**Zlata Đurđević1**

Legislative or regulatory modifications to be introduced in participant member states to the enhanced cooperation2

Firstly, I would like to thank to the Fondazione Basso for inviting me again to this beautiful city. It is a pleasure to be here and to participate in this conference.

I will use this opportunity to give my opinion on some issues that were raised yesterday, then discuss the legislative and regulatory modifications to be introduced in participant member states to the enhanced cooperation, particularly from the Croatian perspective.

**Internal structure of the EPPO and the responsibility of the European Chief Prosecutor**

It is important to repeat and underline that the EPPO is organized in two levels: one with and the other without the operational powers; non-operational and operational level. The European one that includes the European Chief Prosecutor and two deputies as well as the College (European Chief Prosecutor and European prosecutors) does not have operational powers. The second level, Permanent Chambers (three European Prosecutors) and European Delegated Prosecutors that are national prosecutors have operational powers. Only this level has powers to make the decisions in the concrete criminal investigation and trial. The upper level is tasked with administrative, strategic, legal and organizational matters related to the EPPO as an authority and organization. The Chief prosecutor can make prosecutorial decisions only when s/he steps down to the lower level entering the Permanent Chamber and becoming its equal member with other two European prosecutors. The European Chief Prosecutor does not have powers to give orders or directives in any case which the EPPO is going to run or assess. Such a composition, structure and division of functions of the European prosecutorial authority is far away from the concept of the EPPO in the Corpus Iuris, the Green book on the EPPO, The Draft Model Rules or the initial Commission proposal. It is a result of the political compromises during negotiation process. It does not correspond neither to the internal structure of the national prosecutor’s offices in the member states nor to the



* Zlata Đurđević, Professor at the Faculty of Law, University of Zagreb
* This paper is a product of work which has been supported in part by Croatian Science Foundation under the project 8282 Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future (CoCoCrim).

1

international prosecutor’s office in the international criminal courts. As a rule, the Prosecution’s Office is hierarchical, centralized and subordinated organisation and the Chief Prosecutor is entitled and empowered to make decisions and give instructions in each concrete case. National chief prosecutors have prosecutorial and investigative powers with regard all prosecutorial cases, i.e. personal decision-making powers with regard the concrete cases and consequently responsibility for the work of the whole Office. This is not the case with the EPPO and therefore we can legitimately pose the question about the nature of the EPPO.

I would suggest that even entitlement European Chief Prosecutor is misnaming because s/he runs decentralised organization without operational subordination. Therefore, the more correct entitlement for the person who is a head of the EPPO would be “president” or “director” or “administrative director”, as it is a case for the head of the OLAF or the Eurojust.

One can raise a question, why hierarchical and centralized structure with top down operational powers is important. Certainly not only because of the name of the head of the Office, although the legal terminology is very important if we remember the problems in the EU legal order that have been caused by the confusion of the notion “judicial authority” (Is it the Court? Is it the Prosecutor? Is it the police?). The reason to establish personal responsibility of the Chief Prosecutor for the work of the prosecutor’s office, for the prosecutorial policy, concrete prosecutions and its effectivity. The chief prosecutors, as a rule, are responsible to the parliaments. Usually, they submit the annual report to the national parliaments and the parliament has to approve it. In the case of disapproval of the report due to the dissatisfaction with the work of the prosecution’s office, the chief prosecutor has to step down and the parliament will appoint a new one who is going to run the prosecutors office.

However, this is not the case with the European Chief Prosecutor. Regulation on the EPPO provides for the obligation to transmit the annual report to the European Parliament, the Council and national parliaments and to appear annually before the European Parliament and the European Council. However, although these institutions have power to appoint her/him, they do not have the power of dismissal during her/his mandate due to dissatisfaction with the report or the work of the EPPO. The European Court of Justice can dismiss her/him only if s/he is not able to perform duties or is guilty of serious misconduct (Article 14/5 Regulation of the EPPO). As the European Chief Prosecutor does not have operational powers but just administrative duties with regard to the EPPO, s/he has no material responsibility for the work of the EPPO. So, the EPPO is an independent body, with strong repressive powers, it runs criminal investigations and the question arises to whom is responsible this organization?

