



THE 14TH EDITION OF THE INTERNATIONAL CONFERENCE
**EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES**

**The Need to Set Up the European
Public Prosecutor's Office**

Liliana Niculescu¹

Abstract: The idea of setting up a European Public Prosecutor's Office (EPPO) is old and has its foundation in the interest of the European institutions to protect their budgets, both in the pre-accession and post-accession phase. In the interest of protecting financial interests in particular, there was wanted a regulatory framework in criminal matters to generate results. The solution found at Community level, despite complaints from some Member States over the violation of the principle of national sovereignty, was this EPPO institution capable of investigating, judging and prosecuting offenses against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. In Romania, the debate on this issue did not address issues of sovereignty, or elements related to the nature of the institution's appearance, its necessity, or how it will work at the level of the signatory, non-statutory or non-EU. In our country the discussion has reduced to who will lead the respective European body, the views being obviously shared. What the public opinion in Romania ignores is the fact that man does not make the institution, but the institution makes the man. Given these exaggerations on one side and the other at national level, which have not brought any concrete contribution to the development of a European instrument, I consider as necessary a cold analysis of this institution and its implications for the Member States and Europe overall.

Keywords: European Public Prosecutor's Office; fraud; corruption; cross-border fraud; European Union

1. How did the Idea of Setting up the European Prosecutor's Office Arise?

Starting from the intention to combat cross-border crimes as regards the evasion of European funds, EPPO has found a concretization through Art. 86 TFEU² on the establishment of a new body of the European Union with the primary objective of investigating, prosecuting and bringing before the national courts persons who affect the financial interests of the Union.

This European Commission proposal was followed by a resolution of the European Parliament stressing that the EPPO structure should be completely independent of national governments and EU institutions and protected from any political influence or pressure and that the rules governing the division of competences between EPPO and national authorities should be clearly defined so as to eliminate any uncertainty or misinterpretation.

¹ Assistant Professor, PhD, Dunarea de Jos University of Galați, The Faculty of Juridical, Social, and Political Sciences, Romania, Address: 47 Domneasca Street, Tel.: 0040 0336 130 108, Romania, Corresponding author: liliana.niculescu@ugal.ro.

² <https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:12012E/TXT>.

The Commission proposal was the basis for Regulation (EU) No. 2017/1939¹ of the Council from the date of 12 October 2017 implementing enhanced cooperation with regard to the establishment of the European Public Prosecutor's Office.

- The main arguments behind the desire to set up EPPO are that: OLAF, Europol and Eurojust (institutions currently dealing with European money fraud) have no powers to conduct criminal investigations, the power to prosecute offenses against the budget of the Union being the exclusive competence of the Member States;
- Member States' cooperation to secure the Union budget is precarious;
- and the fact that the rate of criminal prosecution for cases of fraud in the Union budget is low, and this is accompanied by a low level of recovery of fraudulent money. In 2015, for example - in addition to VAT fraud - national authorities reported frauds to the EU budget of around € 638 million, and annually, Member States lose at least € 50 billion in VAT revenue due to transnational fraud.

On these grounds, the role of the European Prosecutor's Office is seen as a solution to overcoming these shortcomings and to the repression of crimes affecting the financial interests of the EU.

2. Structure of the European Prosecutor's Office. Establishing Competence

Regarding the structure of the institution, in order to ensure the achievement of the established objectives, the Union envisaged a decentralized structure of the European Prosecutor's Office, which will function "according to the principle of indivisibility and solidarity" consisting of: The College, the Permanent Chambers, the European Prosecutor and his deputies, the staff supporting them in the performance of their tasks, the European Delegated Prosecutors established in the Member States.

The latter exercise their powers in those Member States that have agreed on the idea of enhanced cooperation for the implementation of EPPOs. Investigations and prosecutions of the European Prosecutor's Office are carried out by the European Delegated Prosecutors, under the direction and supervision of the European Prosecutor. There are at least two delegated European prosecutors in each Member State, who are part of the European Prosecutor's Office.

In order to establish the substantive competence of EPPO, the Explanatory Memorandum accompanying Regulation (EU) 2017/1939 implementing enhanced cooperation with regard to the establishment of the European Public Prosecutor, paragraph 11 states that the TFEU provides that the scope of EPPO's material jurisdiction is limited to offenses which affect the financial interests of the Union in accordance with this regulations.

EPPO's tasks should therefore be to investigate, perform the criminal inquiry and prosecute offenders against the financial interests of the Union. For other offenses, which would mean an extension of this competence, a unanimous decision of the European Council would be necessary.

The territorial and personal competence of the European Public Prosecutor shall be determined by applying the principles of *subsidiarity* and *proportionality*. By addressing the principle of subsidiarity, measures to counter tax fraud, especially cross-border, affecting the EU budget can be better achieved at the level of the European Public Prosecutor's Office.

In this respect, we take into account the fact that the current competences of the national institutions do not perform the criminal investigation phase in the most efficient manner. In terms of proportionality,

¹ <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32017R1939>.

the EPPO provisions do not go beyond what is necessary to achieve those objectives and ensure that its impact on the legal systems and institutional structures of the Member States is least intrusive.

