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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND CROATIAN CRIMINAL JUSTICE: IMPLEMENTATION REQUIREMENTS AND POSSIBLE SOLUTIONS**

The European Public Prosecutor's Office (EPPO) was set up in 2017, after successfully completing the legislative process that began in 2013. The EPPO is conceived as an EU body with legal personality and acts as a single office with a decentralised structure which, in addition to the central office, also operates in the participating EU Member States. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office sets certain implementing obligations for the national legal systems of those States. Although regulations are EU legal acts that are binding in their entirety and directly applicable, the EPPO Regulation nevertheless requires certain interventions for the purpose of implementation. Specifically, the Regulation refers to the application of national law to the extent that a matter is not regulated by the Regulation, prescribes certain minimum investigative powers that States should provide to the EPPO, and opts for a prosecutorial inquiry model.

The paper discusses the implementation requirements that the Regulation places before the Croatian criminal justice system, especially with regard to the implementation of the Office's structure, its material competence and the exercise of its prosecutorial and investigative powers. It considers what has been done so far, gives an overview of the proposed solutions, outlines the comparative legal solutions available, and makes suggestions for resolving some of the requirements. In this regard, the analysis shows that the powers of the Croatian State Attor-

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ney in criminal proceedings are largely in line with the requirements of the Regulation and that there are therefore no major implementation obligations.

Keywords: The European Public Prosecutor's Office, EPPO, European Delegated Prosecutors, European Prosecutors, implementation of the EPPO Regulation, Croatia

1 INTRODUCTORY NOTES

The European Public Prosecutor's Office was established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: the Regulation).¹ This opened up the possibility provided for in the Treaty on the Functioning of the European Union (TFEU),² which, in Art. 86(1) lays down the possibility of establishing the Office unanimously after obtaining the consent of the European Parliament, or in the form of enhanced cooperation if this was the wish of at least nine Member States.³ The main reason for the establishment of the European Public Prosecutor's Office was the dissatisfaction with the protection of the financial interests of the Union provided by national criminal justice authorities, which currently do not always sufficiently investigate and prosecute offences against the financial interests of the Union, and, which, due to the fragmentation of the national measures of criminal prosecutions, do not sufficiently achieve the set objective (Recitals 3 and 12 of the Regulation). The Regulation came into effect on 20 November 2017, and currently 22 Member States participate in enhanced cooperation.⁴

In the paper's introduction, a description is given of the structure and competences of the European Public Prosecutor's Office as provided for by the

¹ [2017] OJ L EU L 283.

² Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union [2016] OJ L EU C 202.

³ For details on the importance of providing the possibility for establishing the European Public Prosecutor's Office in the Lisbon Treaty [2007] OJ L EU C 306/1 after two earlier failures – at the Nice Conference and in the failed Constitutional Treaty – see Zlata Đurđević, "Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi" (2008) 15(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 1112-1114. For the chronology of the legislative procedure see Recitals 4–8 of the Regulation.

⁴ Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain. On the other hand, Ireland, Hungary, Poland, Sweden and the UK do not participate in enhanced cooperation, and Denmark opted out of the Area of Freedom, Security and Justice.

Regulation, and the basic principles of its operation. Thereafter, consideration is given to the implementation requirements that the Regulation on the European Public Prosecutor's Office (hereinafter: EPPO Regulation) sets before the Croatian legal system, as well as possible solutions for some of these requirements.⁵ There is a need for implementation into national legislation, although the European Public Prosecutor's Office was established by a Regulation, and regulations, pursuant to Art. 288 TFEU, are legal acts that are binding in their entirety and directly applicable in all Member States, and it is even stated that their implementation is prohibited.⁶ The Regulation refers to the application of national law to the extent that a matter is not regulated by the Regulation itself (Art. 5(3)), prescribes particular minimal investigation competences (Art. 30) that must be attributed to the Office, and opts for a model of prosecutorial investigation, which requires greater or lesser legislative interventions for the purpose of implementation in the Member States.

To be able to consider the implementing obligations, it is necessary first to clarify the legal status of EU legal acts in the Croatian legal order. Art. 141(c) of the Constitution of the Republic of Croatia⁷ prescribes that all the legal acts and decision accepted by the Republic of Croatia in EU institutions are to be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*. The European Court of Justice developed in its case law the notion (or principle) of supremacy of EU law over the laws of Member States, according to which a directly applicable rule of EU law must be applied even when there is a conflicting rule, including a constitutional rule, in the national law.⁸ Without deepening the discussion, since it goes beyond the topic of this paper, it must be emphasised that the constitutional courts of Member States have not fully accepted this supremacy of EU law over their national constitutions.⁹

When considering the need to adopt, amend or delete some provisions for the purpose of implementing the Regulation, the following situations, similar

⁵ A precondition for the successful implementation of the European Public Prosecutor's Office is also the correct transposition of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud related to the Union's financial interests by means of criminal law [2017] OJ L EU 198, the so-called PIF Directive, which lays down the basic criminal offences under the EPPO's competence.

⁶ Đurđević (n 3) p 1106.

⁷ Constitution of the Republic of Croatia, Official Gazette nos 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014.

⁸ Tamara Čapeta, "Nacionalni Ustav i nadređenost prava EU u eri pravnog pluralizma" (2009) 59(1) *Zbornik Pravnog fakulteta u Zagrebu*, pp 65 and 66. In the context of criminal law see Zlata Đurđević, "Mehanizmi utjecaja prava Europske zajednice na kaznenopravne sustave država članica" (2004) 54(2) *Zbornik Pravnog fakulteta u Zagrebu*, pp 300ff.

