

Chapter 1

EPPO structure, statute and principles

1.1. Short history

The concept of a European Public Prosecutor's Office first emerged as a response to the need to strengthen Eurojust; the person who first imagined the existence of European Prosecutors was Franco Frattini, former Commissioner for Justice, in 2007, when he declared: *"I am convinced that Europe will have its own Prosecutor General in the future"*¹.

Going back in time, the doctrine states that *"The project of a European judicial area was launched in November 1995 by Prof. Francesco de Angelis and entrusted to a group of experts from eight European countries for study. Two years later, this group of experts, under the coordination of Professor Mireille Delmas Marty of the Panthéon-Sorbonne University, published the work entitled 'Corpus Juris', which lays the foundations for a set of rules concerning criminal law and criminal procedure applicable to the European judicial area and which proposes more effective penalties for fraud against the Community budget"*². This group has judiciously addressed issues of substantive law, rules of jurisdiction and extraterritoriality, aspects of criminal procedure and possible rules for gathering evidence.

Eurojust, which has been operating since the early 2000s, has proved effective in cooperation between Member States or between Member States and third countries in the exchange of information in judicial proceedings, but has not been considered sufficient to protect the financial interests of the European Union. The insufficiency stemmed from the fact that damage to these interests often occurs through fraud within a single state and

¹ R. Galdirova, *Brussels eyes single European public prosecutor*, published on 1 August 2007 on www.euobserver.com.

² Aug. Lazăr, *Procurorul European – retrospectiva cercetării științifice premergătoare propunerilor Comisiei Europene (The European Prosecutor – a retrospective of scientific research preceding the European Commission proposals)*, Pro Lege Magazine no. 4/2016, available at www.revistaprolege.ro.

without a cross-border character and, as such, there was a need for a specialised body which could also investigate and prosecute such acts, even if committed on the territory of a single Member State.

With regard to the proposals made by *Corpus Juris*, it was also pointed out that “the research group has tried to manage the problem of the “infernal couple”: on one hand, the spirit of effectiveness for the benefit of security, through effective crime control, effective protection of financial interests, combined with the spirit of legitimacy, strengthening freedom and justice by guaranteeing fundamental rights. On completion of the new project, it was noted that the management of this problem has progressed. New instruments have been integrated, representing a very precise and valuable corpus of fundamental rights protection: the case law of the European Court of Human Rights, the 2009 Council resolutions on the roadmap for the protection of fundamental rights of suspects and defendants; the 2010 Directive on the right to interpretation and translation; the 2012 Directive on the right to information in criminal proceedings; the pending proposal for a Directive on the right to silence and to a lawyer”¹.

The actual negotiations between the Member States started in 2012 and the following year the first Regulation establishing the European Public Prosecutor's Office was proposed. The Member States were not able to reach full consensus on how to establish, organise and operate the European Public Prosecutor's Office, so it was not possible to adopt this draft unanimously. For this reason, it was decided to use enhanced cooperation² between 16 Member States, including Romania, bringing the total number of signatory Member States to 22 by 20 November 2017 (when Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office entered into force): Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Latvia, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain.

The countries that have decided not to participate (at least not yet) in the creation of this entity are Ireland, Poland, Sweden, Hungary, the United

¹ *Ibid.*

² The rules for enhanced cooperation are laid down in the texts of both founding treaties: Title IV of the TEU and Part 6, Title III of the TFEU.

Kingdom of Great Britain and Northern Ireland, while Denmark has opted out of Title V of the TFEU (Area of Freedom, Security and Justice) within the Council in the past, therefore it does not partake in the creation of the European Public Prosecutor's Office.

In parallel with the creation of a specialised entity with competence to investigate and prosecute offences against the financial interests of the European Union, an attempt has been made to standardise substantive criminal law so that the future prosecution unit has a relatively uniform basis of offences over which its jurisdiction can be established, therefore limited. Thus, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud to the Union's financial interests by criminal law means (hereafter the "PIF Directive") was adopted.

