

THE SCOPE OF COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE¹

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INTRODUCTION

Twenty years after the first appearance of the idea in the so-called *Corpus Juris*, the *European Public Prosecutor's Office* was finally established by the Council on the 12th October 2017.² The adoption of the Council Regulation was preceded by a long, intense and cumbersome negotiation procedure. The Proposal on the establishment of the European Public Prosecutor's Office was issued by the European Commission in July 2013 based on *Article 86 TFEU*.³ According to this legal basis, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union.

Shortly after the issuance of the Commission's Proposal, 14 chambers of national parliaments from 11 Member States issued *reasoned opinions* based on *Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality*⁴, *requesting the Commission to review the Proposal*.⁵ In its answer, the Commission concluded that its Proposal complies with the principle of subsidiarity and maintained it. However, the Commission promised to take due account of the reasoned opinions of the national Parliaments during the legislative process.⁶ After that, as

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² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017, p. 1–71] (hereinafter referred to as – EPPO Regulation).

³ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM (2013) 534 final, 17.07.2013] (hereinafter referred to as – EPPO Proposal).

⁴ Article 5(3) – (4) TEU.

⁵ Csonka P., Juszcak A., Sason E. The Establishment of the European Public Prosecutor's Office. The Road from Vision to Reality. *Eucrim – The European Criminal Law Associations' Forum*. 2017. № 3. P. 125.

⁶ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol № 2 [COM (2013) 851, 27.11.2013].

a result of discussions within the Council, the draft has been progressively developed, supplemented and clarified, in particular the organization and the structure of the European Public Prosecutor's Office has changed significantly and the substantive and procedural rules has become more accurate and detailed.

However, there was an immense obstacle before the adoption of the EPPO Regulation: Article 86 TFEU requires a *special legislative procedure* and *unanimity* in the Council after obtaining the consent by the Parliament. During the long negotiations, it became clear that the unanimity required for the adoption of the regulation cannot be achieved. However, the Treaty provides for the possibility for *enhanced cooperation* in case of the lack of unanimity. On the 3rd April 2017, 16 Member States announced their intention to establish the European Public Prosecutor's Office through enhanced cooperation⁷, based on which the Regulation was finally adopted after four years of negotiations. The EPPO Regulation entered into force on the 20th November 2017 and will begin its activity at the end of 2020, according to plans of the Commission.⁸

The aim of this article is to analyse one of the key features of the EPPO Regulation, i.e. the material scope of competence of the European Public Prosecutor's Office. The question of competence of the EPPO is of crucial importance since it determines the extent of activities of the new supranational EU body.

1. The general tasks of the European Public Prosecutor's Office

According to *Article 86 (2) TFEU*, the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

The provision of the Treaty is reiterated by the EPPO Proposal and the EPPO Regulation. According to the *EPPO Proposal*, the task of the European Public Prosecutor's Office is to *combat criminal offences affecting the financial interests of the Union*. The EPPO is responsible

⁷ The enhanced cooperation currently involves 22 Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece; Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain); only Denmark, Hungary, Ireland, Poland and Sweden do not take part in the operation of the European Public Prosecutor's Office.

⁸ See : Article 120 (2) of the EPPO Regulation.

for *investigating, prosecuting and bringing to judgment* the perpetrators of, and accomplices in the aforementioned criminal offences. In that respect the EPPO *directs and supervises investigations, carries out acts of prosecution*, including the dismissal of the case and *exercises the functions of prosecutor* in the competent courts of the Member States, including lodging the indictment and any appeals until the case has been finally disposed of.⁹

The final version of the *EPPO Regulation* adopted during the negotiations has been changed in several points. According to the EPPO Regulation, the European Public Prosecutor's Office shall be responsible for *investigating, prosecuting and bringing to judgment* the perpetrators of, and accomplices to, *criminal offences affecting the financial interests of the Union*¹⁰ which are provided for in Directive (EU) 2017/1371¹¹ and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.¹² The functions of prosecutor in competent courts apply until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any legal action or remedies available until that decision has become definitive.¹³

2. The material scope of competence of the European Public Prosecutor's Office

According to the *original version of the Commission's Proposal*, the offences falling within the material competence of the European Public Prosecutor's Office could be divided into two categories. On the one hand, the EPPO has competence in respect of the *criminal offences affecting the financial interests of the Union*, as provided for by

⁹ Article 4 of the EPPO Proposal.