2

**The language knowledge of the Permanent Chamber members**

Second issue that seems disturbing from the point of the functioning of the EPPO is related to the language knowledge. It is well known that one of the main barriers of the political and legal integration of Europe are national languages. Therefore, it is hard to imagine that this problem has been overlooked while constructing European institution that should be composed of national prosecutors and practice law in the national legal systems. The question is how the Permanent Chamber, body composed of three European prosecutors (on composition Article 10/1, Regulation on the EPPO)3 coming from three different European states, will work in language of the state where the criminal proceedings is taking place. It can be realistically presupposed that two of them will not speak the language of the case and although this is, as will be further showed, unsurmountable barrier for the functioning of the EPPO, at this point there is no solution neither in the Regulation not in any other document of the Commission.

Firstly, it should be explained what are the tasks and powers of the Permanent Chamber. They are charged with the crucial prosecutorial powers such as (see Article 10.) to initiate, monitor and direct investigations, indict, dismiss a case, decide on the plea bargaining, reopen an investigation, allocate or reallocate a case, refer a case to the national authorities; approve the decision of the European Prosecutor to conduct the investigation personally, split case and merge cases, hear the European Delegated Prosecutor and then decide without delay on the cross-border measure (Article 31/8). There is also provision on how the Permanent Chambers are deciding: they take decisions by simple majority, they vote at the request of any of its members and each member shall have one vote, decisions shall be taken after deliberation in meetings (Article 10/6). The question is how the Permanent Chamber is going to perform all these activities without understanding the language of the case.

The concept that the Permanent Chamber should, as a rule, adopt decisions on the basis of a draft decision proposed by the handling European Delegated Prosecutor, and only in exceptional cases adopt a decision without such draft decision (recital 36, Regulation on the EPPO), and that it is able to delegate its decision-making power to the supervising European Prosecutor in specific cases (recital 37), does not make any difference. It is not relevant who is going to be mainly in charge, it is about the capability to perform the prosecutorial duties at all. The Permanent Chamber is required to be able



* (26) Permanent Chambers should be chaired by the European Chief Prosecutor, one of the deputy European Chief Prosecutors or a European Prosecutor, in accordance with principles laid down in the internal rules of procedure of the EPPO. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’)

3

to assess evidence in the criminal proceedings, to determine the facts from the records in the file, to apply the national law and to write the reasoned decision.

So, certainly, it is not acceptable in any way that we in this stage of establishing of the EPPO do not have the solution to problem that two Prosecutors in the Permanent Chamber are not speaking the language of the case. Either the whole file has to be translated to English or any other language understandable to the members of the Permanent Chamber or all three members have to know the language of the case. The first solution seems much more realistic and of course costlier. In any case the Permanent Chamber has to be able to read the case file and to communicate with each other.

And this is not only the rule of common sense but the requirement of very strict rules in criminal proceedings. It is well known that if the judges are incompetent, the proceeding will lead to the violation of Article 6 of the European Convention of Human Rights. Although we are not concerned with judges, but prosecutors, the legal toolbox and the required skills are the same for both professions. It is necessary to read or understand the evidence, to assess it and according to the Regulation, not everything can be delegated to the European Prosecutor which is the national one. And even if this is the case, there is no excuse that the members of the Permanent Chamber are not able to understand and assess the evidence in the case.

Furthermore, European legislator have to be aware that in many European countries including Croatia there is a judicial review of the investigation. E.g. judicial review of the decision to initiate investigation and almost always judicial review of the indictment. The defense lawyers and defendants will certainly raise the issue of the competencies of prosecutors in front of the Court and it can find the procedural violation.

