

Zoran Burić*

SUPRANATIONAL PROSECUTING AUTHORITY AND THE NATIONAL ADMISSIBILITY OF EVIDENCE

1. INTRODUCTION

Although with the establishment of the European Public Prosecutor's Office a supranational prosecuting authority will be created, this will not entirely amount to the supranationalisation of criminal justice systems. Through the provisions of the Directive on the fight against fraud to the Union's financial interests by means of criminal law, which need to be implemented by Member States and transposed into national substantive criminal law provisions, national substantive criminal laws in the area of criminal offences against the financial interests of the Union will be harmonised. But these harmonised provisions will still be the provisions of the national legal order of the Member States.¹ The same is even truer for criminal procedural law where the Regulation only foresees the obligation of Member States to have certain investigative measures – those that the European Public Prosecutor must be able to request or order – regulated in their national criminal procedural orders. However, the Regulation does not set any common standards for national criminal procedural rules, which means that Member States are free in this regard. Thus, even though the creation of the European Public Prosecutor's Office represents the establishment of a supranational prosecuting authority, it does not amount to the creation of a unified supranational legal order. Both substantive and procedural criminal law remains regulated by the provisions of the national criminal law of the Member States. This can be seen especially in the area of criminal procedural law, where no common standards for inves-

* Zoran Burić, PhD, Assistant Professor at the Department of Criminal Procedural Law, University of Zagreb, Faculty of Law. This paper was co-financed by the Croatian Science Foundation under the project "Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future" (CoCoCrim).

¹ Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office, 15 January 2020, 2, available at: <http://www.statewatch.org/news/2013/sep/eu-meijers-cttee-european-public-prosecutor-office.pdf>.

tigative measures are created. Full supranationalisation of the criminal justice system² would also require the establishment of a European Criminal Court competent to try cases under the competence of the European Public Prosecutor. The Regulation does not provide for the creation of such a court. However, this is not due to the unwillingness of the drafters of the Regulation to have a European Criminal Court established, but due to the absence of the legal basis for such an institution in primary EU law.³

In a fully supranationalised model, there would be no need to talk about cross-border evidence gathering because the whole system would be characterised by supranational judicial and law enforcement authorities, and by unified supranational substantive and procedural criminal law. In the model of the European Public Prosecutor's Office, only a small part of the criminal justice system is supranationalised – a supranational prosecuting authority is established. However, substantive and procedural criminal laws remain to a high extent national, and so do other criminal justice actors. Because the European Public Prosecutor needs to make use of different criminal procedural orders of different Member States in order to investigate a case which includes a cross-border dimension, talking about the cross-border evidence gathering still makes sense.

The provisions of the Regulation contain a couple of references to cross-border situations and to the questions related to evidence in criminal matters. The most important characteristics of these rules are the following: (1) European territoriality in ordering investigative measures; (2) limitations arising out of national criminal procedural laws; and (3) mutual admissibility of evidence.

2. EUROPEAN TERRITORIALITY IN ORDERING INVESTIGATIVE MEASURES

The European Public Prosecutor can order or request the undertaking of investigative measures on the whole territory of the European Union. The investigative measures which the European Public Prosecutor may order or request can be divided into two groups: investigative measures which must be available under the law of Member States; and investigative measures which

² For the supranational model of EU criminal law and the various possible degrees in its development, see Ulrich Sieber (2009) "Die Zukunft des Europäischen Strafrechts, Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems" 121(1) ZStW, 22-23, 44ff.

³ Article 86 TFEU requires that adjudication of cases prosecuted by the EPPO remains on national level. See Katalin Ligeti and Michele Simonato (2013) 4(1-2) "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service, p 14.

do not have to be available under the law of the Member States. A list of investigative measures which must be available under the law of the Member States is given in Article 30(1) of the Regulation.

3. LIMITATIONS ARISING OUT OF NATIONAL CRIMINAL PROCEDURAL LAWS

Although the European Public Prosecutor can order or request investigative measures on the whole territory of the EU, this does not mean that the conditions for undertaking investigative measures are not made dependent upon the conditions foreseen in the national criminal procedural laws of Member States. In relation to the investigative measures which must be available under the national law of Member States, the Regulation prescribes that these measures are subject to the conditions set out in the national law of the Member State in whose territory the measure is undertaken.⁴ In relation to investigative measures that do not have to be available under the law of the Member States, the Regulation prescribes that they may only be ordered or requested by the European Public Prosecutor if available under the law of the Member State where the measure is to be carried out.⁵

Although the EPPO can order or request that the investigative measures be undertaken on the whole territory of the EU, the possibility to have the investigative measures executed depends largely on the conditions prescribed by the national laws of Member States. Although the EPPO acts on the whole territory of the EU, the European Public Prosecutor's activity is legally deeply rooted in the national legal systems of Member States.⁶

The Regulation, therefore, did not accept the approach which was developed in the research project which was conducted by the University of Luxembourg, under the leadership of Ligeti.⁷ The project resulted in a system of procedural rules which define the status and the powers of the EPPO and its relation with the national criminal justice system. They are divided into three parts: the general part; the investigation phase; and the prosecution phase and the bringing to judgment. The starting premise of the project is that the EPPO,

⁴ Article 30(2) of the Regulation.