¹⁰ According to Point 3 of Article 2 of the EPPO Regulation, the notion of the financial interests of the Union means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them.

¹¹ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.07.2017, p. 29–41] (hereinafter referred to as – PIF Directive).

¹² Article 4 of the EPPO Regulation.

¹³ Recital 31 of the EPPO Regulation.

the *PIF Directive* and *implemented by national law*. On the other hand, the EPPO has *ancillary competence* in connection with crimes which are *inextricably linked* with the aforementioned offences under the conditions that the offences affecting the financial interests of the Union are *preponderant*¹⁴, *the other criminal offences are based on identical facts*, and their joint investigation and prosecution are in the *interest of a good administration of justice*.¹⁵

The regulation on the material competence of the European Public Prosecutor's Office has been modified and expanded on several points during the negotiations of the EPPO Regulation, partly in line with the negotiations and amendments of the PIF Directive. According to the EPPO Regulation material scope of competence on the European Public Prosecutor's Office can be divided into three categories.

2.1. The criminal offences affecting the financial interests of the European Union

According to the EPPO Regulation, the European Public Prosecutor's Office is competent in respect of the *criminal offences affecting the financial interests of the Union* that are provided for in the *PIF Directive*, as *implemented by national law*¹⁶, *irrespective of whether the same criminal conduct could be classified as another type of offence under national law*.¹⁷

It can be seen that the competence of the EPPO covers the criminal offences which are defined in the PIF Directive. The PIF Directive regulates four criminal offences, which therefore fall into the competence of the EPPO, i.e. fraud affecting the Union's financial interests, money laundering, active and passive corruption and misappropriation. The Directive also stipulates the definitions of these criminal offences.

In connection with *fraud affecting the Union's financial interests*, the PIF Directive distinguishes between *offenses relating to the expenditure and to the revenue side of the EU budget*. On the expenditure side,

¹⁴ According to Recital 22 of the EPPO Proposal, the preponderance should be established on the basis of criteria such as the offences' financial impact for the Union, for national budgets, the number of victims or other circumstances related to the offences' gravity, or the applicable penalties.

¹⁵ Articles 12–13 of the EPPO Proposal.

¹⁶ Under Article 117 of the EPPO Regulation, the Member States are required to notify to the EPPO an extensive list of the national substantive criminal law provisions that apply to the offences defined in Directive (EU) 2017/1371 and any other relevant national law.

¹⁷ Article 22 (1) of the EPPO Regulation. See : Karsai K. A kívülmaradás lehetetlensége – az Európai Ügyészség működésének várható hatásai a kimara dóta gállamokban. *Magyar Jog*. 2018. № 12. P. 673.

the Directive criminalize conducts in connection with *non-procurement-related and procurement-related expenditures*, while on the revenue side, it differentiates between punishable conducts relating to the *revenues arising from VAT own resources and other revenues*.

In respect of *non-procurement-related expenditure*, the Member States are required to criminalise any act or omission relating to:

a) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;

b) non-disclosure of information in violation of a specific obligation, with the same effect;

c) the misapplication of such funds or assets for purposes other than those for which they were originally granted.

In respect of *procurement-related expenditure*, the criminalisation obligation of the Member States relates to the following acts or omissions, however, only at least when they are committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests:

a) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;

b) non-disclosure of information in violation of a specific obligation, with the same effect;

c) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests.

In respect of *revenue other than revenue arising from VAT own resources*, the Member States has to criminalise any act or omission relating to:

a) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;

b) non-disclosure of information in violation of a specific obligation, with the same effect;

c) a misapplication of a legally obtained benefit, with the same effect.

In respect of *revenue arising from VAT own resources*, the Member States has to punish any act or omission committed in cross-border fraudulent schemes in relation to:

a) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;

b) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect;

c) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.¹⁸

The definition of *money laundering* is defined by the PIF Directive with reference to the 4th *Anti-Money Laundering Directive of the European Union*.¹⁹ Consequently, the Member States are required to criminalise the following intentional conducts, if they are committed in connection with property derived from the criminal offences covered by the PIF Directive²⁰:

a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;

c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;

d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in the aforementioned points.²¹

Under the regulation of the PIF Directive, *passive corruption* means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting

¹⁸ Article 3 of the PIF Directive.