And lastly and the most important, it is clear what the European citizens would think if they participate in the proceedings where prosecutors are deciding on the issues related to the use of repressive system and if they do not understand anything. This is the last moment to decide how the EPPO is going to be responsible before the EU citizens and how to resolve the issue of different languages in which the EPPO is going to operate.

4

**Defense rights in criminal proceedings**

The right to a fair trial includes the equality of arms particularly with regard to the right to access the information and the right to participate in the proceedings as well as effective defense rights from the early stage of the proceedings. During the investigation and before the investigation some of defense rights are ensured by the directives on procedural rights, but many of them depend on the national law. In the proceedings conducted by the EPPO there is no right to transnational defense and there is no new supranational defense rights. The right of defense to collect exculpatory evidence and the corresponding procedural rules and remedies depend exclusively on the national law. The same is true for the right to access to the file before and during the investigation. The need for cooperation between defense lawyers has also been neglected. The European network of defense lawyer is strongly engaged on fair trial issues and the cooperation of the defense lawyers in the criminal proceedings prosecuted by the EPPO. However, it is not for the lawyers to decide on defense rights or on the right to access to a lawyer, but for the State. European Court of Human Rights has found in numerous cases the European states responsible for violation of defense rights in criminal proceedings. Therefore, it is for the European Union to ensure equality of arms and to take the lead and decide how to organize transnational defense in the transnational criminal proceedings. Additionally, the European Union is aiming to become a State authority, e.g. with regard to the EPPO in the relationship with the third and non-participating states,4 therefore it also has to be concerned with the responsibility of the State to ensure the fair trial and defence rights in the supranational and transnational prosecutions, that will be strongly enhanced with the EPPO. So, on the eve of the establishment of the EPPO we have just a rudiments of supranational transnational defense against the fully fledged transnational investigation and prosecution conducted by the EPPO. It is clear that there is a serious imbalance and structural deficiency with regard to fair trial guarantee.

**Fragmentation of the EPPO legal framework**

The EPPO does not operate within a distinct, autonomous and separate legal order. The Regulation on the EPPO has just a few criminal procedural provisions and the EPPO is going to apply national procedural law in concrete criminal cases. The minimalistic approach in regulation of criminal procedure for the EPPO is on one hand result of the



* See Franssen, Nicholas (2018) The future judicial cooperation between the EPPO and non-­‐participating Member States, New Journal of European Criminal Law XX(X), 1-­‐9.

5

differences in the criminal justice systems in the EU member states, and on the other hand of reluctance of the member states to create genuine supranational prosecution. The result is deep fragmentation of the EPPO legal order that refers not only to defense rights but all other elements of criminal procedure.

Thus, the Regulation is providing for the investigation measures that have to be at the disposal to the European Delegated Prosecutor just by listing their names (Article 30/1). It prescribes for their enforcement only following two substantive requirements (Article 30/5): reasonable grounds to believe that the measure might provide information or evidence useful to the investigation and the application of the principle of proportionality (there is no less intrusive measure). There are no provisions about the form of these measures, about procedural requirements and guarantees, about their duration, remedies, suspension, review and so on. It all depends on national law. Even, for certain very intrusive measures such as production of stored computer data, banking account data and traffic data, interception of electronic communication and track and trace an object by technical means, the national law can prescribe limitations and exclude their application for certain offences (Article 30/3). Thus, all these measures are subject to conditions and limitations in national law, without any supranational procedural requirement. The same is true for the rules on the admissibility of evidence resulting from them and their prosecutorial and judicial review.

As regards the admissibility of evidence, the Regulation envisages that evidence presented by the EPPO to a Court are not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State (Article 37). But as there are no supranational rules on admissibility of evidence, every Member State applies its own rules on evidence. Therefore, there is no mutual admissibility of evidence.