⁵ Article 30(4) of the Regulation.

⁶ Meijers Committee (n 1) p 5.

⁷ The results of the research project named "Model Rules for the Procedure of the EPPO" are available at: <https://orbilu.uni.lu/handle/10993/42085>. About the work of the research group, see Zlata Đurđević, Elizabeta Ivičević Karas and Zoran Burić, "Konferencija Projekt za Ured europskog javnog tužitelja (Nacrt europskih oglednih pravila o kaznenom postupku) (2012) 19(1) *Croatian Annual of Criminal Sciences and Practice*, pp 363-369.

if it is to become a genuinely European prosecuting authority established in accordance with the objectives of the Area of Freedom, Security and Justice, needs to be equipped with a “set of powers uniformly formulated and valid in all Member States participating”.⁸ The elaboration and acceptance of such rules would enable the EPPO to undertake European investigations free of the difficulties which arise from the differences in the national legal orders of Member States.⁹ The fact that the Regulation did not follow this approach, but accepted a much more modest one, where the investigative and prosecutorial activities of the EPPO are not based on a uniform supranational set of rules, but are rooted in the specificities of the national legal orders of Member States, shows that the need to safeguard Member State national sovereignty and cultural identity in the area of criminal procedural law was an interest which was well taken care of in the negotiation process.

4. MUTUAL ADMISSIBILITY OF EVIDENCE

As explained above, although the EPPO is competent to conduct investigations on the whole territory of the EU, depending on the case, it might need to rely on the criminal procedural rules of different Member States. If the case in the hands of the EPPO includes a cross-border dimension and if investigative measures need to be undertaken on the territory of different Member States, the admissibility of the measures, as well as the form of their execution, is determined by the law of the Member State on the territory of which the investigative measure is undertaken. This might mean that the evidence collected during the investigation, which the EPPO plans to use in order to submit the indictment, might originate from different criminal procedural orders.

When a case is transferred from the investigation to the indictment and trial phase, the competence of the court which is to try the case must be determined. It is highly possible that the evidence to be presented before this court would not have been gathered in accordance with the criminal procedural rules of the Member State where the court is situated. This might raise the question of the admissibility of evidence. The Regulation resolves this issue by prescribing a very soft rule on the mutual admissibility of evidence. The admission of evidence collected by the EPPO, which might originate from the criminal procedural orders of different Member States, will not be refused on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.¹⁰

⁸ Ligeti and Simonato (n 3) p 7.

⁹ Ibid, pp 18-20.

¹⁰ Article 37(1) of the Regulation. See Zlata Đurđević, “Judicial Control in Pre-trial Crim-

5. CONCLUSION

In order to solve problems arising from the inadequate level of criminal law protection by Member States of legal interests which are of utmost importance to the EU, a model of European criminal justice is created where elements of law enforcement are shifted from the national to the supranational level. The model of the European Public Prosecutor's Office proposes the creation of a supranational procedural authority which will have exclusive competence for offences against the Union's financial interests on the entire territory of the EU. The competence of the EPPO is not dependent on the national or transnational character of the underlying offence.

In order to enable the EPPO to undertake investigative acts in all the Member States of the EU, the concept is based on the idea of European territoriality. This means that the EPPO can act on the entire territory of the EU. National borders which impede national prosecution authorities from undertaking activities on the territory of other Member States are shifted when it comes to the activities of the EPPO. This means that the cross-border evidence gathering in the traditional sense, as an activity involving judicial authorities among different States, is not applicable here. However, with the EPPO model, supranationalisation is put into effect only at the organisational level, and only in relation to prosecutorial activities. Other law enforcement activities and the indictment and trial phase of the criminal procedure remain national. In addition, criminal laws remain national, especially criminal procedural laws. Although the EPPO can undertake its investigative activities in all Member States, when undertaking them it is not governed by a supranational criminal procedural order, but by the national law of the Member States. Since the EPPO can undertake its activities on the whole territory of the EU, the criminal procedural laws of all Member States, as a framework for its activities, come into account.

inal Procedure Conducted by the European Public Prosecutor's Office" in Katalin Ligeti (ed), *Toward a Prosecutor for the European Union, Volume I: A Comparative Analysis* (Hart Publishing, 2013).