¹⁹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) № 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [OJ L 141, 05.06.2015, p. 73–117].

²⁰ Article 4 (1) of the PIF Directive.

²¹ Article 1 (3) of the 4th Anti-Money Laundering Directive.

in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. *Active corruption* means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.²²

The final criminal offence is *misappropriation* which means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.²³

It has to be mentioned, that the EPPO Regulation sets out some limitations in relation to the competence of the EPPO to the criminal offences affecting the financial interests of the European Union. On the one hand, the EPPO can only be competent in connection with *VAT-fraud* when the intentional acts or omissions defined in the PIF Directive are connected with the *territory of two or more Member States* and involve a *total damage of at least EUR 10 million*.²⁴ This provision is fully in compliance with the regulation of the PIF Directive.²⁵ On the other hand, the EPPO shall not be competent for *criminal offences in respect of national direct taxes* including offences inextricably linked thereto.²⁶ The purpose of this limitation is essentially to prevent that the European Public Prosecutor's Office is overwhelmed by cases in connection with criminal offences which harms exclusively the financial interests of the Member States and which have already been investigated at national level.²⁷

2.2. Participation in a criminal organisation

The European Public Prosecutor's Office can also be competent for criminal offences regarding *participation in a criminal organisation* as defined in *Framework Decision 2008/841/JHA*²⁸, as implemented in national

²² Article 4 (2) of the PIF Directive.

²³ Article 4 (3) of the PIF Directive.

²⁴ Article 22 (1) of the EPPO Regulation.

²⁵ See : Article 2 (2) of the PIF Directive.

²⁶ Article 22 (4) of the EPPO Regulation.

²⁷ Békés Á., Gépész T. Az Európai Ügyészség hatásköri szabályozása. *Iustum aequum salutare*. 2019. № 2. P. 43.

²⁸ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, p. 42–45].

law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences affecting the financial interests of the European Union.²⁹ The competence of the EPPO may cover the membership in, or the organisation and leadership of such a criminal organisation.³⁰

According to the referred Framework Decision, *criminal organisation* is a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit. The notion of *structured association* means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.³¹

2.3. Criminal offences inextricably linked to crimes affecting the financial interests of the European Union

The criminal offences affecting the financial interests of the European Union are often not committed independently, but together with other crimes.³² Therefore, the material scope of competence of the European Public Prosecutor's Office also covers any other criminal offence that is *inextricably linked to a criminal offence affecting the financial interests of the European Union*.³³ This type of competence of the EPPO can be justified by the *principle of efficiency and the effective use of resources*, by the *right to a fair trial* and by the *objective of the avoidance of the unnecessary duplication of criminal procedures*.³⁴

The definition of the inextricably linked offences cannot be found in the EPPO Regulation, only the Recital of the Regulation gives some guidelines in connection with this notion. Accordingly, this notion should be considered in light of the relevant case-law which, for the application of the *nebis in idem principle*, retains as a relevant criterion the *identity*

²⁹ Article 22 (2) of the EPPO Regulation.

³⁰ Recital 57 of the EPPO Regulation.

³¹ Article 1 of the Framework Decision.

³² Alexandrova V. Presentation of the Commission's Proposal on the Establishment of the European Public Prosecutor's Office. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague : Asser Press, 2015. P. 17.

³³ Article 22 (3) of the EPPO Regulation.

³⁴ Alexandrova V. Op. cit. P. 17–18 ; Békés Á., Gépész T. Op. cit. P. 47 ; Petrus S. Európai Ügyészség. *Európai Jog*. 2017. № 4. P. 32.

of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space. The EPPO should have the right to exercise competence, where offences are *inextricably linked* and the offence affecting the Union's financial interests is *preponderant*, in terms of the *seriousness of the offence* concerned, as reflected in the *maximum sanctions* that could be imposed. However, the EPPO should also have the right to exercise competence in the case of inextricably linked offences where the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be *ancillary in nature* because it is merely *instrumental* to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof.³⁵

It can be seen that during the negotiation process of the EPPO Regulation, the regulation of this category of competence has been modified significantly. The reference to the *ancillary competence* as well as to the *interest of a good administration of justice* was omitted from the final text of the Regulation. The existence of the *identical factual basis* is only mentioned by the Recital of the Regulation, and the *preponderant* character of the criminal offence affecting the financial interests of the Union has been replaced by the *requirement of seriousness of the offence*, which is reflected in the *maximum sanctions*, according to the Recital.³⁶ According to the EPPO Regulation, the EPPO shall refrain from exercising its competence in respect of any offence falling within its scope of competence if the maximum sanction provided for by national law for an offence affecting the financial interest of the Union is equal to or less severe than the maximum sanction for an inextricably linked offence unless the latter offence has been instrumental to commit the former offence.³⁷

It is important to underline that the definitions and the sanctions of inextricably linked offence are essentially regulated by the national

³⁵ Recitals 54–56 of the EPPO Regulation.