There are no provisions on judicial review. In some countries there are judicial review of prosecutorial decisions such as decisions to start prosecution or institute criminal proceedings and in some country such as Germany, prosecutorial decisions during investigation is solely in the hands of prosecutors without judicial control. The judicial review of the investigative decisions with regard to its existence, frequency, remedies and so on, is also different in the member states. Therefore, the EU citizens are going to have different judicial protection against investigative measures ordered by the EPPO.

One of the mayor problems not only relating to the different treatment of the EU citizens but to the EPPO as a prosecutorial body is absence of provisions on prosecutorial reviews of the European Delegated Prosecutors, European Prosecutors or Permanent Chamber decisions. The question is whether, as in previous examples, the prosecutorial

6

review depends on the rules on national law. Whether, if the review of prosecutorial decisions exists in national law, it has to be organized within the EPPO. If the answer is positive, this will lead to the fragmentation within the functioning of the EPPO because in some cases and in some countries the higher European prosecutors are going to supervise, control and review decisions of the lower prosecutor, and in other this will not be the case. This means that the EPPO is not going to have the common internal supervision of the work of European prosecutors and European Delegated Prosecutors.

Finally, the fragmentation is not only legal, but also structural. The procedural decision-making within the EPPO in the concrete criminal proceedings is multileveled. Partial operative decisions are given to the European Delegated Prosecutors, the European Prosecutor and the Permanent Chambers. The one of them is deciding on the initiation of the proceedings, another one is deciding on the investigative acts, the third is deciding to indict, to dismiss or reopen the case. So, there are different bodies who decide within the same criminal proceeding. Furthermore, different bodies are going to assess the same evidence. E.g. whether there are reasonable grounds to start investigation, to order or request investigative measures, to indict and so on. It seems inevitable that this multilayered, overlapping and multiplied operations will affect the urgency and effectivity of the EPPO. And it has been repeated that one of the crucial issues for the EPPO will be “how fast it can work”.

The fragmentation of the EPPO system is consequence of the member states approach that for the introduction of the EPPO we do not need to make many modifications in our national criminal justice systems. The member states have relieved themselves of reforms in their system but this have made many difficulties for the EPPO, whose Chambers and European Prosecutors need to know different national standards, provisions and guarantees. This is necessary not only from the point of view of respecting national legal system where the trial will take place but also from the point of the principle of fair trial which does not depends only on the jurisprudence of the European Court of Human Rights, but every national system has its own way of achieving fair trial standards.

The conclusion on the legislative or regulatory modifications to be introduced in participant member states to the enhanced cooperation is that as a rule they are minimal. As there are minimal supranational procedural requirements, the adjustment of the criminal procedure is also minimal. With regard to the structural or regulatory modification the degree of harmonization is considerable only in the states which have judicial investigation. It will be impossible or very hard task to reconcile the EPPO with the investigative judge who is conducting investigation and collect evidence during the investigation. Croatia had the investigative judge until year 2008 when we, as one of the

7

reforms in the process of accession to the European Union, replaced it with the prosecutorial investigation which was considered to be more effective in combating corruption and organized crime. After the decision of the Constitutional Court of the Republic of Croatia in 2012 that proclaimed unconstitutional many provisions of the 2008 Criminal Procedural Act, we have introduced the judicial review from the beginning to the end of the investigation. So, the EPPO is going to work a lot with the Croatian judges of freedom during the investigation.

