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**The EPPO and its coordination with the national prosecuting authorities: the Croatian perspective\*\***

**1. Introduction**

The idea of the supranational European public prosecutor, which would be in charge of protection of financial interests of the European Union, was presented in the 1997 Corpus Juris. First only theoretical,<sup>1</sup> the idea was finally realised two decades after through the Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO)<sup>2</sup> (hereinafter: Regulation), adopted by the Council of the European Union in October 2017. Almost two years after, the establishment of the EPPO is still a subject of numerous theoretical analyses and critical debates, and still many organizational and procedural questions remain open. This comment has no pretensions to offer an overall and in depth analysis of this new institute. Instead, this comment will address some theoretical and practical problems concerning the coordination between the EPPO and national prosecution authorities, regarded from Croatian perspective.

**2. Efficiency depending on national law and coordination with national (prosecution) authorities**

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<sup>1</sup> See Bachmaier Winter, Lorena, The Potential Contribution of a European Public Prosecutor in Light of the Proposal for a Regulation of 17 July 2013, 23 Eur. J. Crime Crim. L. & Crim. Just. 121, 2015, p. 122.

<sup>2</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 2017 283.

One of the main reasons justifying the establishment of the supranational, European prosecution service, was providing efficiency of investigation and prosecution of criminal offences affecting financial interests of the European Union. That goal was to be achieved through a centralised and strong EPPO, which would act according to the complete supranational system of procedural rules. Yet, this initial idea has been significantly changed, due to critics based on the need to preserve national sovereignty in the area of criminal procedure.<sup>3</sup> The final concept, which was adopted in the Regulation, implies the combination of supranational and national rules of procedure. Even though the Regulation does contain a number of specific rules of procedure on investigation, the investigation is actually conducted according to national law which must provide a list of investigative measures (according to Article 30 of the Regulation).<sup>4</sup> Therefore, the investigations of the EPPO, as well as its efficiency, will actually depend on the efficiency of national legal systems.<sup>5</sup> In other words, the EPPO will only be as efficient as the national system provides it, since the possibilities of the EPPs to gather evidence will be limited.<sup>6</sup> This relativizes one of the main objectives of the EPPO project as it was initially envisaged – efficiency in investigating and prosecuting criminal offences against financial interests of the European Union. In addition, much efficiency will depend not only on the coordination with national prosecution authorities, but also with other relevant actors, primarily national law enforcement authorities which in many legal orders have important role in gathering evidence.

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<sup>3</sup> See Satzger, Helmut, The European Public Prosecutor's Office and Its Coordination with the National Public Prosecutor's Office: The Model of Complementarity, in: Bachmaier Winter L. (eds), The European Public Prosecutor's Office, Legal Studies in International, European and Comparative Criminal law, vol. 1, Springer, 2018, p. 44.

<sup>4</sup> See Bachmaier Winter, *op. cit.* note 1, p. 140.

<sup>5</sup> *Ibid.*, p. 141.

<sup>6</sup> See in more detail arguments against the wide use of national laws in Ligeti, Katalin; Simonato, Michele, The European Public Prosecutor's Office: Towards a Truly European Prosecution Service, 4 New J. Eur. Crim. L. 7, 2013, p. 19.

On the other side, the EPPO has a complexed structure. It is based on the “collegiate system” and it is composed of a number of staff both at the central level<sup>7</sup> and decentralised level.<sup>8</sup> The complexity of the EPPO structure itself may be regarded as a potential challenge to efficiency of proceedings, including the efficiency of coordination with national prosecution authorities, but this issue will not be in the focus of this analysis.

### **3. Principles regulating coordination between the EPPO and national authorities**

As the Regulation stipulates, the EPPO will be in charge of investigation and prosecution of criminal offences affecting the financial interests of the European Union according to the Directive (EU) 2017/1371 and the Regulation, offences which are inextricably linked to them, as well as of offences regarding participation in criminal organisation as defined in Framework Decision 2008/841/JHA, if the organisation’s focus is on committing criminal offences against the financial interests of the European Union, until the case has been finally disposed off (Article 4 and Article 22(1) of the Regulation). All national authorities, competent under national law, have an obligation to report any criminal conduct that could fall within the material competence of the EPPO (Article 24(1) of the Regulation). The report should contain at least following information: description of the facts, including assessment of the damage, possible legal qualification of the offence and information on potential victims, suspects or third involved persons (Article 24(4) of the Regulation). The duty to report criminal offences is mutual, meaning that the EPPO must as well inform competent national authorities of any criminal offence falling outside its competence, as well as provide all the available relevant evidence (Article 24(8) of the Regulation). In brief, the relationship between the EPPO and national prosecuting authorities is based on the principle of sincere cooperation implying mutual supporting and informing (Recital 14 of the Regulation). This means that the EPPO, especially delegated EPPs, and national