Another mechanism that could prove useful in making the European Public Prosecutor's Office more operational and efficient would be to standardise the criminal procedure provisions in the Member States, but achieving such a goal is a controversy that we will not be addressing in this study.

1.2. Purpose and status of¹ EPPO

As the recitals of the EPPO Regulation clarify², the general purpose of the European Public Prosecutor's Office is to protect the financial interests of the Union against offences causing significant financial damage. The notion of *financial interests of the European Union* is defined in Art. 2

¹ With reference to the EPPO status in Romania, the Law on the establishment of measures for the implementation of the EPPO Regulation (Law no. 6/2021) provides in Art. 12 that "*the European Public Prosecutor's Office is a judicial authority within the meaning of Art. 2(d) of Law no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented, republished, and shall be notified as such to the relevant international legal instruments in the field of international mutual legal assistance in criminal matters to which Romania is a party, as well as in cases where, according to the EPPO Regulation, delegated European Prosecutors may carry out international judicial cooperation activities under the applicable treaties*", available at <http://www.just.ro/proiectul-de-lege-privind-stabilirea-unor-masuri-pentru-punerea-in-aplicare-a-regulamentului-ue-2017-1-939-al-consiliului-din-12-octombrie-2017-de-punere-in-aplicare-a-unei-forme-de-cooperare-consol/>.

² Published in OJEU L283 of 31 October 2017.

para. (3) of the Regulation as "*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*".

The need to create and operationalise the EPPO is also justified by the application of ideas which are in line with the principle of subsidiarity¹: given that the fight against crime committed by Member States against the Union's financial interests is not effective or efficient in all cases, the Union was obliged, in order to make these particularly important objectives effective, to tackle this problem at a transnational level, more specifically at European level.

EPPO's primary mandate, to ensure the protection of the Union's financial interests, requires precautionary strategies to guarantee EPPO's independence. There is a risk of political, group and illegitimate or vested interest pressure that could be exerted on the EPPO and, more specifically, on delegated European Prosecutors working in Member States. This risk is caused by the high level of corruption in some Member States in relation to the political implications of some cases that might end up being investigated by the EPPO.

Precisely because of this desire to ensure the independence of the EPPO, none of the Union institutions, and even less the authorities or institutions of the Member States, will have authority over the EPPO or over any of the prosecutors working in this Office. However, in order to comply with the Union's principle of *checks and balances*, the EPPO Chief Prosecutor will report to the European Parliament, the Council of the European Union and the European Commission on an annual basis, as provided for in Art. 6 para. (2) of the Regulation.

¹ This is enshrined in Art. 5 para. (3) of the TEU: "(3) *In accordance with the principle of subsidiarity, the Union shall take action in areas which do not fall within its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States at central, regional or local level, but can, by reason of the scale and effects of the proposed action, be better achieved by the Union. The Union institutions apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol*".

However, the aim of this Prosecutor's Office is not to draw on its exclusive competence to protect the Union's financial interests, but to create a system of shared competences, linking the efforts of national authorities with those of EPPO in this area. The conclusion is drawn from Recital (13) of the Regulation, which states that a "system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union, based on the right of evocation of the EPPO" is established.

1.3. EPPO Structure

The European Public Prosecutor's Office was conceived as an indivisible body of the Union¹ functioning as a single prosecutor's office, consisting of two levels: central and decentralised. It has its own legal personality and, as it is intended to be an autonomous and independent body, it has an autonomous budget, with revenues mainly provided by contributions from the EU budget. As stated in legal literature, the organisational structure of the EPPO suggests that the European Public Prosecutor's Office will not primarily be an instrument for the harmonisation of practices, but rather a multinational body which will ensure that the Union's aims² in combating fraud against its budget are achieved.