**Added value of the EPPO**

After criticism related to the EPPO, one can conclude that I oppose to this institution. Actually, I am a proponent of the European supranational prosecution and believe that the EPPO is very promising institution, and that we should not miss this opportunity due to language or any other problems. Its added value is that it will force national prosecution to focus on PIF crime and it will also function as a supervision of national prosecutions. As concerns prosecution of PIF crimes in Croatia, in the accession period we did have some proceedings for euro-fraud, but now for years there are no cases or they are very rare. Despite the fact that we have harmonized our Criminal Code with the PIF Convention and have establish well known USKOK – Office for the prevention of organized crime and corruption. Knowing that the corruption in Croatia is widespread in the public sector, certainly there are cases connected to the EU funds or revenue. Although, the prosecution is governed by the principle of legality, the prosecutor service has to make selection of cases due to political priorities (e.g. war crimes) as well as due to limited resources. So, obviously the focus is not on the crimes against the budget of the European Union, and that should be changed with the EPPO. Secondly, the EPPO is going to ensure the supervision of the national prosecutions from the European level and it will raise the level of expertise. Permanent Chambers and European Prosecutors will have supervisory powers on the prosecution of financial and economic crime by the national prosecutors, and that is important for Croatia as for many other countries.

**Perspective from Croatian criminal procedure**

Introduction of the EPPO in Croatia can create problems in the area of prosecutorial review. One of the major problems in Croatia with regard human rights and criminal justice system is related to the right to effective investigation in criminal proceedings. The European Court of Human Rights has found in numerous judgments that Croatian prosecutorial and judicial authorities had violated the right to effective investigation. It

8

concerns positive procedural obligation of the States to ensure effective investigation in cases of crimes that violate right to life (Article 2 of the ECHR), prohibition of torture (Article 3 of the ECHR), protection of private and family life (Article 8 of the ECHR). The major problems were that the investigations were too long, not independent and the victims were not participating. In order to remedy these problems, ensure effective investigation for such crimes and prevent future violation of the Convention, Croatia has in 2013 introduced time limits for the investigation, procedural sanctions in case of overstepping the time limits and remedies for the victims. The investigation can last six months, and if it is not completed within six months, the state’s attorney will inform of the reasons the higher state attorney who shall take measures to complete the investigation or can extend the investigation by six months, and if the investigation is not possible to complete within 12 months the General State Attorney may extend the deadline by six months at the most. If the investigation is still not completed, the defendant may file a complaint with the judge against the delaying of the proceedings.5 The question is how this can fit in the EPPO investigation and which body will extend the time limits for the investigation first and second time. In the stage of the indictment the time-limits are even more strict and procedural sanctions are more severe. The state attorney should prefer the indictment or discontinue the investigation within one month from the completion of the investigation. The higher state attorney may extend the deadline by two months at the most. If the state attorney fails to prefer an indictment within the deadlines, it shall be deemed that s/he has dismissed the case.6 Here the question is not who is going to extend the deadlines for the indictment but how to adjust this mechanism with the provision of Article 36/1 of the Regulation which provides that the Permanent Chamber has 21 days to decide on the draft decision of the European Delegated Prosecutor proposing to bring a case to judgment.

Further issue is related to the provision of the Croatian law which precludes the prosecution in case of failing to observe the time limit for indictment except in case of the disciplinary offence of the prosecutor. Namely, if the time limit was not observed due to a disciplinary offence of the State Attorney, established by decision of the State Attorneys’ Council, the authorized prosecutor may submit the request for the reopening of proceedings.7 However, a member state may not take disciplinary action against a European Delegated Prosecutor for reasons connected with his/her responsibilities under this Regulation without the consent of the European Chief Prosecutor (Article 17/4). As concerns the European Prosecutor and the Permanent Chamber there are no disciplinary responsibility in the Regulation. Therefore, the Croatian provisions of prosecutorial and



* Article 229 of the Criminal Procedural Act of the Republic of Croatia

6 Article 300 of the Criminal Procedural Act of the Republic of Croatia

7 Article 500/3 of the Criminal Procedural Act of the Republic of Croatia

9

judicial review with the view ensuring the effective investigation are not adjusted to the Regulation on the EPPO. It can be anticipated that such conflict of European and national norms will result in deletion of the Croatian provision introduced to ensure the right to effective investigation. We can hope that the EPPO will not lead to deleting national standards for ensuring effective investigation without introducing the effective European investigations.

10