

# EPPO Institutionalization during the Bulgarian Council Presidency

– Main Steps and Challenges Ahead

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## ABSTRACT

The article follows up the efforts undertaken by the EU Commission together with the Council of the European Union to set up the European Public Prosecutor's Office (EPPO). Preparing the EPPO to become operational by 2020 was a top political priority during the Bulgarian Council Presidency, given the paramount importance of the proper protection of the EU's financial interests against fraud and misuse of EU money. In the first part, information is provided on how the Presidency drove forward the initial steps to structure the EPPO and enhance its coordination with other EU partner agencies.

In the second part, the article gives an overview of EPPO's powers that make it a unique EU organism equipped with the necessary tools to effectively investigate crimes against EU funds. This overview is followed by an analysis on the challenges that lay ahead particularly for the integration of the European Delegated Prosecutors into this new law enforcement scheme.

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# I. Introduction

After publication in the EU Official Journal of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO),<sup>1</sup> it was time for initial steps to establish the Office to be taken. Institutionalizing the EPPO is a complex task involving many legal, organizational, and capacity-building measures. It also requires providing for cooperation and complementarity between the EPPO and other EU partner agencies, in particular Eurojust, OLAF, and Europol. Measures needed to get the EPPO up and running by 2020 include, inter alia:

- Creating a panel for selection of the European Chief Prosecutor (ECP) and European Prosecutors (EPs);
- Designing a EPPO Case Management System;
- Preparing the Member States for selection and appointment of the candidates for the positions of European Prosecutors;
- Changing the national legal rules on criminal proceedings in conformity with the requirements of the EPPO Regulation;
- Organising the functioning of the European Delegated Prosecutors (EDPs) within the national prosecution systems.

However, preparing Member States to adapt their criminal procedures to the requirements of Regulation 2017/1939 and to select the best professionals as European Prosecutors and European Delegated Prosecutors requires a keen understanding of the nature of the EPPO and its unique structure. The EPPO's design allows for the co-existence of supranational powers concentrated at its Central Office, with national prosecutions being conducted by the European Delegated Prosecutors. Nevertheless, whatever structure is in place, the human factor remains indispensable for its proper functioning. On the one hand, the core question is how to change the mentality of a national prosecutor making the abrupt career shift to European prosecutor and, on the other hand, how to facilitate his/her transition gradually by first taking the job of European Delegated Prosecutor. Despite the remaining challenges in organizing the EPPO, the time is ripe for its implementation.

Against this background, the following parts will deal with the steps undertaken to set up the EPPO during the Bulgarian Presidency of the Council of the EU (II.) and the challenges ahead regarding the conversion from national prosecutors to European Prosecutors or European Delegated Prosecutors (III.).

## II. Institutionalizing the European Public Prosecutor's Office – A Political Priority of the Bulgarian Council Presidency

The Commission introduced its legislative proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office on 17 July 2013 by the words:<sup>2</sup>

"Both the Union and the Member States of the European Union have an obligation to protect the Union's financial interests against criminal offences generating significant financial damages every year. Yet, these

offences are currently not always sufficiently investigated and prosecuted by the national criminal justice authorities.”

The Commission’s press release welcoming the political agreement on establishing the new Office continued:<sup>3</sup>

“Every year, at least 50 billion euros of revenues from VAT are lost for national budgets all over Europe through cross-border fraud. Transnational organised crime is making billions in profit every year by circumventing national rules and escaping criminal prosecution. Outside the area of VAT, in 2015, the Member States detected and reported to the Commission fraudulent irregularities for an amount of around €638 million. National prosecutors’ tools to fight large-scale cross-border financial crime are limited.”

This statement was made after more than four years of intensive negotiations in the Council, when 20 EU Member States took the road to enhanced cooperation in setting up the European Public Prosecutor’s Office. As one of the EPPO’s founding Member States, Bulgaria – which also held the EU Council Presidency from 1 January-30 June 2018 – declared the timely setting up of the EPPO to be one of its top priorities. Together with the EU Commission, this demanding task was put at the top of the Council’s political agenda. As a result of the proactive policy to attract new Member States to join the enhanced cooperation, the Netherlands and Malta also decided to join the EPPO and submitted their requests to do so in the first half of 2018. Two consecutive JHA Councils in March and June 2018 and one Informal Ministerial Meeting in January 2018 were dedicated to the measures that must be undertaken to a successful establishment of the EPPO. The Commission informed the Council about the ongoing administrative and organizational steps undertaken by it in setting up the EPPO, and the ministers in turn outlined the need for an effective future cooperation of the EPPO with the other partner agencies and bodies, in particular Eurojust, Europol, and OLAF. The conclusions were drawn that other EU partner agencies and entities should cooperate and coordinate its efforts with the EPPO. This approach should complement EPPO investigations while maintaining the respective partner agency’s individual role in administrative enquires (OLAF) and in criminal investigations in which the EPPO does not have competences (Eurojust). The ministers considered it an important task to make the EPPO operational swiftly, a task that requires organizational measures, political support, and regular Commission updates.

