

# EPPO – Diversity and Challenges in Investigation and Prosecution in 22 Member States

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## Article

### ABSTRACT

Differences in the criminal systems of the 22 participating Member States will certainly be a challenge for the EPPO when conducting investigations at the national level and, in particular, when using evidence obtained from other Member States. How competent courts in individual Member States react to the impact of evidence gathered in other Member States under the EPPO Regulation will be shown in practice. Surely, the sooner the EPPO starts producing some tangible results, the sooner it will be recognized by European taxpayers as an effective and efficient instrument in the protection of the European Union's budget.

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For an efficient functioning of the EPPO, all participating Member States<sup>1</sup> are obliged to meet the substantive and procedural preconditions. The substantive preconditions are covered by the criminal offenses and penalties transposing the PIF Directive<sup>2</sup> into the national laws. Although the Directive harmonises the legal orders, it should be stressed that the underlying criminal law provisions are those of the national legal orders of the Member States.

The procedural preconditions relate to the implementation of the EPPO Regulation.<sup>3</sup> Compared to the substantive aspect, the situation is a little different: European Delegated Prosecutors (EDPs) will conduct investigations in accordance with the Regulation and, for matters not covered by it, in accordance with national law. Furthermore, Art. 30(1) of the EPPO Regulation lists certain investigative measures that the Member States are obliged to provide in their national criminal procedure laws and which the EDP must be able to request or order.<sup>4</sup> Although the EPPO may order or require investigative measures to be taken throughout the EU, the possibility to enforce investigative measures depends, to a large extent, on the conditions laid down by the national laws of the Member States. Practice will show to which extent courts will hold investigative measures admissible if they are carried out on the basis of an EPPO order but are not prescribed by their national law. In this context, it should be noted that Union law obliges the Member States to apply and interpret national law in accordance with EU law, in this case the EPPO Regulation. The EPPO Regulation does not set any common standards for national rules of criminal procedure, however, which means that Member States are free in this respect.<sup>5</sup>

The chosen approach means that EDPs in 22 Member States have to apply 22 different laws of criminal procedure. This will create certain difficulties in their daily work on specific subjects. In some Member States, for instance, EDPs will conduct their own investigations, whereas, in others, they will only supervise investigations carried out by the police. In a number of Member States, it will also be possible for two or more prosecutors to conduct the same investigation, while it will not be possible in others. In some Member States, EDPs will be able to apply a simplified prosecution procedure in the investigation phase but, in others, they will only be able to do so after the indictment has been filed.<sup>6</sup>

All these differences in the national criminal procedures pose a major challenge to the Permanent Chambers, which will be tasked with monitoring and directing investigations and prosecutions conducted by EDPs. Here, a great role and responsibility falls to the supervising European Prosecutors, who will present summaries of the cases under their supervision and make proposals for decisions to be taken by the Permanent Chambers. The role of European Prosecutors will also be important in explaining to the president and members of the Permanent Chambers not only the facts of the case but also the specifics of their national legislation.

As mentioned, the EPPO is responsible for conducting investigations throughout the EU. The EPPO Regulation supports this objective by making cross-border collection of evidence faster and more efficient.<sup>7</sup>

Nonetheless, if investigative measures need to be taken in the territories of different Member States, the admissibility of the measures and their form of execution is determined by the law of the Member State upon whose territory the investigative measure is taken. This concept implies the following:

- Cross-border gathering of evidence in the traditional sense, as an activity involving the judicial authorities of different countries, will not be applicable in EPPO cases;
- Evidence gathered during the investigation, which the EPPO will submit when filing the indictment, comes from different criminal procedural systems;

– Not only prosecutorial activities, but also other activities, e.g., the indictment and conducting the criminal trial, will remain at the national levels of the Member States. The issue that evidence is gathered under different legal orders will certainly raise the question of admissibility of evidence. The Regulation is quite clear in this regard: evidence presented by the EPPO in court should not be denied admission solely on the ground that the evidence was collected in another Member State or in accordance with the law of another Member State.<sup>8</sup> Nonetheless, the criminal justice systems of the Member States have had or will have to undergo certain adjustments and changes. The way in which prosecutors (EDPs) and other parties in criminal proceedings work and act will need to be adapted, especially concerning a preliminary procedure in which the EPPO will carry out all actions and assume the rights and obligations of prosecutors through the EDPs.

The EPPO will soon begin its work on specific criminal cases detrimental to the EU's financial interests. Successful and efficient work by the EPPO will require both the contributions of EPPO officials at the central and decentralised level and those of all other competent national authorities belonging to the participating Member States. Only then will the joint work and motivation of all participants who combine their expertise via the new Office lead to concrete results in protecting the EU's financial interests, regardless of the differences in the criminal justice systems of the 22 participating Member States. The sooner the EPPO starts producing tangible results, the sooner it will be recognised by European taxpayers as an effective and efficient instrument in the protection of the EU budget.

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1. I.e. the EU Member States that support the EPPO by accepting the enhanced cooperation procedure. Hereinafter referred as "Member States".↔
  2. 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, O.J. L 198, 28 July 2017, 29.↔
  3. Council Regulation (EU) 2017/1939 of 12 October 2017 on the implementation of enhanced cooperation in connection with the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31. October 2017, 1.↔
  4. It should be added that Art. 30(1) further stipulates that this obligation applies at least in cases in which the offense under investigation is punishable by a maximum term of imprisonment of at least four years.↔
  5. Of course, to the extent that the national rule is not contrary to the Regulation.↔
  6. For the application of simplified prosecution procedures, cf. Art. 40 of the EPPO Regulation.↔
  7. Cf. Art. 31 of the EPPO Regulation.↔
  8. Cf. Art. 37(1) of the EPPO Regulation.↔
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