³⁶ See : Békés Á., Gépész T. Op. cit. P. 47.

³⁷ Article 25 (3) of the EPPO Regulation. See : Kuhl, Lothar. The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud? *Eu crim – The European Criminal Law Associations' Forum*. 2017. № 3. P. 139.

law; therefore, the exercise of the competences of the EPPO could trigger problems in this area.³⁸

3. The territorial and personal competence of the European Public Prosecutor's Office

The European Public Prosecutor's Office can exercise its competences in the following cases: if the crime concerned was *committed in whole or in part within the territory of one or several Member States*; if it was *committed by a national of a Member State*; and if it was *committed outside the aforementioned territories by a person who was subject to the Staff Regulations or to the Conditions of Employment*, at the time of the offence. In the last two cases, it is a further condition that the Member State concerned has jurisdiction for such offences when committed outside its territory.³⁹ In connection with this, the Recital of the Regulation stipulates, that the EPPO should exercise its competence as broadly as possible so that its investigations and prosecutions may extend to offences committed outside the territory of the Member States.⁴⁰

The European Public Prosecutor's Office can exercise its competence with regard to any offence within its competence *committed after the date on which this Regulation has entered into force*.⁴¹

4. The exercise of the competence of the European Public Prosecutor's Office

According to the original EPPO Proposal, the European Public Prosecutor's Office has *exclusive competence* to investigate and prosecute criminal offences against the Union's financial interests.⁴² However, the final version of the EPPO Regulation – due to the pressure of the Member States – broke with the concept of exclusive competence and referred the fight against criminal offences affecting the financial

³⁸ Békés Á., Gépész T. Op. cit. P. 47.

³⁹ Article 23 of the EPPO Regulation.

⁴⁰ Recital 64 of the EPPO Regulation.

⁴¹ Article 120 (2) of the EPPO Regulation.

⁴² Articles 11 (4) and 14 of the EPPO Proposal. See in details : Coninx M. The European Commission's Legislative Proposal: An Overview of its Main Characteristics. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague : Asser Press, 2015. p. 29 ; Kuhl. Op. cit. P. 137 ; Ligeti K., Weyembergh A. The European Public Prosecutor's Office: Certain Constitutional Issues. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague : Asser Press, 2015. P. 61.

interests of the Union to the *shared competence*⁴³ between the EPPO and the national authorities.⁴⁴

In accordance with the concept of shared competences, the EPPO Regulation defines several exceptions in case of which the European Public Prosecutor's Office cannot exercise its competences.

Firstly, if the criminal offence that falls within the scope of competence of the EPPO caused or is likely to cause *damage to the Union's financial interests of less than EUR 10.000*, the EPPO can only exercise its competence if:

a) the case has repercussions at Union level which require an investigation to be conducted by the EPPO; or

b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence.⁴⁵

Secondly, the EPPO has to *refrain from exercising its competence* and – upon consultation with the competent national authorities – *refer the case without undue delay to the national authorities* if:

a) the maximum sanction provided for by national law for an offence affecting the financial interest of the Union is equal to or less severe than the maximum sanction for an inextricably linked offence unless the latter offence has been instrumental to commit the former offence;

b) there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence does not exceed the damage caused, or likely to be caused to another victim (e.g. to the Member States). However, in this latter case, the EPPO may – with the consent of the competent national authorities – exercise its competence if it appears that the EPPO is better placed to investigate or prosecute.⁴⁶

⁴³ See : Recital 13 of the EPPO Regulation.