During the Bulgarian Presidency, political agreement on the Eurojust Regulation was reached. Eurojust and the EPPO will contribute to the close cooperation provided for in the new legal framework by sharing information and complementing each other according to their respective competences.<sup>4</sup> In addition, a reform of OLAF began after a new draft of the OLAF Regulation had been issued in May 2018.<sup>5</sup> Negotiations started in the Council on the new legal framework to regulate OLAF’s competencies, with due regard to those of the EPPO, which is expected to facilitate cooperation and complementarity in the work of these two EU entities.

A major conference was co-organized by the Bulgarian Presidency and the Commission. It took place in Sofia at the end of March 2018. Representatives of Member States, EU institutions, and practitioners discussed the EPPO’s future structure, the elections of EPPO staff, future EPPO internal rules, the EPPO’s competences and necessary adaptations of national laws to the EPPO Regulation, cooperation with partner agencies and third countries, and training of EPPO staff.

The EPPO Expert Group<sup>6</sup> held its first two meetings on 14 April and 29 May 2018. The Commission gave a state of play on the setting up of the EPPO, namely on the appointment procedure for the EPPO’s interim Administrative Director; the different preparatory steps for selection of the European Chief Prosecutor; the proposed budget for next year, and the study to identify the requirements for the Case Management System. The Expert Group consulted the Commission on future operational rules of the selection panel for the

European Prosecutors, the vacancy notice for the position of the European Chief Prosecutor, and the design and operational characteristics of the future Case Management System. In June 2018, an Implementing Decision on the operating rules of the selection panel, provided for in Art. 14(3) of Regulation (EU) 2017/1939, was agreed upon on a working level and adopted on 13 July 2018 as A Item of the Economic and Financial Affairs Council.<sup>7</sup> Furthermore, the vacancy notice for the European Chief Prosecutor was consulted provisionally with Member States.

Setting up the EPPO is an ongoing process. The next EU Presidencies and the Commission will have to continue the work in view of accomplishing the legal and organizational measures to make the EPPO operational by the end of 2020. One of the main tasks is the integration of the European Prosecutors and European Delegated Prosecutors into the new structure. This is dealt with in the following part.

### III. EPPO's Powers – Challenges in Becoming European Prosecutor or European Delegated Prosecutor

Institutionalizing the EPPO is a complex but worthwhile endeavor for the benefit of all EU citizens. The EPPO is an entirely new investigative body within the EU law enforcement and justice architecture. The word "EPPO" is often used as a catchword nowadays – it is synonymous with a completely new level of professional, effective, and timely investigations by a new, single criminal investigative office throughout the entire EU territory, securing the quick return of misused EU funds and coordinating financial investigations against fraudulent crimes within the Area of Freedom, Security and Justice.

This entails, however, several questions, such as: what are EPPO's powers, and what (kind of) competences must be transferred to this new entity? And: how easy is it to quit the previous way in which standard investigative proceedings against fraud and other crimes against the EU budget were being carried out in the Member States' jurisdictions and instead immediately revert to the EPPO's own investigations? In order to answer these questions one must recall the peculiarities of the EPPO.

First, as a single EU body operating across the territory of all participating Member States. EPPO's powers to investigate, prosecute, and bring to court perpetrators who have committed offences against the Union's financial interests go beyond purely national competences. The purpose is to gain a higher level of independence in a specific field affecting the EU's budget. Therefore, the EPs and EDPs will act in the interest of the EU and will neither seek nor take instructions from EU institutions or national authorities.

Second, the EPPO structure is also unique, with a central office at the EU level and a decentralized level consisting of EDPs located in the Member States, who retain their capacities as national prosecutors ("double hat").<sup>8</sup> The central level is entrusted with supervisory powers over the investigations and prosecutions at the national level. This mixed approach is designed to ensure the effectiveness and consistency of criminal investigations in the participating Member States.

Third, the EPPO will concentrate on investigations of serious crimes affecting EU funds: those over €10,000 and cross-border VAT fraud of over €10 million. It will be equipped to act quickly across borders without the need for lengthy judicial cooperation proceedings, and it will bring actions against criminals directly before national courts. These elements should lead to more successful prosecutions and a better recovery of the losses.

We should not be too hasty, however, to think that making the EPPO operational means to immediately abandon the “national investigations”. On the contrary, investigations at the national level coordinated by the EPPO should lay the groundwork and play an important role in the EPPO’s success story. We should recall that the EPPO’s powers are based on the investigations and prosecutions carried out by European Delegated Prosecutors in individual Member States under the authority of the European Prosecutors in the central office. On top of that, national authorities will be the ones to supply the EPPO with reports that might lead to justified conclusions for misuse of EU funds, subsequently triggering criminal prosecutions. It will be also up to the national prosecutorial authorities to consider whether a specific criminal case calls for the EPPO’s competences and involves transfer of those cases to the EPPO. Conversely, the EPPO assessing the case might arrive at the decision to transfer the proceedings back to the respective national authorities.