A special situation arises in the case of conflicts of jurisdiction when a European Public Prosecutor from a Member State may initiate an investigation into a case handled by another European Public Prosecutor, in compliance with the following criteria: a) the place where the suspect or accused person is habitually resident, b) the nationality of the suspect or accused person, c) the place where the main financial damage occurred.

Before a criminal investigative decision is taken and with the hearing of the European Prosecutors Delegated in the Member States, the competent Permanent Chamber may decide either to relocate the case to a European Public Prosecutor in another Member State, or to merge or divide the cases and, in each case, the choice of the European Public Prosecutor to pursue it, sense in which the above-mentioned criteria apply. Conflicts of jurisdiction may also arise between EPPO and a judicial authority of a Member State, in which case jurisdiction will be determined by national authorities.

Problems may also arise as regards the functional competence of the European Public Prosecutor, starting from his dual quality - as a European Attorney Delegate and a National Prosecutor. Paragraph 32 of the Explanatory Memorandum to Regulation (EU) No. 2017/1939 provides that “*The European Delegated Prosecutors (...) when investigating or prosecuting offenses within the sphere of competence of EPPO, they should act exclusively on behalf and on behalf of EPPO on the territory of their respective Member State*”; art. (6) of the same Regulation states that “*the European Public Prosecutors (...) shall not seek or accept instructions from any person outside the EPPO from any Member State of the European Union or from an institution, body, office or agency of the Union their duties under this Regulation*”; and. art. 132 of the Romanian Constitution on the Status of Prosecutors “*(1) Prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control under the authority of the Minister of Justice. (2) The position of prosecutor is incompatible with any other public or private function, with the exception of teaching functions in higher education*”.

Given that Regulation (EU) No. 2017/1939 does not specify that the position of the national prosecutor would be suspended during the course of investigations within the EPPO, so implicitly the prosecutor concerned may carry out simultaneous inquiries both as a national prosecutor and as a European public prosecutor, we consider the idea that the European Delegate Prosecutor be suspended from office as a national prosecutor while exercising his mandate, which would also require a series of adaptations of domestic law regarding prosecution, trial and control.

3. Election of the European Chief Prosecutor

In order to be able to speak of the European Prosecutor’s Office as well as a zero point from which it can become functional, we have to report fundamentally to the head of this institution, the Commission, thus setting the date of commencement of EPPO operations on the basis of a proposal from European Chief Prosecutor. In other words, we first choose the leader and then establish the Prosecutor’s Office.

Currently, the procedure for electing the European Prosecutor is in full swing, among the candidates being also a Romanian citizen, with real chances of being appointed. Even if we do not yet know the elected person, what we know for sure is that it will ultimately be negotiated between the Council of the European Union and the European Parliament, which is likely to negatively affect the credibility of the appointment of the European Prosecutor, for, although we insist on the professional skills of the

candidates, on the remarkable results obtained by the candidates in the legal field, the final vote seems to have a pronounced political character.

In addition, the institution of the European Prosecutor's Office still raises many questions. What began as a coherent centralized structure was twisted and turned into a heavily and partially decentralized arrangement. This is largely the result of the compromises that had to be made to resolve the tensions between Brussels and the Member States, without losing the concept.

The effect is, however, to create a state of uncertainty, confusion and power struggles between the center and the national authorities in individual cases, which in turn may lead to delays and cases being abandoned or lost. It will also serve to shadow the functioning of EPPO, to the detriment of transparency and accountability.

There is also the likelihood of war of attrition between states and EPPO on jurisdiction in individual cases. There is also uncertainty about the relationship between EPPO and Eurojust and, more broadly, the relationship between EPPO investigations/prosecutions conducted by EPPOs and Member States not participating in EPPO.

In Romania, as expected, the Brussels moves to set up the EPPO and the election of its leader crystallized into a campaign for or against the Romanian candidate.

Against the backdrop of the lack of information, insufficient explanations by Romanian MEPs about the new institution, and in the context of media manipulations, social networking, we are witnessing street protests or heated debates in the social media and in the European Parliament on behalf of our representatives, exaggerations that contribute to the loss of citizens' confidence in an institution that has not even started its activity.

However, the really negative aspect of the whole discussion is altogether different: it reveals the incapacity or the ill will deeply rooted in society, in the public consciousness, namely that in Romania (in many cases) the head of the institution makes it possible to understand that it represents the institution in itself, the reality being quite different. The power in an institution, if it is built on a solid basis, does not sit with the person named or elected on the highest position, but with all the members of the team - appointed/employees/collaborators working within that institution.

In conclusion, I believe that, besides the doubts that may still exist on this new European body on the transfer of sovereignty, confusion over the competence of the EPPO at the level of the Member States, credit should be given to this "novelty", hoping that any deficiencies will be remedied and regulated right once the EPPO becomes operational.

EU funds should help boost growth, combat unemployment, support economic and social equality, strengthen education and research, and should not fund crime and if the European Parliament can better protect this objective in a fair and transparent way, then its establishment will certainly be a good thing for EU citizens.