⁴⁴ Békés Á., Gépész T. Op. cit. P. 44, 46 ; Csonka, Juszczka, Sason. Op. cit. P. 128 ; Karsai K. External Effects of the European Public Prosecutor's Office Regime. *Miskolci Jogi Szemle*. 2019. № 2. különszám. P. 461–462 ; Polt P. Az európai ügyész. *Ünnepikötet Györgyi Kálmán 75 születésnapjaalkalmából* / P. Polt Péter et al. (ed.). Budapest : ELTE Eötvös Kiadó, 2016. P. 210 ; Polt P. Critics and alternatives towards an enhanced protection of the financial interests of the EU. *Criminal Law Aspects of the Protection of the Financial Interests of the European Union – with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime* / A. Farkas et al. (ed.). Budapest : Wolters Kluwer Hungary, 2019. P. 513.

⁴⁵ Article 25 (2) of the EPPO Regulation.

⁴⁶ Article 25 (3) – (4) of the EPPO Regulation. According to Recital 60 of the Regulation, the EPPO could appear to be better placed, inter alia, where it would be more effective to let the EPPO investigate and prosecute the respective criminal offence due to its transnational nature and scale, where the offence involves a criminal organisation, or where a specific type of offence could be a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence. In such a case the EPPO should be able to exercise its competence with the consent given by the competent national authorities of the Member State(s) where damage to such other victim(s) occurred.

Thirdly, if the criminal offences caused or are likely to cause *damage to the Union's financial interests of less than EUR 100 000* and the College considers that – 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 to prosecute at Union level*, it can issue *general guidelines*.⁴⁷ On the basis of these guidelines, the European Delegated Prosecutors can independently and without undue delay decide *not to evoke the case*, or – if the criminal procedure has already been initiated – to *refer a case to the competent national authorities*.⁴⁸

The European Public Prosecutor's Office is obliged to *inform the competent national authorities* without undue delay of any decision to exercise or to refrain from exercising its competence. In case of *disagreement between the EPPO and the national prosecution authorities* over the question of whether the criminal conduct falls within the scope of the EPPO, the *national authorities* competent to decide on the attribution of competences concerning prosecution at national level is entitled to decide who is to be competent for the investigation of the case. Member States has to specify the national authority which will decide on the attribution of competence.⁴⁹ The abovementioned regulation means that the exercise of the competences of the supranational European Public Prosecutor's Office in concrete cases is largely dependent on the decision of the national authorities.⁵⁰

The EPPO Regulation declares that the procedure of the European Public Prosecutor's Office *takes precedence* over those of the national authorities in order to ensure the consistency of investigations and prosecutions at the EU level. That means that if the EPPO decides to exercise its competence, the competent national authorities cannot exercise their own competence in respect of the same criminal conduct.⁵¹ The obligation

⁴⁷ According to Article 27 (8) – (9) of the EPPO Regulation, the guidelines shall specify, with all necessary details, the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to fully recover the damage to the Union's financial interests. In order to ensure the coherent application of the guidelines, a European Delegated Prosecutor are required to inform the competent Permanent Chamber of each decision taken and each Permanent Chamber has to report annually to the College on the application of the guidelines.

⁴⁸ Article 27 (8) and 34 (3) of the EPPO Regulation.

⁴⁹ Article 25 (5) – (6) of the EPPO Regulation.

⁵⁰ Békés Á., Gépész T. Op. cit. P. 47–48 ; Caianiello M. The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes, or Nothing Changes? *European Journal of Crime, Criminal Law and Criminal Justice*. 2013. Vol. 21/2, P. 121.

⁵¹ Article 25 (1) of the EPPO Regulation. See also : Article 27 (5) of the EPPO Regulation.

of the acceptance of the precedence of the EPPO stems from the *principle of sincere cooperation*⁵² and from the obligation imposed on the Member States arising from the Treaty⁵³ that they shall counter fraud and any other illegal activities affecting the financial interests of the Union.⁵⁴

5. The possibility of the extension of the competences of the European Public Prosecutor's Office

Although the European Public Prosecutor's Office primarily serves for the fight against criminal offences affecting the financial interests of the European Union, *Article 86 (4) TFEU* provides the opportunity to the European Council to *extend the powers of the EPPO to other serious crimes having a cross-border dimension*. In this case, the European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

The possibility for the extension of the competences of the EPPO was introduced into the Treaty as a result of a political compromise. During the negotiations of the Constitutional Treaty – which formed the basis of the Treaty of Lisbon – the Member States did not agree as to the *necessity and the added value of the EPPO*. While some Member States argued for an EPPO which investigates and prosecutes only offences against the financial interests of the European Union, others preferred an EPPO with a scope of competence in line with the Europol and Eurojust, i.e. which covers the so-called *euro-crimes*⁵⁵ as well. *According to the result of the compromise, the competence of the European Public Prosecutor's Office only covers the criminal offences affecting the financial interests of the European Union, but it can be extended to other serious cross-border crimes by the European Council.*⁵⁶

The question of the extension of the competences of the European Public Prosecutor's Office to other criminal offences has already arisen at the level of the EU institutions. In 2018, the European Commission issued

⁵² Article 4 (3) TEU.