Therefore, considering the EPPO to be simply a supranational agency is a rather too far-reaching assumption. Attributing such a capacity to the EPPO is not the right way to perceive its nature. Rather, a more holistic approach is needed, namely viewing the EPPO as an EU single investigative agency integrating national and cross border investigations into crimes affecting the EU’s financial interests under mandatory EU rules. European Prosecutors in turn should not be seen as modern-day mavericks who one day suddenly decide to abandon their national investigative functions in favour of the EU investigations and prosecutions. After all, supranational investigations are difficult enough (consider e.g., the International Criminal Court), especially without a national network of prosecutors and law enforcement personnel in place. In fact, any such legal action without the proper support and involvement of the national authorities would quickly fail. Here is where the European Delegated Prosecutors come into play, who will help translate decisions taken by the Permanent Chambers of the EPPO into concrete investigative measures in the territories of the participating Member States. Thus, the EPPO would practically supplement and enforce the investigations and prosecutions within its competence on the territories of the Member States participating in the enhanced cooperation, contributing to better recovery of the financial losses from the EU budget.

Further, there is much more at stake in transitioning from being a national prosecutor to becoming a EP or EDP than one might think. Changing one’s mindset from that of a prosecutor at a national prosecution office following certain hierarchy under a national legal framework to that of a EP or EDP in the new single European office under a European legal framework is the key to successfully bridging that divide. As an EP or EDP, however, there are more tools and options at the prosecutor’s disposal to decide on the next step in the investigation if the powerful tools set up in the Regulation are used properly. The prosecutors will execute that step in their day-to-day actions, either as part of the decision-making process within the Permanent Chambers of the central office (in the case of EP) or by investigating and bringing the specific EPPO cases before the courts in the territory of a participating MS under the oversight of those Chambers (in the case of EDP). This requires – as the EDP acts in his/her own country – both a significant mindset shift and major convergent behavior.

At the same time, in the rapidly changing criminal environment harshly affecting the economy, performing the function of a prosecutor in the new single European office allows for a broadening of competences to effectively deal with criminality on a broader scale. But how is this possible while also working as a full-time national prosecutor? The “hybrid path” to the European Central Prosecution Office could be taken by initially performing the function of European Delegated Prosecutor who later on could apply for a job as European Prosecutor in the central office. In addition, being a European Delegated Prosecutor while maintaining his/her existing job allows the national prosecutor to develop the necessary skills and traits needed for the gradual transition from a national office to a possible future career in the central one.

## IV. Conclusion

Having the competence to open investigations in one Member State (on its own motion), which often could have a bearing on investigations taking place in another Member State, generating EDPs' actions in different Member States in cross-border cases (when the EPPO considers evidence sufficient to trigger such investigations), and ultimately bringing the perpetrators to justice in one or more Member States (when the EPPO decides on its own terms that there is sufficient evidence to bring the case to the court) certainly make the EPPO valuable, especially if the future Office could potentially yield concrete results.

Today, it is more important than ever to properly select the most suited persons for the job of European Chief Prosecutor, European Prosecutor, and European Delegated Prosecutor to make the EPPO operational. The success of the EPPO largely depends on the future performance of its prosecutors and their new thinking on a larger, transnational scale. National investigations are no longer sufficient; a common EU approach and uniform criminal policy is necessary to successfully fight today's transborder crime and recover the defrauded money for benefit of the EU budget. The EPPO is the future – let us build it together!

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1. O.J. L 283, 31.10.2017, 1.↵
  2. COM(2013) 534 final, p. 9.↵
  3. European Commission – Press Release of 8 June 2017, IP/17/1550.↵
  4. Council of the European Union, Press Release of 20 June 2018, "EU agrees new rules for a more efficient and effective Eurojust", 359/18.↵
  5. Cf. T. Wahl, "Commission Makes OLAF Fit as Partner of EPPO", (2018) eucrim, pp. 5–6; K. Bovend' Eerd, "The Commission Proposal Amending the OLAF Regulation, (2018) eucrim, pp. 73–76.↵
  6. Pursuant to Article 20(4) of Council Regulation (EU) 2017/1939, this expert group should assist the Commission in the establishment and initial administrative operation of the EPPO until the College of the EPPO takes up its duties in accordance with Article 9(1) of the Regulation. In addition, the group shall assist the Commission in the preparation of the delegated act pursuant to Article 49(3) of the Regulation. This group is composed of representatives of the Member States participating in the EPPO.↵
  7. Council of the European Union, Doc. 11122/18, PRESSE 41, PR CO 41, OUTCOME OF THE COUNCIL MEETING. 3631st Council meeting Economic and Financial Affairs, p. 14.↵
  8. Cf. the article of H.H. Herrnsfeld, "The EPPO's Hybrid Structure and Legal Framework", eucrim 2/2018 (<https://doi.org/10.30709/eucrim-2018-010>).↵
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