1.3.1. Central level

EPPO's headquarters are in Luxembourg, joining the other EU bodies located in this country, namely the Court of Justice of the European Union and the European Court of Auditors. At central level, the head is the

¹ As observed in the legal doctrine: "This does not turn the EPPO into a formal «organ of the EU». But it leads to the EPPO's being fully bound by Union law, including its constitutional principles and the Charter" in C. Burchard in Herrnfeld/Brodowski/Burchard, *European Public Prosecutor's Office, Article by Article Commentary*, Beck Hart Nomos, p. 17.

² G. Sgueo, *The institutional architecture of EU anti-fraud measures. Overview of a network*, Paper prepared for the European Parliament, Brussels, 2018 p. 22, available at www.europarl.europa.eu.

European Chief Prosecutor, who will coordinate the permanent chambers and the European Prosecutors, the latter being organised in the EPPO College, presided by the European Chief Prosecutor.

This central structure provides, on one hand, the overall control, *i.e.* general management of EPPO's activities, in the exercise of which instructions are given only on matters of *horizontal importance*. This can be considered the strategic layer of EPPO, consisting of the the EPPO College and the Chief Prosecutor.

On the other hand, the central level monitors and directs the European Prosecutors on each individual investigation and prosecution in the overall interests of the EPPO and, by extension, the Union. Last but not least, there is also the supervision of the European Prosecutors, *i.e.* a close and continuous monitoring of investigations and prosecutions, including, whenever necessary, intervening and giving instructions on matters relating to investigations and prosecutions. Therefore, the Permanent Chambers and the European Prosecutors are involved in the operational activities of the EPPO, precisely each particular case is monitored and directed by a Permanent Chamber and supervised by one European Prosecutor.

1.3.1.1. The European Chief Prosecutor

The European Chief Public Prosecutor holds the highest seniority in the EPPO hierarchy and is the representative of the European Public Prosecutor's Office in its relations with other institutions, bodies or with Member States and third parties. She or he can be considered to be in charge of the work of the European Public Prosecutor's Office in all respects.

The European Parliament and the Council appoint the European Chief Public Prosecutor in common agreement for a non-renewable term of 7 years, with the Council deciding by simple majority. According to Art. 14 para. (3) of the Regulation, "*The selection shall be based on an open call for candidates, to be published in the Official Journal of the European Union, following which a selection panel shall draw up a shortlist of qualified candidates to be submitted to the European Parliament and to the Council*".

The eligibility conditions for the candidate for the office of European Prosecutor are, according to Art. 14 of the Regulation:

- *to be an active member of the prosecution services or the judiciary of the Member States, or be an active European Public Prosecutor;*
- *to offer every guarantee of independence;*
- *to have the necessary qualifications for appointment to the highest prosecutorial and judicial offices in the Member States concerned and have relevant practical experience of national legal systems, financial investigations and international judicial cooperation in criminal matters, or have served as European Prosecutors; and*
- *to have sufficient managerial experience and qualifications for the position.*

The first European Chief Prosecutor was elected on 16 October 2019, when Laura Codruța Kövesi, a candidate from Romania, was confirmed by the European Parliament as the first European Chief Prosecutor¹, following her being voted by the EU Council on 19 September 2019².

The European Chief Prosecutor is assisted by two Deputy European Prosecutors, who assist them in day-to-day activities and replace them when they are absent or unable to perform their duties. The Deputy European Prosecutors are elected from the European Prosecutors for 3-year terms by the EPPO College. On 11 November 2020, the first Deputy Chief Prosecutors were elected, Danilo Ceccareli from Italy and Andrés Ritter from Germany³.

Their activity and organisation is regulated, in principle, by the provisions of Art. 25 to 29 of the EPPO Internal Rules adopted by College Decision No 003/2020 of 12 October 2020 (hereinafter "EPPO Internal Rules").

¹ <https://www.europarl.europa.eu/news/en/press-room/20191016IPR64417/laura-kovesi-confirmed-as-european-chief-prosecutor>.

² https://ec.europa.eu/commission/presscorner/detail/en/statement_19_5769.