⁹ Čapeta (n 8) pp 76-78.

to the considerations concerning the context of cooperation with international criminal courts,¹⁰ may arise:

- a) an implementing provision is not necessary because the provisions of the Regulation are directly applicable. Considering the legal nature of the Regulation, most provisions should be directly applicable;
- b) the provisions of the Regulation are directly applicable, but an implementing provision is adopted, which replicates its content. In principle, such provisions should be avoided, although, in particular circumstances, their adoption might be justified;¹¹
- c) an implementing provision is necessary to supplement the directly applicable provision of the Regulation so as to facilitate the fulfilment of an obligation;
- d) an implementing provision is necessary because the provision of the Regulation is not directly applicable, including situations in which the Regulation refers to the application of the national legislation;
- e) there is a provision in the national legislation that is contrary to the provisions of the Regulation. As mentioned above, in this case, the provision of the Regulation applies, and the national provision is set aside.

Below, the structure and the competences of the EPPO are described (Part 2), followed by an examination of the implementation requirements concerning the structure and material competence of the EPPO (Part 3), and its prosecutorial and investigative competences (Part 4). In this way, the provisions regulating the structure and competences of the EPPO are selectively examined, only to the extent necessary to consider the implementation requirements and possible solutions in the Croatian judicial system. Finally, some conclusions are presented regarding the implementation of the Regulation in the Croatian criminal justice system.

¹⁰ Marin Bonačić, "Postupak predaje okrivljenika Međunarodnom kaznenom sudu iz perspektive hrvatskog provedbenog zakonodavstva" (2017) 24(1) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 67 and 68.

¹¹ Thus, Josipović states that the Act on the Application of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law includes such provisions when this is necessary to fully understand part of the matter regulated by this law. Ivo Josipović, "Novo hrvatsko implementacijsko kazneno pravo – procesnopravni i organizacijski aspekti" (2003) 10(2) *Hrvatski ljetopis za kazneno pravo i praksu*, p 854.

2 THE STRUCTURE AND COMPETENCES OF THE EPPO

The EPPO is conceived as a body of the Union with legal personality (Art. 3 of the Regulation¹²), acting as one single Office with a decentralised structure organised both at a central level and a decentralised level (Art. 8(1)(2) of the Regulation). It has been set out that the Office and all its bodies “act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union”. It has also been prescribed that the Member States of the European Union and the institutions, bodies, offices and agencies of the Union must respect the independence of the EPPO and not seek to influence it in the exercise of its tasks (Art. 6 of the Regulation). With regard to its foreseen independence, there are, nevertheless, some concerns about whether the complex structure of the EPPO will guarantee the independence of the Delegated European Prosecutors since protection against their removal from office has not been guaranteed, and the foreseen “double hat” system, or the simultaneous work of both the EPPO and the national prosecution service, could also have a negative effect on such protection.¹³

At the central level, within the central office, there is a College, Permanent Chambers, the European Chief Prosecutor and two Deputy European Prosecutors, European Prosecutors, the Administrative Director, and the staff of the Office (Art. 8(3) and (5) of the Regulation). A concern has been expressed that the adopted organisational structure, which is different from that suggested in the original Commission proposal, would probably be “at least inefficient, if not ineffective”.¹⁴ The decentralised level consists of European Delegated Prosecutors (Art. 8(4) of the Regulation) who act in their respective Members States (Art. 13(1) of the Regulation). In exceptional cases, the European Prosecutors may act at the level of a Member State, where this appears to be indispensable in the interest of the efficiency of the investigation or criminal prosecution (Art. 28(4) of the Regulation). The European Delegated Prosecutors are responsible for those investigations and prosecutions that they have initiated, that have been allocated to them, or that they have taken over using their right of evocation. In doing this, they must follow the direction and instructions of

¹² Hereinafter, only Articles regarding the provisions of the Regulation will be referred to.

¹³ Antonio Martínez Santos, “The Status of Independence of the European Public Prosecutor's Office and Its Guarantees” in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018) p 21.

¹⁴ Marianne L. Wade, “The European Public Prosecutor: Controversy Expressed in Structural Form” in Tommaso Rafaraci, Rosanna Belfiore (ed), *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2019) p 178.

the Permanent Chamber in charge of a case as well as the instructions of the supervising European Prosecutor. In addition, they are also responsible for the follow-up stages of the procedure: for bringing a case to judgment, for presenting trial pleas, participating in taking evidence and exercising the available remedies in accordance with national law (Art. 13(1) of the Regulation).

The relationship between the Permanent Chambers and the European Delegated Prosecutors has been regulated in great detail, and the European Delegated Prosecutors are less autonomous in their actions than state attorneys in the Croatian criminal procedure. Thus, the Permanent Chambers decide on whether to bring a case to judgment or dismiss a case,¹⁵ whether to apply a simplified prosecution procedure,¹⁶ to refer a case to the national authorities, or to reopen an investigation on the basis of new facts (Art. 10(3) of the Regulation). The Permanent Chambers can also instruct the European Delegated Prosecutor: a) to initiate an investigation; b) to exercise the right of evocation; and c) to allocate or reallocate a case. In addition to this, the Permanent Chambers approve the decision of a European Prosecutor to conduct the investigation himself/herself (Art. 10(4) of the Regulation).

3 IMPLEMENTATION OF THE STRUCTURE AND OF MATERIAL COMPETENCE OF THE EPPO

3.1 Implementation of structure of the EPPO

Considering the direct application of the Regulation, implementation issues can only arise in terms of the European Delegated Prosecutors and the European Prosecutors. The Regulation requires that there should be a minimum of

¹⁵ Pursuant to Art. 39 of the Regulation, a case may be dismissed on the following grounds: (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person, unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts; (g) the lack of relevant evidence.