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<sup>7</sup> The Central Office shall include: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director (Article 8(3) of the Regulation).

<sup>8</sup> The decentralised level consists of European Delegated Prosecutors located in the Member States (Article 8(4) of the Regulation).

authorities should actually work together, which requires mutual trust and the recognition of the EPPO as a part of domestic criminal justice system.<sup>9</sup>

Even though the Regulation proclaims that the relationship between the EPPO and national prosecution authorities is based on a „system of shared competence“ (Recital 13 of the Regulation), it is strongly determined by the right of evocation attributed to the EPPO (Article 27 of the Regulation). The right of evocation clearly indicates not only the primary competence of the EPPO, when it comes to criminal offences placed under its material competence, but also its hierarchical superiority with regard to national prosecution authorities.<sup>10</sup> Yet, there are no strict criteria specifying what principles should lead the EPPO when deciding to exercise its right of evocation. The Regulation contains only several general provisions, such as the one determining that the EPPO may exercise that right only as long as the investigation has not yet been closed and “an indictment has not been submitted to a court” (Article 27(7) of the Regulation). In addition, the Regulation provides the possibility for European Delegated Prosecutors to decide not to evoke a particular case, regarding offences which caused or are likely to cause damage to the European Union’s financial interests of less than 100.000 Euro (Article 27(8) of the Regulation). With that regard, the College should issue general guidelines that should establish clear criteria, taking specifically into account several elements (Article 27(8) of the Regulation) which would actually leave much space for discretion when deciding on whether to use or not the EPPO’s right of evocation. On one side, there are relatively objective criteria, such as the nature of the offence and urgency of the situation. On the other side, indicating “the commitment of the competent national authorities” as one of the criteria that should be taken into account, the Regulation introduces the subjective element into regulating the coordination issues. If not expressly, then implicitly, this may be interpreted as referring to the principle of complementarity.

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<sup>9</sup> Jelenić, Dražen, *Europeizacija kaznenog progona – ured europskog javnog tužitelja u Republici Hrvatskoj*, u: Barbić Jakša (ur.), *Europska budućnost hrvatskoga kaznenog pravosuđa*, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2018, p. 112.

<sup>10</sup> In Croatian law, the right of evocation is vested in the higher state attorney with regard to the lower state attorney and is an expression of the hierarchical structure of the State Attorney’s Office. See Krapac, Davor, *Kazneno procesno pravo Prva knjiga: Institucije*, Narodne novine, Zagreb, 2015, p. 220 – 221.

As Satzger pointed, the application of complementarity principle, if it had been adopted as a principle regulating the coordination between the EPPO and national prosecution authorities, would imply that national prosecution authorities would be competent for investigating and prosecuting crimes against the European Union’s financial interests, while the competence of the EPPO would depend on the willingness and ability of national prosecution authorities to genuinely protect the EU financial interests.<sup>11</sup> In other words, only if national prosecution authorities would be unwilling or unable genuinely to protect the EU financial interests, the EPPO would be competent to prosecute.<sup>12</sup> Even though this principle has not been adopted in the Regulation, Satzger points that still it could be used as an important “restrictive guideline”, especially in exercising the EPPO’s right of evocation.<sup>13</sup> Moreover, the same author points that the principle of complementarity, or “the complementarity regime” as useful tool in defining “the mode of cooperation between national prosecution authorities and the EPPO”.<sup>14</sup> A following brief analysis should provide an answers whether such application of the complementarity regime would reply to some challenges to the system of shared competence and the sincere cooperation, especially with regard to the EPPO’s right to evocation, considered from Croatian perspective.

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<sup>11</sup> Satzger, *op. cit.* note 3, p. 48.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 51.

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