⁵³ Article 325 (1) TFEU.

⁵⁴ Alexandrova V. Op. cit. P. 15.

⁵⁵ See : Article 83(1) TFEU.

⁵⁶ Vervaele J. The material scope of competence of the European Public Prosecutor's Office: Lexuncerta and unpraevia? *ERA Forum*. 2014. Vol. 15/1. P. 87–90. See also : Smulders B. Is the Commission Proposal for a European Public Prosecutor's Office Based on a Harmonious Interpretation of Articles 85 and 86 TFEU? *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague : Asser Press, 2015. P. 45.

a *Communication* in which it recommended the European Council to use its competence under Article 86(4) TFEU and adopt a decision amending Article 86 (1) – (2) TFEU to extend the competence of the European Public Prosecutor’s Office to *terrorist offences affecting more than one Member State* as part of the comprehensive and strengthened European response to terrorist threats. In its justifications, the European Commission highlighted that there are number of gaps in the current anti-terrorism legal, institutional and operational framework, in particular, there is no common Union approach to the investigation, prosecution and bringing to judgment of cross-border terrorist crimes. Pursuant the Commission, the EPPO can *address the existing gaps* and could *bring added value to combating terrorist crimes*. After the possible positive decision of the European Council, the EPPO Regulation is also required to be amended by the European Commission.⁵⁷

CONCLUSIONS

The European Public Prosecutor’s Office can be regarded as a significant milestone in the development of the European criminal law since it is expected to provide for a more effective criminal law protection of the financial interests of the European Union. The EPPO is the *first supranational EU body* which is empowered to *carry out criminal investigations and prosecutions* in connection with criminal offences affecting the financial interests of the European Union. The EPPO could bring *more consistency and coherence* into the fight against crimes affecting the EU budget and thereby could lead to a *greater number of prosecutions and convictions* and as a result of thereof to a *higher level of recovery of fraudulently lost Union funds*.⁵⁸

However, it cannot be suppressed that the regulation of the material competence of the European Public Prosecutor’s Office has some substantial features which could give reason to criticism.

First of all, it has to be highlighted that the regulation on the competence of the European Public Prosecutor’s Office is a so-called *framework regulation*.⁵⁹ It means that the criminal offences falling within the scope

⁵⁷ See : Communication from the Commission to the European Parliament and the European Council: A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to cross-border terrorist crimes [COM (2018) 641 final, 12.09.2018].

⁵⁸ Csonka P., Juszcak A., Sason E. Op. cit. P. 132.

⁵⁹ See : Polt P. Az Eurojust működése és az Európai Ügyészség létrehozatalának tevei. *Az EU mint a szabadság, a biztonság és a jog térsége. Magyarország Európai Unióban 2004–2014* / M. Hollán (ed.) ; Nemzeti Közzolgálati Egyetem. Budapest : Nemzetközi Intézet, 2014. P. 175.

of competence of the EPPO are not determined by the EPPO Regulation itself but by the *PIF Directive*. It can raise problems that the legal act which lists the criminal offences in connection with which the EPPO could be competent is a *directive*, since it has to be *implemented into the national legal systems of the Member States*. It can clearly be seen, that the PIF Directive only provides a framework which the Member States can transplant differently based on their national concepts and traditions. The competence of the EPPO is therefore *bound to the national implementation of the PIF Directive*, which means that the proper implementation of the PIF Directive in the Member States is a *necessary and essential prerequisite* for the applicability of the EPPO Regulation.⁶⁰

