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**Supranational Prosecuting Authority and National Admissibility of Evidence[[1]](#footnote-1)**

Although with the establishment of the European Public Prosecutor’s Office a supranational prosecuting authority will be created, the supranationalisation of the criminal justice systems will not be conducted all the way. 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, harmonization of national substantive criminal laws in the area of criminal offences against the financial interests of the Union shall be conducted. But these harmonized provisions shall still be the provisions of the national legal order of the Member States.[[2]](#footnote-2) The same is even truer for criminal procedural law. In the area of criminal procedural law, the Regulation only foresees the obligation of Member States to have certain investigative measures – the ones 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 the national criminal procedural rules, which means that Member States are free in this regard. To conclude, even though the creation of the European Public Prosecutor’s Office represents the establishment of a supranational prosecuting authority, it does not represent 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 Member States. This is especially visible in the area of criminal procedural law, where no common standards for investigative measures are created. Full supranationalisation of the criminal justice system[[3]](#footnote-3) would also require the establishment of the European Criminal Court, which would be competent to try the cases the European Public Prosecutor is competent for. The Regulation does not foresee the creation of such a court. However, this is not due to the unwillingness of the drafters of the Proposal to have the European Criminal Court established, but due to the absence of the legal basis for such an institution in primary EU law.[[4]](#footnote-4) 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 the supranational judicial and law enforcement authorities, and 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 degree 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 cross-border gathering of evidence still makes sense.

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 three: (1.) European territoriality in ordering the investigative measures, (2.) limitations arising out of national criminal procedural laws, and (3.) mutual admissibility of evidence.

**1. European territoriality in ordering the investigative measures**

The European Public Prosecutor can order or request the undertaking of the 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: the investigative measures which must be available under the law of Member States, and investigative measures which must not mandatory 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.

**2. Limitations arising out of national criminal procedural laws**

Although the European Public Prosecutor can order or request the investigative measures on the whole territory of the EU, this does not mean that the conditions for undertaking of the 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 subjected to the conditions set out in national law of the Member State in whose territory the measure is undertaken.[[5]](#footnote-5) In relation to investigative measures that must not mandatory 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.[[6]](#footnote-6)

To conclude – 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 largely depends upon the conditions prescribed by national laws of Member States. Although the EPPO acts on the whole territory of the EU, his/her activity is legally deeply rooted into the national legal systems of Member States.[[7]](#footnote-7)

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*.[[8]](#footnote-8) 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.[[9]](#footnote-9) They are divided into three parts: general part, investigation phase, and prosecution phase and bringing to judgment.[[10]](#footnote-10) The starting premise of the project is that the EPPO, if it is to become a genuinely European prosecuting authority established in accordance with the objectives of an Area of Freedom, Security and Justice, needs to be equipped with a “set of powers uniformly formulated and valid in all Member States participating”.[[11]](#footnote-11) The elaboration and acceptance of such rules would enable the EPPO to undertake European investigations emancipated from the difficulties which arise out of the differences of the national legal orders of Member States.[[12]](#footnote-12) The fact that the Regulation did not follow this approach, but accepted a much 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 States 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.

**3. 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, he/she might need to rely on criminal procedural rules of different Member States. If the case at hands of the EPPO includes a cross-border dimension and 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 are 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 being transferred from the investigation to the indictment and trial phase, the competence of the court which is going to try the case has to be determined. It is highly possible that evidence which will be presented before this court is not gathered in accordance with the criminal procedural rules of the Member States 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. Evidence collected by the EPPO, which might originate from the criminal procedural orders of different Member States, shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.[[13]](#footnote-13)

**Conclusion**

In order to solve the problems which arise out of the inadequate level of criminal law protection by Member States of legal interests which are of outmost 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 is going to 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 dependant on the national or transnational character of the underlying offence.

In order to enable the EPPO to undertake the investigative acts in all the Member States of the EU, the concept is based on the idea of European territoriality. That 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. That means that cross-border gathering of evidence in the traditional sense, as an activity involving judicial authorities between different States is not applicable here. But, with the EPPO model, supranationalisation has been effectuated only on the organisational level, and only in relation to prosecutorial activities. Other law enforcement activities and indictment and trial phase of the criminal procedure remain national. Also criminal laws remain national, especially criminal procedural laws. Although the EPPO can undertake its investigative activities in all Member States, when undertaking them he/she is not governed by a supranational criminal procedural order, but by national law of Member States. Since EPPO can undertake his/her activities on the whole territory of the EU, criminal procedural laws of all Member States, as a framework for his/her activities, come into account.

1. This paper was presented at the Conference Integration of the EPPO in the National Criminal Justice Systems: Institutional, Procedural and Cooperative Challenges, Zagreb, 11-12 April 2019, Co-funded by Croatian Science Foundation under project Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future (CoCoCrim) [↑](#footnote-ref-1)
2. Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office, 25 September 2013, available at:

   <http://eppo-project.eu/design/eppodesign/pdf/converted/index.html?url=f97b4056e17f5326bdb6ef3a0293bcf0.pdf&search>=, p. 2. [↑](#footnote-ref-2)
3. For the supranational model of EU criminal law and the various possible degrees in its development, see *Sieber*, 2009, 22-23, 44 and further. [↑](#footnote-ref-3)
4. Article 86 TFEU requires that adjudication of cases prosecuted by the EPPO remains on national level, see *Ligeti/Simonato*, 2013, 14. [↑](#footnote-ref-4)
5. Article 30(2) of the Regulation. [↑](#footnote-ref-5)
6. Article 30(4) of the Regulation. [↑](#footnote-ref-6)
7. Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office, 25 September 2013, available at:

   <http://eppo-project.eu/design/eppodesign/pdf/converted/index.html?url=f97b4056e17f5326bdb6ef3a0293bcf0.pdf&search>=, p. 5. [↑](#footnote-ref-7)
8. The results of the research project named *European model rules for the procedure of the future EPPO* are available at the following website: [www.eppo-project.eu](http://www.eppo-project.eu) About the work of the research group, see Đurđevć, Zlata; Ivičević Karas, Elizabeta; Burić, Zoran, Konferencija Projekt za Ured europskog javnog tužitelja (Nacrt europskih oglednih pravila o kaznenom postupku), HLJKPP, 1(2012), p. 363-369. [↑](#footnote-ref-8)
9. Ligeti, Katalin, *Introduction to the Model Rules*, available at the project web page, p. 2. [↑](#footnote-ref-9)
10. *Ibid*, 4. [↑](#footnote-ref-10)
11. *Ligeti/Simonato*, 2013, 7. [↑](#footnote-ref-11)
12. *Ibid*, 18-20. [↑](#footnote-ref-12)
13. Article 37(1) of the Regulation. See Đurđević, 2013, 997. [↑](#footnote-ref-13)