¹⁶ Art. 40 of the Regulation sets out that, if the national law provides for a simplified prosecution procedure aiming at the final disposal of a case on the basis of terms agreed with the suspect, the handling European Delegated Prosecutor may propose to the competent Permanent Chamber to apply that procedure (Art. 40(1)). The criteria taken into account by the Chamber and the guidelines it adopts concerning their application are as follows: a) the seriousness of the offence, based on, in particular, the damage caused; b) the willingness of the suspected offender to repair the damage caused by the illegal conduct; c) that the procedure would be in accordance with the general objectives and basic principles of the EPPO (Art. 40(2)).

two *European Delegated Prosecutors* in each Member State, and the exact number is approved by the Chief European Prosecutor after consulting and reaching an agreement with the relevant authorities of the Member States (Art. 13(2) of the Regulation). The European Prosecutors are nominated by the Member States and appointed by the College upon the proposal of the Chief European Prosecutor. The European Delegated Prosecutors, from the time of their appointment until dismissal, must be active members of the public prosecution service or judiciary of the respective Member States which nominated them (Art. 17(1)(2) of the Regulation).

The European Delegated Prosecutors are employed as Special Advisors, and the competent national authorities have the obligation to provide them with the resources and equipment necessary to exercise their functions. In addition to this, the Member States must ensure that adequate arrangements are in place so that: a) the rights relating to social security, pension and insurance coverage under the national scheme are maintained; b) and that the total remuneration of a European Delegated Prosecutor is not lower than what it would be if that prosecutor had remained a national prosecutor (Art. 96(6) of the Regulation). It will be necessary to regulate this specific solution through implementing provisions to ensure that European Delegated Prosecutors maintain these rights and that their remuneration is not lower than it would be if they had remained national prosecutors, although the latter situation is not probable in the Republic of Croatia.

Member States are given the freedom to decide how to organise the operations of the European Delegated Prosecutors. In general, two solutions are possible: that they act in one centralised body; or they are distributed in different territories. For example, in Portugal, the decision was taken that its European Delegated Prosecutors would act before the investigative and appellate courts in Lisbon and Porto.¹⁷ Croatia, from the very beginning, has been considering the solution that they should act within the Office for the Suppression of Corruption and Organised Crime (USKOK).¹⁸ However, since the EPPO operates as a first-instance and second-instance prosecutor, there was a proposal to consider whether a Croatian Deputy State Attorney General should assume the role of European Delegated Prosecutor, which would make this

¹⁷ Vania Costa Ramos, "European Public Prosecutor's Office Implementing Law Approved in Portugal", *eucrim*, 12 September 2019, available at: <https://eucrim.eu/news/european-public-prosecutors-office-implementing-law-approved-in-portugal>, Accessed 20 November 2019.

¹⁸ Dražen Jelenić, "Europeizacija kaznenog progona – Ured europskog javnog tužitelja u Republici Hrvatskoj" in Jakša Barbić (ed), *Europska budućnost hrvatskog kaznenog pravosuđa. Round table held on 24 May 2018 in the building of the Zagreb Academy* (Croatian Academy of Sciences and Arts, 2018) pp 110 and 111.

solution closer to the arrangement in our legal order.¹⁹ Even though this issue has not yet been legislated, it seems that it has been accepted that the European Delegated Prosecutors will act within USKOK, which is now competent for most of the crimes within the EPPO's competence, and that this will require changes to the Act on the Office for the Suppression of Corruption and Organised Crime (the USKOK Act), providing for European Delegated Prosecutors as a new category of prosecutors, and broadening the competence of USKOK.²⁰ Provided that this is adopted, four County Courts that currently have jurisdiction over USKOK cases, and have special court divisions for these types of criminal offences (Art. 31 and 32 of the USKOK Act), will have subject-matter and territorial jurisdiction for cases under the competence of the EPPO.²¹ The advantages of such a solution would be that proceedings would be conducted closer to the place where the offence was committed, which would have a beneficial effect on the economy of proceedings, whereas the disadvantage would be that two European Delegated Prosecutors (and their number will probably amount to two) would have to bring actions before four courts, which would hamper the performance of their tasks. The best solution in this case would probably be to give them the opportunity, depending on the circumstances of the particular case, to choose before which of the four competent courts they wish to proceed. In other words, more flexible rules should be introduced when it comes to the territorial jurisdiction of these courts. Another issue that needs to be regulated is the fact that it is mentioned that the deployed Deputy Directors of USKOK are appointed for a term of four years (Art 8 of the USKOK Act), while the European Delegated Prosecutors are appointed for a term of five years.²² This could be resolved in the implementing regulation in such a way as to prescribe that the term of office of Deputy Directors of USKOK when appointed as European Delegated Prosecutors should last as long as their term of office of European Delegated Prosecutor, that is, five years.

Concerning the number of cases, in the period from 2012 to 2016, there were a total of 25 criminal reports by natural persons, and five criminal reports of legal persons, and indictments were raised against 13 persons,²³ thus the most acceptable solution is deemed to be the so-called "double hat" system

¹⁹ Ibid., pp 95 and 96.

²⁰ Tamara Laptoš, "Uloga i položaj europskog javnog tužitelja u hrvatskom prethodnom postupku" (2019) 28(4) *Policija i sigurnost*, pp 499 and 500. The author states that this includes receiving and offering bribes, receiving and offering bribes in economic transactions, abuse of office and official authority by an official person, participation in a criminal organisation, and all criminal offences perpetrated within a criminal organisation, including for the purpose of money laundering and tax evasion.

²¹ These include the County Courts in Osijek, Rijeka, Split and Zagreb.

²² Ibid., p 500.

²³ Jelenić (n 18) p 88.

referred to in Art. 13(3) of the Regulation, according to which the European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under the Regulation.²⁴

Although it has been emphasised that the independence of European Delegated Prosecutors should be ensured by law,²⁵ such a provision is not strictly necessary because the Regulation, as a supra-legal act, sets out in its Art. 6 that the EPPO is independent and, among other things, that the European Delegated Prosecutors should neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union, or any institution, body, office or agency of the Union in the performance of their duties under the Regulation, and that the Member States of the European Union must respect the independence of the EPPO and must not seek to influence it in the exercise of its tasks.