Another problem could arise from the fact that the PIF Directive only establishes *minimum rules* concerning the definition of criminal offences and sanctions with regard to combating fraud and other illegal activities affecting the Union's financial interests, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the *acquis* of the Union in this field.⁶¹ It means that the PIF Directive only provides for a *minimum harmonization*, whereby the Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests.⁶² Therefore, Member States are entitled to criminalize other conducts which are not regulated in the Directive or to impose more severe penalties than those set out by the EU legislator.⁶³ Consequently, even if the PIF Directive is fully implemented by the Member States, it is highly probable that the substantive

⁶⁰ Békés Á., Gépész T. Op. cit. P. 44–46. See also: Ligeti, Weyembergh. Op. cit. P. 65, 109–110; Pawlik M., Klip A. A Disappointing First Draft for a European Public Prosecutor's Office. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague: Asser Press, 2015. P. 186–187; Polt. Op. cit. (2019). P. 514–515; Wasmeier M. The Choice of Forum by the European Public Prosecutor. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague: Asser Press, 2015. P. 147–148.

⁶¹ Article 1 of the PIF Directive.

⁶² See: Recital 16 of the PIF Directive.

⁶³ Böse M. Kompetenzen der Union auf dem Gebiet des Straf- und Strafverfahrensrechts. *Europäisches Strafrecht mit polizeilicher Zusammenarbeit* / M. Böse (ed.). Baden-Baden: Nomos Verlagsgesellschaft, 2013. P. 157; Safferling C. Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht., Heidelberg; Dordrecht; London; New York: Springer Verlag, 2011. P. 417; Satzger H. Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf und Strafverfahrensrecht – Völkerstrafrecht. Baden-Baden: Nomos Verlagsgesellschaft, 2016. P. 144; Schermuly K. Grenzen funktionaler Integration: Anforderungen an die Kontrolle europäischer Strafgesetzgebung durch den EuGH., Frankfurt am Main: Peter Lang Verlag, 2013. P. 56; Zeder F. Europastrafrecht: Aktueller Stand. *Österreichisches Anwaltsblatt*. 2008. № 6. P. 253.

criminal law provisions still remain different from one Member State to another. This means that the European Public Prosecutor's Office *cannot provide for a unified criminal protection* since the offences falling within its competence can be different based on the national implementation of the PIF Directive. Although the EU legislator intended to establish a supranational law enforcement body which can combat against criminal offences affecting the financial interests of the European Union unitedly in the whole territory of the EU, the regulation of the competences of the EPPO could *jeopardize the efficiency of the prosecution service*, since it will have to deal with the full range of substantive criminal law.⁶⁴ This could also result in the *violation of the legality principle*.⁶⁵

In order to eliminate these shortcomings, it would have been more appropriate if the criminal offences falling within the scope of competence of the European Public Prosecutor's Office had been determined by the EPPO Regulation which is directly applicable in the Member States.⁶⁶ Naturally, this would have resulted in a more serious intervention into the national sovereignty of the Member States; therefore, they did not choose this solution. However, if the substantive criminal regulations of the Member States are different, it makes the European Public Prosecutor's Office more difficult to effectively and unitedly fight against the criminal offences affecting the financial interests of the European Union.

SUMMARY

The article deals with the material scope of competence of the European Public Prosecutor's Office. The establishment of the EPPO was a significant milestone in the development of the European criminal law since it could provide for a more effective criminal law protection of the financial interests of the European Union. The EPPO was established by the Council on the 12th October 2017 through enhanced cooperation after a long negotiation procedure. According to the EPPO Regulation, the competence of the European Public Prosecutor's Office covers the criminal offences affecting the financial interests of the Union; the participation in a criminal organisation; and any other criminal offences that are inextricably linked to the crimes against the financial interests of the EU. The competences

⁶⁴ Békés Á., Gépész T. Op. cit. P. 44–46.

⁶⁵ Meij A. Some Explorations into the EPPO's Administrative Structure and Judicial Review. *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* / L. Erkelens, A. Meij, M. Pawlik (ed.). The Hague : Asser Press, 2015. P. 109.

⁶⁶ Pawlik M., Klip A. Op. cit. P. 186 ; Wasmeier. Op. cit. P. 147.

of the EPPO could be extended to other serious crimes having a cross-border dimension. However, it can raise problems that the criminal offences falling within the scope of competence of the EPPO are defined by the PIF Directive. The competence of the EPPO is therefore bound to the national implementation of the PIF Directive, which could jeopardize not only the principle of legality but also the effectivity activity of the European Public Prosecutor's Office.

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