor no. 137 of 20th February 2019.

<sup>113</sup> Published in the Official Monitor no. 167 of 18th February 2021.

Prosecutor and European Delegated Prosecutors, as well as the rights and status of the above-mentioned functions.

Secondly, and in a more applied approach, especially for the establishment of measures to put into application the EU Reg., Romania adopted Law no. 6/2021. One of the basic principle of the activities of the EPPO, as per art. 5(3) EU Reg. is the applicability of the European legislation<sup>114</sup> regarding the investigation and prosecution on behalf of the EPPO. However, it is mentioned that national law shall apply to the extent that a matter is not regulated by the EU Reg.<sup>115</sup>

This new Romanian legislation is quite comprehensive<sup>116</sup>, as it covers aspects such as judicial procedure, facilitating the judicial cooperation in criminal matters, special provision on the organisation of the EPPO in Romania<sup>117</sup>, changes in the legal provisions of the Romanian Criminal Code of Procedure, provisions on the competence of courts, changes in regards to the national legislation on the prevention, establishment and sanctioning of irregularities in the obtaining and use of European funds and/or national public funds related to them.

Without going into a complex analysis on the Romanian legislation, we would like to point out certain aspects that will be of most relevance for the activity of the EPPO in Romania, as well as the interaction of the European institutional with the national investigation bodies.

We can observe that Chapter II of Law no. 6/2021, that is dedicated to provisions on judicial procedure, transposes the relevant provision of the EU Reg. on aspects such as the communication between national authorities and the EPPO and the right of evocation<sup>118</sup>. In this context, it is clear that some of these provisions

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<sup>114</sup> As was previously observed, Regulations are binding in their entirety and directly applicable in all Member States part in this form of enhanced cooperation. Moreover, it is stated that regulations are inherently part of the national legal system and there is no need for transformation or adoption by separate national legal measures, in P. CRAIG, G. DE BÚRCA, *EU Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 105.

<sup>115</sup> We can observe to this extent that a significant number of provisions of the EU Reg. refer to the rules of procedures, as enshrined in the national systems of law – art. 12 para. (3), art. 13 para. (1), 3<sup>rd</sup> thesis, art. 26, art. 28-31, art. 40, art. 42 and others.

<sup>116</sup> The approach of the Romanian legislator could be considered problematic considering that, as a general rule, regulations must not be tempered with by Member States. P. CRAIG, G. DE BÚRCA, *EU Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 106.

<sup>117</sup> For example, Law no. 6/2021 provides that, in the application of the EU Reg., in the National Anticorruption Directorate, a support structure for the EDPs in Romania will be established, which will function with a maximum number of 20 positions, among them 5 positions of officers and agents of judicial police, 8 positions of specialists, 5 positions of clerks and 2 positions of drivers.

<sup>118</sup> Moreover, art. 24 provides as transitional and final provisions of the law, that, in criminal cases registered before the operationalisation of the EPPO having as object criminal offences of its competence, the national prosecutors will inform, without undue delay, the EPPO in order to allow the institution to decide on exercising its right of evocation.

are irrelevant, considering the existence of the EU Reg., while others might pose a risk towards the ignoring of the European provisions on the same matter.

An interesting approach of the Romanian legislator comes under attention in art. 20 of Law no. 6/2021, where it is clearly established that where the criminal investigation is carried out by the EPPO, only the courts in four Romanian cities will have the ability to judge the case<sup>119</sup>.

Besides the aspects above, it was already mentioned<sup>120</sup> that the EU Reg. has the ability to change the general rules applicable to certain institutions of criminal procedure law, irrespective of the crimes that are being investigated. Such a change is represented by the adoption of a new article<sup>121</sup> in the matter of the verification of precautionary measures taken by the judicial authorities, establishing as such that, during the entirety of the criminal trial procedure, the prosecutor, the competent judge or the competent court will verify, but no later than 6 months during the criminal investigation, respectively 1 year during the trial, if the grounds on which the precautionary measure was previously taken or maintained is still applicable. Depending on the result of such an analysis, the judicial bodies will either maintain, narrow down or extend the precautionary measures.

The College of the EPPO already appointed the first six EDPs from Romania<sup>122</sup>, after it accepted all the proposals that came from the Romanian Ministry of Justice. Romania is one the Member States that is extremely willing to cooperate with the EPPO and ensure the European institution with all the necessary human resources to fight crimes affecting the financial interest of the Union in Romania. Romania has accepted to send 15 EDPs<sup>123</sup> to the EPPO, after the initial announcement of the Romanian Ministry of Justice mentioned 10 such prosecutors. This solution was more appropriate and represents a middle ground between the wishes of the EU Office and the Romanian national authorities, as the ECP initially<sup>124</sup> asked Romania to designate 20-30 EDPs. In this context, it

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<sup>119</sup> Different hierarchical courts will judge EPPO cases depending on the specific quality of the person involved, in accordance with the general provision of the Romanian Criminal Code of Procedure.

<sup>120</sup> M. Morar, Short guide about the EPPO and the business environment, 17<sup>th</sup> March 2021, available at [www.legalmarketing.ro](http://www.legalmarketing.ro)

<sup>121</sup> From our perspective, the change can represent a clear application, by the Romanian legislator, of the basic principle provided by art. 5 para. (2) of the EU Reg. that binds the European institution to proportionality in all its activities (i.e. in relation to its exercise of competence, investigative and precautionary measures, pre-trial detention, etc.).

<sup>122</sup> <https://www.eppo.europa.eu/news/college-appoints-first-european-delegated-prosecutors-romania-and-netherlands>.

<sup>123</sup> Romania to Send 15 Prosecutors instead of the 10 to the EPPO in Romanian Journal, 09.10.2020, available at [www.romanianjournal.ro](http://www.romanianjournal.ro).

<sup>124</sup> Kovesi asks Romania to Provide 20-30 Prosecutors for EPPO, Justice Ministry Explains it can Send Only 10 in Romanian Journal, 17.09.2020, available at [www.romanianjournal.ro](http://www.romanianjournal.ro).

remains to be seen when the Romanian Ministry of Justice will begin the selection procedure for the remaining 9 positions.

## 6. Conclusion

It remains to be seen in what way the EPPO will prove itself to be an efficient tool for protecting the financial interest of the European Union, while also providing a clear model for national prosecuting bodies in dealing with criminal conducts and assuring the full respect of the rights of the parties involved.

It is also clear that the answer to the above will remain in the eye of the beholder. Of course, a strong indication of the proper functioning of the EPPO and its success can be observed in relation to the similar or different approach the newly operational European institution adopted with regards to criminal deeds depending on where they are committed. If the EPPO will treat cases, defendants, national judicial authorities differently, the credibility and legitimacy of the new institution might be undermined.

Ensuring such an important form of cooperation and integration at the Union's level, such as the EPPO, and harmonizing the procedural criminal legislation clearly represent a strong ambition of the European legislator.

The new model of a decentralized Prosecution's Office and the complex architecture of the EPPO, encompassing the operation and strategic level, will have to prove its usefulness in the months and years to come. Only time will tell if this new approach may create a better life for the European citizen.