An implementation requirement is also the obligation of bearing the costs of the European Delegated Prosecutors regarding the investigation measures carried out by the competent national authorities or the costs of legal aid, although there is a possibility for the EPPO to bear part of the costs related to exceptionally costly investigation measures (Art. 91(5) and (6) of the Regulation). Regarding this, the Republic of Croatia will need to allocate funds in its budget for the operations of the EPPO within its territory.

An implementing obligation of each participating Member State is also to nominate three candidates who meet the set criteria for the position of *European Prosecutor*.²⁶ The Council selects from the proposed candidates by simple majority based on the reasoned opinion of the selection panel (Art. 16). The procedure of selecting candidates has been regulated by the Ordinance regarding the conditions and procedure of nominating candidates for the appointment of the European Prosecutor.²⁷ The Ordinance was adopted pursuant to Art. 107(5) of the State Attorney's Office Act,²⁸ which prescribes that all the rights and obligations arising from the performance of state attorney duties of state attorneys or deputy state attorneys who have been nominated to work in EU institutions are to be suspended during the term for which they have been

²⁴ Laptoš (n 20) p 499.

²⁵ Ibid., p 500.

²⁶ Pursuant to Art. 16(1), the candidates must: a) be active members of the public prosecution service or judiciary of the relevant Member State; b) be persons whose independence is beyond doubt; and c) possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters.

²⁷ Official Gazette, no. 23/2019.

²⁸ Official Gazette, no. 67/2018.

nominated or appointed, and pursuant to Art. 88 of the Courts Act,²⁹ which regulates the suspension of the rights and obligations of posted judges. On the basis of the Ordinance, the Croatian government met its obligation in April 2019, when it nominated three candidates for the position of European Prosecutor. The nomination of European Delegated Prosecutors may be conducted according to the same model, or the conditions and the procedure can be prescribed through implementing provisions.

3.2 Implementation of the material competence of the EPPO

The material competence of the EPPO is regulated by Art. 22 of the Regulation which includes: a) the criminal offences that are provided for in Directive (EU) 2017/1371, with some limitations, as implemented in national law; b) offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in the PIF Directive; and c) any other criminal offence that is inextricably linked to criminal conduct that falls within its scope (Art. 22).³⁰ Nevertheless, pursuant to Art. 25(2), the competence of the Office is limited when the damage to the Union's financial interests is of less than EUR 10,000 (Art. 25(2)), and in cases where the sanction provided for an offence referred to in the PIF Convention is equal to or less severe than the maximum sanction for an inextricably linked offence, and where the damage caused to the Union's financial interests does not exceed the damage caused, or likely to be caused, to another victim (Art. 25 (3)).³¹

In line with the presented rules, it can be concluded that for the mentioned crimes, the EPPO has comparative (competitive) competence with national authorities, where prosecution by national prosecutors has priority,³² which

²⁹ Official Gazette, nos. 28/2013, 33/2015, 82/2015, 82/2016, 67/2018.

³⁰ For the successful functioning of the EPPO, it is important to correctly transpose the criminal offences referred to in the PIF Directive into the national criminal legislation. Since the material competence of the EPPO is not the topic of this paper, it refers only to an analysis which shows that the Republic of Croatia has not transposed this Directive in a satisfactory manner. See Lucija Sokanović, "Materijalna nadležnost Ureda europskog javnog tužitelja – hrvatska perspektiva" (2019) 26(2) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 669-692.

³¹ The Regulation also provides for the possibility that the College, with regard to offences which have caused or are likely to cause damage to the Union's financial interests of less than EUR 100,000, issues general guidelines with clear criteria, when, 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 prosecute at Union level (Art. 27(8)).

³² The Regulation provides for a system of shared competence (Recital 13).

means that the competent authorities will not exercise their own competence if the EPPO decides to exercise its competence (Art. 25(1)) and that the EPPO may exercise its right of evocation pursuant to Art. 27 of the Regulation. With regard to the principles of subsidiarity and proportionality, it has been emphasised that such power is left to the discretion of the EPPO, and that the EPPO, when exercising this power, should be guided by the complementarity principle, which means that it would exercise its right of evocation only when national authorities are unwilling or unable to genuinely conduct the prosecution at national level.³³

The Regulation also provides for the possibility of disagreement over the question of who is competent between the EPPO and the national criminal prosecution authorities, and prescribes that the decision on who is to be competent is made by “the national authorities competent to decide on the attribution of competence concerning prosecution at national level” (Art. 25(6)). Since a common immediately senior state attorney who could resolve the conflict of competences between the EPPO and the national state attorney does not exist (a request pursuant to Art. 39(3) of the Criminal Procedure Act³⁴), it will be necessary to prescribe which authority is to decide in such a case. The logical solution would be that this decision be made by the State Attorney General of the Republic of Croatia.³⁵

The last, general question related to the implementation of the competences of the EPPO is whether this competence should be set out in the Croatian Constitution. The Constitution prescribes that the State Attorney's Office is an autonomous and independent judicial body empowered and duty-bound to institute the prosecution of perpetrators of criminal and other offences (Art. 21(a)). After the adoption of the Regulation, the EPPO will also, within its competence, be empowered and duty-bound to instigate the prosecution of perpetrators of criminal offences, hence, the respective constitutional provision could be supplemented in these terms. Considering the supremacy of EU law mentioned in the introduction, such an amendment would probably not be necessary for the implementation of the Regulation into the Croatian legal system, but the author considers that such an amendment would be justified bearing in mind the mentioned constitutional provision on the competence of

³³ Helmut Satzger, “The European Public Prosecutor's Office and Its Coordination with the National Public Prosecutor's Office: The Model of Complementarity” in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018) p 52.