³ https://ec.europa.eu/info/news/european-prosecutors-germany-and-italy-appointed-deputy-european-chief-prosecutors-2020-nov-11_en#:~:text=The%20College%20of%20the%20European,and%20Andr%C3%A9s%20Ritter%20from%20Germany.

1.3.1.2. *The EPPO College*

The EPPO College is, to make a parallel with other institutions/bodies, *the representative forum of the Member States in the EPPO*, consisting of the European Chief Prosecutor and one European Prosecutor per each Member State. The EPPO College is responsible for the general control of the work of the EPPO, an attribution which allows them to request information on all EPPO activities, at any time, in accordance with Art. 5 para. (1) of the EPPO Internal Rules of Procedure. The reunions, the methodologies and procedures for work, decision making and adopting of general orientations are described by art. 6-14 from the Internal Rules.

The European Chief Prosecutor is responsible for chairing regular meetings of the College and is in charge of their preparation, and may propose the establishment of permanent chambers by the College.

The College is responsible for making decisions on strategic issues, including setting priorities and EPPO policy on investigation and prosecution, as well as on any general issues that may arise from individual cases¹. For example, it could determine that fraud with EU funds committed in a certain area (agriculture, education, infrastructure) will be a priority for EPPO activities for a certain period, or that in the case of a certain way of committing VAT fraud within the competence of EPPO, which is encountered in several cases and on which there is debate on how to calculate the damage, it will be calculated in a certain way.

However, the decisions of the College will not affect the obligation to carry out investigations or prosecutions under the EPPO Regulation or national law, in the sense that it is beyond the powers of the College to impose a decision in an individual case or to overrule the decisions of the European Prosecutors. Thus, the College does not have the power to take operational decisions in individual, concrete cases, its work always falling within the *general* scope of EPPO operations. By way of example, the College will not be able to say that the act under investigation in a particular case is not provided for by criminal law or that a particular solution ordered by a European Delegated Prosecutor is or is not well founded.

¹ "The College (Art. 9) is the principal actor for strategic affairs. It is responsible for the general oversight of the EPPO" in C. Burchard in Herrnfeld/Brodowski/Burchard, *European Public Prosecutor's Office, Article by Article Commentary*, Beck Hart Nomos, p. 46.

The College also acts as a disciplinary forum for European Delegated Prosecutors. Interpreting the provisions of art. 17 para. (4) and recital 46 of the Regulation, the European Delegated Prosecutors are subject to disciplinary actions both from the European Public Prosecutor's Office and from the national level, in accordance with internal procedures. If the reason for dismissal or the disciplinary measure is not related to the responsibilities of the European Delegated Prosecutor set out in the Regulation, Member States must inform the European Chief Prosecutor before adopting the measure. However, if the grounds for dismissal or disciplinary action are related to the activities carried out under the Regulation, Member States cannot take such measures without the consent of the European Chief Prosecutor. If the European Chief Prosecutor does not agree, the Member State may request the College to reconsider this matter.

1.3.1.3. Permanent chambers

The fundamental procedural role in EPPO investigations and prosecutions belongs to the permanent chambers, which will direct, monitor and supervise all investigations carried out by the European Delegated Prosecutors, who will be accountable to them and will have to comply with the received instructions.

Rather untypically for such an important body, the permanent chambers could only be set up following the adoption of the EPPO's Internal Rules of Procedure by the College, on a proposal by the European Chief Prosecutor, the number of which was also established by that decision¹. The Chambers are composed of a President (who will be either the European Chief Prosecutor, one of the two Deputy European Prosecutors or another European Prosecutor appointed as President of the Chamber) and two other permanent members from among the European Prosecutors. According to Art. 16 para. (2) and (3) of the EPPO Internal

¹ By EPPO College Decision No 015/2020 of 25 November 2020, the EPPO College decided to establish 15 permanent chambers and each European Prosecutor will be a member of 1, 2 or 3 permanent chambers, taking into account the estimated workload of each European Prosecutor, based on the criteria set out in the decision. For more details, see https://ec.europa.eu/info/sites/info/files/2020.015_decision_on_the_permanent_chambers_-_final_o.pdf.