³⁴ Official Gazette, no. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017.

³⁵ See also Jelenić (n 18) p 100, who states that this was the solution selected by the Czech Republic in its Public Prosecutor's Office Act (Art. 34).

the State Attorney's Office of the Republic of Croatia, and the fact that the EPPO will operate within the Croatian criminal justice system. The issue of harmonisation with the Constitution was raised in France, where, on the one hand, the Constitutional Court considers that only the judiciary may set out measures that affect personal freedoms, and thus the EPPO should be considered part of the judiciary, while, on the other hand, the Constitution refers directly to the Lisbon Treaty.³⁶

4 IMPLEMENTATION OF THE PROSECUTORIAL AND INVESTIGATIVE POWERS OF THE EPPO

Considering the above, the first implementation requirement is to ensure that the EPPO enjoys the status of authorised prosecutor in the national criminal procedure. Jelenić states as a possible solution, an amendment to Art. 202 point 14 of the Criminal Procedure Act, where the EPPO would be added and defined as “a prosecutor which in criminal proceedings for criminal offences under its competence has all the powers and duties that are by law also held by the state attorney”.³⁷ Since the EPPO is represented by European Delegated Prosecutors before Croatian courts and, exceptionally, by the European Prosecutor (pursuant to Art. 28(4) of the Regulation), this definition could be narrowed in such a manner as to mention the European Delegated Prosecutor and the European Prosecutor instead of the EPPO. In addition, perhaps it would be better to prescribe that, in cases where the EPPO has competence, the European Delegated Prosecutor and the European Prosecutor are deemed to be state attorneys. This could avoid the potential situation where the court has to establish whether the EPPO or the national state attorney is the authorised prosecutor in a particular case, and render a judgment “rejecting” the charges because the request has not been made by an authorised prosecutor.³⁸ This is particularly important because the competence of the EPPO depends on many circumstances of a particular case, and, in the case of disagreement regarding this issue, the Croatian State Attorney General is the one who should decide rather than the courts.

³⁶ Emanuelle Wachenheim, “The Consequences of the Institution of the European Prosecutor's Office: The Status of the European Prosecutor in France and the Necessary Amendments in the French Penal Order” in Miranda Fidelbo, (ed), *International Conference on Enhanced Cooperation for the Establishment of the EPPO* (Fondazione Lelio e Lisli Basso, 2018) p 81.

³⁷ Jelenić (n 18) p 85. See also Laptoš (n 20) p 496.

³⁸ Such a possibility was presented at the international conference “Integration of the EPPO in the National Justice Systems: Institutional, Procedural and Cooperative Challenges” held in Zagreb in April 2019.

Pursuant to Art. 4, the EPPO is responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences under its competence. It is additionally emphasised that, in these cases, it undertakes investigations and carries out acts of prosecution and exercises the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of. It can therefore be concluded that the powers foreseen for the EPPO are generally those of the prosecutor in systems that have prosecutorial investigation in place. Considering that since 2008 in Croatia this has been the status of the state attorney, this has a positive effect for there will be no need to introduce additional implementing measures in this regard. As opposed to this, those states that have investigating judges will encounter many more problems when implementing the prosecutorial and investigative powers of the EPPO. Spain is an example of such a state, which is considering a radical change in the structure of the entire pre-trial procedure and a transition into prosecutorial investigation, or prescribing a special procedure for cases under the competence of the EPPO.³⁹ The problem in such states is that investigating judges, as opposed to European Delegated Prosecutors, due to their independence, may not receive orders from the EPPO concerning the manner in which they conduct their procedures.⁴⁰ Besides Spain, other examples of such states are Slovenia, and, partially, Belgium and France.⁴¹ In France, the investigating judge carries out 3% of the investigations regarding the most complex and most serious crimes.⁴² In these cases, the investigating judge could not be a European Delegated Prosecutor since he/she may not receive hierarchical instructions and conduct proceedings until a judgment is rendered, or lodge appeals, while broadening the powers of the state attorney to embrace such cases would represent a significant evolution.⁴³ A different situation is also possible in some countries which might encounter implementing problems because the specific powers assigned to the EPPO are held by other state authorities in the national legal system, such as the police, customs services, etc.

A question that must be examined during the implementation is how to regulate the powers of the EPPO regarding extraordinary legal remedies. This depends on the interpretation of the term “final” referred to in the Regulation. Pursuant to Recital 31, it means “the resolution of any legal action or remedies available”, but according to the Croatian translation (“konačno”), it is not clear

³⁹ David Vilas Álvarez, “The EPPO Implementation: A Perspective from Spain” (2018) 2 *eu crim*, pp 126 and 127.

⁴⁰ *Ibid.*, p 126.

⁴¹ David Vilas Álvarez, “The EPPO Implementation: The Spanish Case” in Fidelbo (n 36) p 74.

⁴² Emanuelle Wachenheim, (n 36), p 82.

⁴³ *Ibid.*

whether this also includes extraordinary legal remedies. The problem lies in the fact that, according to the Criminal Procedure Act, the only person authorised to submit a request for the protection of legality is the State Attorney General (Art 509(1) CPA), and a copy of the request to review a final judgment is also delivered to him/her (Art. 518(4) CPA). Jelenić considers that the Croatian State Attorney General should continue to be authorised to submit a request for the protection of legality, because this is not a continuation of criminal prosecution, but “the exercise of the powers and duties of the State Attorney’s Office referred to in Art. 125(1) of the Constitution of the Republic of Croatia to lodge legal remedies for the protection of the Constitution and the law in criminal proceedings to both the benefit and the detriment of the accused”.⁴⁴ Nevertheless, when it comes to a request for the extraordinary review of a final judgment, he considers that the convicted person’s request, without the file, should also be delivered to the EPPO.⁴⁵ However, since the Republic of Croatia has ceded competence for the prosecution of particular criminal offences to the EPPO, it would be justified to enable it also to autonomously decide on the lodging of a request for the protection of legality.

Another area that will perhaps need regulating during implementation are the deadlines for state attorneys undertaking individual actions. An example would be the deadline for raising an indictment referred to in Art. 230 CPA. According to this deadline, the state attorney must, within a month from entering the completion of the investigation or research in the criminal register, raise an indictment or discontinue the investigation/dismiss the criminal charge, and if he/she fails to do so, it will be deemed that he/she has desisted from criminal prosecution (this is a preclusive deadline). One possible interpretation is that such deadlines do not apply to European Delegated Prosecutors. However, since they operate according to the rules of the national legal order, the only consistent interpretation would be that the deadlines that apply for national prosecutors also apply to them. Otherwise, it would be difficult to explain why these deadlines apply to the most serious international crimes, such as genocide, and do not apply to criminal offences which are usually under the jurisdiction of a municipal court. If this stance is accepted, this will lead to the problem that the European Delegated Prosecutor will have to submit a draft decision to the Permanent Chamber which will decide on the draft within 21 days (Art. 36(1) of the Regulation). Considering this deadline, the Croatian Delegated Prosecutor would have a very short time to draft the indictment if he/she wishes to meet the requirements provided for in the CPA. For this reason, a justification should be considered to extend this deadline in EPPO cases for the time that the Permanent Chamber takes to decide on the

⁴⁴ Jelenić (n 18) p 95.

⁴⁵ *Ibid.*, pp 95 and 96.

draft. Đurđević also points out this problem, including that the Regulation does not provide for the establishment of disciplinary liability of European Delegated Prosecutors, which is the precondition for reopening proceedings referred to in Art. 500(3) CPA in cases where the state attorney has not raised an indictment in due time.⁴⁶ In Art. 17, the Regulation sets out that a Member State may not dismiss or take disciplinary action against a European Delegated Prosecutor for reasons not connected with his/her responsibilities under the Regulation without the consent of the European Chief Prosecutor. However, in the situation where the preclusive deadline for raising the indictment has been missed, it will be in the interest of the European Chief Prosecutor to give his/her consent to the State Attorney's Office to initiate disciplinary action. It should be possible to reopen such proceedings even according to the present solution. However, consideration should be given in such cases to authorising the EPPO to autonomously take disciplinary action against European Delegated Prosecutors.

A similar problem with deadlines also appears in the case where an appeal is lodged, when the European Delegated Prosecutor must also submit a draft decision to the Permanent Chamber and await its instructions, and, if it is impossible to await those instructions within the deadline set by national law, he/she is entitled to lodge the appeal without prior instructions from the Permanent Chamber (Art. 36(7) of the Regulation).

An even greater problem is the deadlines concerning the duration of an investigation prescribed by the Criminal Procedure Act. In its Art. 229(1), it prescribes that the investigation must be concluded within six months after the decision on the conclusion of the investigation has become final. When there are justified reasons, the state attorney may extend this deadline for a maximum of another six months (Art. 229(2) and (3)). The first question in this regard is whether these deadlines also bind European Delegated Prosecutors when they conduct investigations since the Regulation has supremacy over national law.⁴⁷ Since European Delegated Prosecutors, as already mentioned, conduct investigations in conformity with the national law, it can be concluded that the mentioned deadlines will also apply to such investigations. If this is accepted, the question arises of who would in such a case be competent to decide on extending the deadline for investigations.⁴⁸ The Regulation in Art. 12(4) prescribes that where the national law of a Member State provides for the internal review of certain acts within the structure of a national prosecutor's office, the review of such acts taken by the European Delegated Prosecutor falls under the super-

⁴⁶ Zlata Đurđević, "Legislative or Regulatory Modifications to Be Introduced in Participant Member States to the Enhanced Cooperation" in Fidelbo (n 36) p 108.

⁴⁷ Laptoš (n 20) p 508.

⁴⁸ *Ibid.*; Đurđević (n 46) p 108.

visory powers of the supervising European Prosecutor. If the extension of the deadlines for the duration of an investigation can be deemed as a “review of certain acts”, or as supervisory powers of the (supervising) European Prosecutor, no specific implementing provision will be necessary in this regard. Otherwise, the implementing provisions should prescribe that in the case of European Delegated Prosecutors, the EPPO should assume the role of senior state attorney. Concerning the deadlines, there is concern that a collision between the rules provided for in the Regulation, which does not mention deadlines for the duration of the investigation, and the national rules could lead to the abolishment of these deadlines which ensure effective investigation.⁴⁹

4.1 Investigation measures and other measures

The Delegated European Prosecutor and the European Prosecutor may either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State to undertake these measures (Art. 28(1) and (4) of the Regulation). In order for the European Delegated Prosecutor to conduct effective investigation and prosecution, it has been prescribed that Member States must ensure that European Delegated Prosecutors are entitled to order or request a minimum list of investigation measures (Art. 30). The minimum list of investigation measures includes the following:

- a) searching premises and taking all measures necessary to avoid the loss or contamination of evidence;
- b) obtaining the production of any relevant objects or documents;
- c) obtaining the production of stored computer data, including banking account data and traffic data;
- d) freezing instrumentalities or proceeds of crimes;
- e) intercepting electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;
- f) tracking and tracing an object by technical means, including controlled deliveries of goods.

In conformity with the principle of proportionality, these investigation measures may be subject to further conditions, including limitations, provided for in the applicable national law. Intercepting electronic communications to and from the suspect or accused person, and tracking and tracing an object by technical means can be limited to individual serious crimes (Art. 30(3)).

⁴⁹ Đurđević (n 46) p 108.