Rules of Procedure, each European Prosecutor shall be a member of at least one permanent chamber and may be appointed to more than one permanent chamber if such an appointment is justified on the basis of the workload of that prosecutor.

The permanent chambers are able to share competences according to the operational needs of EPPO and in accordance with the internal rules of procedure, ensuring an equitable distribution of workload based on a system of random, automatic and alternative allocation of cases, respecting the order of registration of new cases and ensuring a balanced distribution of workload between the permanent chambers as provided for in Art. 19 para. (1) of the EPPO Internal Rules of Procedure. At the same time, Art. 19 para. (2) of the EPPO Internal Rules of Procedure provides for the need to set up the system in such a way as to exclude the possibility of a case being allocated to the chamber whose permanent member is the European Prosecutor in charge of supervising the case.

However, this system may be circumvented in exceptional circumstances by direct allocation of cases as ordered by the European Chief Prosecutor. In this respect, the provisions of Art. 4 and 5 of EPPO College Decision No. 015/2020 of 25 November 2020 rule that the allocation of cases between the 15 permanent chambers will be done randomly, using the CMS¹, but the European Chief Prosecutor will have to be notified when the number of cases allocated to one of the permanent chambers is more than 10% higher than the average number of cases allocated to the others. In these situations, in order to ensure efficiency of work and uniformity of workload between the permanent chambers, the European Chief Prosecutor may suspend the allocation of new cases to one or more permanent chambers for a specified period of time. Moreover, Art. 19 para. (4) of the EPPO Internal Rules of Procedure provides for the possibility to decide, by decision of the College on the permanent chambers, that certain categories of cases are allocated to a certain permanent chamber, the recommended criterion being the type of offences investigated or their circumstances. In essence, it seems that these provisions establish the possibility of having specialised permanent chambers for a certain type of crime.

¹ For more details on CMS, see Chapter 6, Section 6.5.

The permanent chambers oversee investigations and prosecutions by European Delegated Prosecutors and ensure the coordination of investigations and prosecutions in cross-border cases. The Chambers are also responsible for implementing the decisions taken by the College. The working procedures in which these tasks are carried out are described in the EPPO Internal Rules of Procedure, Art. 23 and 24.

As regards the competence of the Permanent Chambers in certain cases and their redistribution, the rules are laid down in Art. 20 of the EPPO Internal Rules of Procedure, which establishes the principle of the competence of the Chamber seized until the case is finalised. Obviously, there are also three exceptional situations in which the European Prosecutor may, after consulting the permanent chamber, reassign the case to another chamber: i) where there are connections between individual cases assigned to different permanent chambers, or where the subject-matter of the investigation is repetitive; ii) in the case of urgent decisions, including decisions to exercise the right of evocation; iii) where the case fell within the jurisdiction of a specialised permanent chamber, within the meaning of Art. 19 para. (4) of the EPPO Regulation or where such competence emerged in the course of the investigation. Reasons must be given for any redeployment decisions taken by the European Prosecutor and they must be brought to the attention of the College, in accordance with Art. 20 para. (4) of the EPPO Internal Rules of Procedure.

Practically, if we were to use the correlative criminal procedural terminology of the Romanian legal system, the permanent chambers have the role of *hierarchical superior prosecutor*¹ of the European Delegated Prosecutors they supervise even if, analysing the provisions of the Regulation, it appears that the European Delegated Prosecutors do not enjoy the same independence over the way the case is dealt with as in the case of Romanian prosecutors. In the conduct of criminal investigation in Romania, the senior prosecutor can only reject the documents drawn up by

¹ Article 4 para. (2) of the Romanian Law no. 6/2021 on the establishment of measures for the implementation of the EPPO Regulation provides that "whenever national law refers to the senior prosecutor, the reference shall be deemed to be made, where appropriate, to the European Prosecutor or to the permanent chamber of the European Public Prosecutor's Office for cases falling within the jurisdiction of the European Public Prosecutor's Office".