It has additionally been set out that European Delegated Prosecutors must also have access to any other measures in their Member State that are available to prosecutors under national law in similar national cases, in any situation in which this investigation measure is available, but may be subject to limitations in line with the national law (Art.30(4)). According to the Croatian legal system, this means that all the evidence and special evidence gathering procedures apply under the conditions referred to in the CPA.⁵⁰

The following crimes are expected to be under the competence of the EPPO because they are consistent with those referred to in the PIF Convention: tax or customs duty evasion, referred to in Art. 256 of the Croatian Criminal Code (hereinafter: CC),⁵¹ subsidy fraud referred to in Art. 258 CC, fraud in business dealings referred to in Art. 247 CC, misuse of public procurement procedures, referred to in Art. 254 CC, money laundering, referred to in Art. 265 CC, and offering and accepting a bribe, referred to in Art. 293 and 294 CC.⁵² Other crimes mentioned are as follows: abuse of position and authority, referred to in Art. 291 CC, unlawful favouritism, referred to in Art. 292 CC, criminal association, referred to in Art. 328 CC, and committing a criminal offence as a member of a criminal organisations, referred to in Art. 329 CC, and sometimes also criminal offences of receiving and offering a bribe in business dealings, referred to in Art. 252 and 253 CC.⁵³

⁵⁰ The Criminal Procedure Act provides for the following evidence gathering procedures (and prescribes the conditions for undertaking these procedures): search (of a person, a dwelling and other premises, search of movable property and a bank safe) (Arts. 240-260), temporary seizure of objects (Arts. 261-270), interrogation of the defendant (Arts. 272-282), examination of witnesses (Arts. 283-300), identification (Arts. 301-303), judicial view (crime reconstruction or experiment) (Arts. 304-306), taking fingerprints or prints of other body parts (Art. 307), expert witness testimony (Art. 308-328), documentary evidence (Art. 329), recording evidence (Art. 330), electronic (digital) evidence (Art. 331). Under the special collection of evidence, the Act provides for: surveillance and interception of telephone conversations and other means of remote technical communication, interception, gathering and recording of electronic data, entry on the premises for the purpose of conducting surveillance and technical recording at the premises, covert following and technical recording of individuals and objects, use of undercover investigators and informants, simulated sales and purchase of certain objects, simulated bribe-offering and simulated bribe-receiving, offering simulated business services or closing simulated legal business, controlled transport and delivery of objects from criminal offences (Arts. 332-338). In addition, the Act also provides for retaining and opening shipments (Art. 339), checking the establishment of a telecommunication contact (Art. 339(a)) and comparing personal data of citizens kept in a database and other registers with police data records, registers and automatic data processing base (Art. 340).

⁵¹ Official Gazette, no. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019.

⁵² See Sokanović (n 30).

⁵³ Jelenić (n 18) p 99. All the mentioned criminal offences are also mentioned by Laptoš (n 20) pp 495 and 496.

The maximum penalty prescribed for all the crimes listed above is at least five years of imprisonment, and, therefore, the obligation of ordering or requesting investigation measures referred to in Art. 30 CPA applies to these crimes. The CPA sets out all the prescribed investigation measures and allows for their implementation during the prosecution of crimes under the competence of the EPPO. In addition, a comparison with the list of crimes to which the special evidence gathering actions referred to in Art. 334 CPA apply shows that they may be ordered for nearly all the crimes under the competence of the EPPO, with the exception of crimes such as tax and customs duty evasion (Art. 256 CC) and fraud in business dealings (Art. 247 CC). Since the Directive allows for further limitations (Art. 30(3)), it can be concluded that, in terms of minimum investigation measures, the Croatian legislation is aligned with the requirements provided for by the Regulation.⁵⁴ On the other hand, consideration can also be given to broadening the list referred to in Art. 334 to the remaining two criminal offences in all the cases or when they affect the financial interests of the Union.

The Regulation provides for special rules regarding the cross-border implementation of investigation measures by the assisting European Delegated Prosecutor. The rule is that the assisting European Delegated Prosecutor must obtain a judicial authorisation if this is required in accordance with the law of his/her Member State. What is specific for cross-border investigations by the EPPO is the situation where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it. In such a case, the Regulation prescribes that the authorisation must be obtained by the handling European Delegated Prosecutor and submitted together with the assignment of the measure (Art. 31(3) of the Regulation). The German draft law implementing the Regulation includes a provision that it is necessary to obtain judicial authorisation or a certificate for an enforcement measure that must be implemented in another participating Member State only if according to the law of (this) other Member State such an authorisation is not required (Art. 3(2) of the draft law).⁵⁵ In conformity with the intention expressed in Recital 72, such a provision also prevents requesting two judicial authorisations in the case where such authorisation is requested both according to the law of the handling European Delegated Prosecutor's Member State and according to the law of the assisting European Prosecutor's Member State.

⁵⁴ With the obligation of notifying the EPPO regarding the list of specific serious offences for which special investigation measures can be ordered (Art. 30(3)).

⁵⁵ *Entwurf eines Gesetzes zur Durchführung der Verordnung (EU) 2017/1939 des Rates vom 12. Oktober 2017 zur Durchführung einer Verstärkten Zusammenarbeit zur Errichtung der Europäischen Staatsanwaltschaft und zur Änderung weiterer Vorschriften* of 7 October 2019.

Taking this into account, consideration should be given to introducing a similar implementing provision in the Croatian legislation.

5 CONCLUDING REMARKS

The European Public Prosecutor's Office was established after a long legislative procedure conducted by the European Union, during which different concepts of its competences and structure came into conflict. This eventually led to the establishment of a basic enhanced judicial cooperation mechanism, without the participation of all the Member States. The final result is a new concept of a prosecution authority that combines two levels (a central and a decentralised one), which operate in the participating Member States within their justice systems, and, generally, on the basis of their procedural rules. This was done to ensure the easier acceptance of the proposed solutions by the EU Member States, since there is less interference in their sovereignty, although this has also created a range of (potential) problems. Thus, for instance, in the case of a conflict of competences between the EPPO and national prosecution authorities, the solution is left to the discretion of the Member States, which can lead to different material competence of the EPPO in different Member States. The accepted solution also failed to regulate the issue of admissibility of the evidence gathered in other Member States when it comes to cases handled by European Delegated Prosecutors, but it allowed for the possibility of evidence gathered in other Member State to be found inadmissible when it does not meet the conditions required by the national law. Such a regulation is criticised for neglecting the original problem of the fragmentation of national criminal laws, the transnational features of EU fraud, or the acceptance of cross-border evidence.⁵⁶ The integration of a new authority into the existing architecture of EU bodies that deal with the protection of the Union's financial interests and cooperation in criminal matters among Member States will also be challenging. Since the EPPO has not yet begun operating, time will tell whether some of these challenges, or something that has not currently been raised as an issue, will actually emerge as a problem in the functioning of the EPPO.

Notwithstanding the above, the implementation requirements set before Member States are not excessively demanding. The EPPO was established by an EU Regulation, which means that the provisions therein are directly applicable and have supremacy over national law in situations where the rules collide. However, as already mentioned in the introduction, the Regulation refers

⁵⁶ Andras Csuri, "The Proposed European Public Prosecutor's Office: From a Trojan Horse to a White Elephant" (2016) 18 *Cambridge Yearbook of European Legal Studies*, p 140.

to the application of national law (to the extent to which some issue has not been regulated by the Regulation itself), sets out specific investigation measures that must be assigned to the EPPO, if they have not already been provided, and opts for the model of prosecutorial investigation, which requires greater or lesser legislative interventions to ensure implementation in the Member States.

A consideration of the structure of the EPPO at the decentralised level has shown that the implementation requirement for any participating Member State is to provide a minimum of two European Delegated Prosecutors to carry out the activities of the EPPO in a particular Member State, with the freedom to choose how to organise them, and earmark the costs of their operational functions. Another implementing obligation is to propose three candidates for the position of European Prosecutor. Regarding the material competence of the EPPO, there is an implementing obligation to determine a national body to decide on the conflict of competences between the EPPO and the national prosecution service. A study of implementing prosecutorial and investigative powers has shown that a key requirement is to assign to the European Delegated Prosecutors and European Prosecutors powers equal to those held by national prosecutors. The Regulation itself regulates the powers of the EPPO, and thus assigns to it the same powers held by prosecutors in systems that exercise prosecutorial investigation, and sets out specific investigation measures that must be provided. In this part, it has been shown that the status of the state attorney in the Croatian criminal procedure conforms to a large extent with the requirements set out in the Regulation, and, for this reason, no great implementing obligations exist.

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Sažetak

URED EUROPSKOG JAVNOG TUŽITELJA I HRVATSKO KAZNENO PRAVOSUĐE: IMPLEMENTACIJSKI ZAHTJEVI I MOGUĆA RJEŠENJA

Ured europskog javnog tužitelja osnovan je 2017. godine, čime je uspješno završen zakonodavni postupak koji je započeo još 2013. godine. Ured EJT-a je zamišljen kao tijelo EU-a koje ima pravnu osobnost i funkcionira kao jedinstven ured s decentraliziranom strukturom, koji osim na centralnoj razini djeluje i u sudjelujućim državama članicama EU-a. Uredba Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem Ureda europskog javnog tužitelja postavlja pred nacionalne pravne sustave tih država određene implementacijske obveze. Iako su uredbe pravni akti EU-a koji su obvezujući u cijelosti i izravno se primjenjuju, Uredba o Uredu EJT-a ipak zahtijeva određene intervencije u svrhu imple-

mentacije. Naime Uredba upućuje na primjenu nacionalnog prava u mjeri u kojoj neko pitanje nije njome uređeno, propisuje određene minimalne istražne ovlasti koje države trebaju osigurati Uredu EJT-a te se opredjeljuje za model tužiteljske istrage.

U radu se razmatraju implementacijski zahtjevi koje Uredba postavlja pred hrvatski kaznenopravni sustav, osobito u pogledu implementacije ustroja Ureda i njegove stvarne nadležnosti te implementacije njegovih tužiteljskih i istražnih ovlasti. Analiza je pokazala da je položaj državnog odvjetnika u hrvatskom kaznenom postupku u velikoj mjeri sukladan zahtjevima iz Uredbe. Međutim implementacijskim odredbama trebat će integrirati delegirane europske tužitelje u hrvatski kaznenopravni sustav, odnosno urediti im položaj unutar strukture Državnog odvjetništva RH, stvarnu i mjesnu nadležnost sudova nadležnih za njihove predmete te tijelo koje će odlučivati u slučaju neslaganja oko nadležnosti. Uz to delegiranim europskim tužiteljima trebat će osigurati ovlasti koje imaju nacionalni državni odvjetnici. U samom kaznenom postupku trebat će razriješiti pitanje ovlasti Ureda za podizanje zahtjeva za zaštitu zakonitosti te uskladiti zakonske rokove koji obvezuju državne odvjetnike u prethodnom postupku s osobitostima postupanja delegiranih europskih tužitelja. Za razliku od toga postojeće istražne mjere u skladu su sa zahtjevima iz Uredbe te nisu potrebne implementacijske odredbe o tome. U odnosu na sve navedeno u radu se razmatra što je do sada napravljeno, daje se osvrt na predložena rješenja, iznose se dostupna komparativnopravna rješenja te se daju prijedlozi za rješenje nekih od zahtjeva.

Ključne riječi: Ured europskog javnog tužitelja, delegirani europski tužitelji, europski tužitelji, implementacija Uredbe o Uredu EJT-a, Hrvatska