

UDC 343

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## **CRITICAL REFLECTIONS ON THE COOPERATION BETWEEN THE EPPO AND OLAF AND THE NON-PARTICIPATING MEMBER STATES**

### **1. Introduction: The Background of the Newly Born EPPO**

After a whole host of regulation concepts and a legislative procedure challenged by many difficulties, Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: 'Regulation') was at last adopted by the Council on the 12th of October 2017. This means that after the long and challenging road, we have at last arrived at the birth of the European Public Prosecutor's Office (hereinafter: 'Prosecutor's Office' or 'EPPO'): the EU's independent prosecuting authority will definitely be established and according to the EU's current schedule shall begin its virtual operation at the latest at the beginning of 2021.

However, the reception of the new body was not the least united: the member states participating in the enhanced cooperation and the authors supporting the concept, welcomed the Prosecutor's Office as a new *acquis* of the European integration bearing utmost importance; whilst others noted the necessity of due prudence and diligence concerning the practical implementation

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of the Regulation and the real operations of the EPPO; the non-participating member states and those refusing the EPPO's concept may even consider it an unnecessary and too complex body adding no additional value to the current acquis of the EU, contending in particular the alleged infringement of their national sovereignty. It seems although that the European legislator had also been aware of that the Prosecutor's Office's reception would not be uniformly positive, a study carried out during the preparatory work provided 'early warning' that "it will anyway be target of criticisms, coming either from the supporters of deeper EU integration in criminal matters, or from those more attached to MSs' prerogatives in criminal law".

The above cited study, sensing the member states' uncertainty and degree of rigidity concerning the real establishment of a European prosecution authority, also warned that "envisaging enhanced cooperation for an issue that concerns the interests of the EU as a whole appears rather paradoxical".

Further to the above, the EU is well aware that the EPPO's organizational and operational structure is considerably complex which is demonstrated by the fact that the European Parliament's Directorate General for Internal Policies of the Union requested a study on the strategies for coping with the EPPO's complexity. This study also highlighted concerning the issue of non-participating Member States (hereinafter: 'MS') that "Hungarian non-participation can be seen in the context of broader skepticism on the part of the current Hungarian government towards European integration". According to the study's analysis "EPPO negotiations, constitutional reforms in Hungary and the respect of fundamental rights have become issues of conflicts between the Hungarian government and EU institutions", moreover "given the substantial value of EU funds paid to this country and the risks related to corruption" detected by Transparency International's latest survey. Transparency

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International's survey established that Hungary's CPI index dropped eight points over the last five years resulting that "have seen the sharpest decline in its respective CPI scores in recent years, allowing corruption to worsen", which "significant change also reflects a deterioration of democracy, as well as a rapidly shrinking space for civil society and independent media", whilst "populist rhetoric is often used to discredit public scrutiny". Considering all these issues the EU's study concluded that "Hungary can be identified as a high-risk non-participating Member State" and its "non-participation constitutes serious risks for the Union's financial interests".

The aim of the present study is to examine the above issue focusing on the EU's alleged intention to solve the problem of non-participating MS and the role of the Prosecutor's Office and other related EU bodies, especially OLAF in this strategy which may be deduced from Vera Jourová's declaration that 'establishing the European Public Prosecutor's Office will be a real game-changer' and anyway 'the Commission will remain a staunch supporter of the collective efforts to fight fraud and corruption in the EU'. The process of this analysis will be to describe some aspects of the formal system of the EPPO and its external relations as set out in the Regulation, then some critical reflections will be drawn on the envisaged cooperation between the affected bodies.

## **2. The External Relations of EPPO with OLAF and the Non-Participating MS as Envisaged by the Regulation Combined With Practical Reflections**

At first, it is essential regarding the EPPO's external relations as well, that in lack of the united acceptance of the member states, the Prosecutor's Office will be established in the frame of enhanced cooperation pursuant to Article 86 paragraph 1 subparagraph 3 of TFEU. It could hardly be a surprise, as a

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representative of the Council made it already clear at the meeting of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE-committee) held on the 29th of November 2016 that in case less than 20 member states would support the establishment of enhanced cooperation than it will hardly be accepted, this standpoint could also be deduced from several work documents as well. As a result of further conciliations and the last amendments of the proposal, by June 2017, 20 MS made a stand for the EPPO which made it possible that the Regulation also referred as a 'phoenix' could finally be adopted on the 12th of October 2017. Currently, at last 22 MS joined the enhanced cooperation, whilst Denmark, Ireland and the UK have specific opt-out and opt-in arrangements for Justice and Home Affairs (JHA) policies that preclude their participation in the EPPO. Only Hungary, Poland and Sweden are the three MS that have not joined the EPPO so far for internal political reasons despite that there are no general constitutional hurdles or opt-outs that would prevent them from joining. This well demonstrates that the Prosecutor's Office divides the unity of the MS and seemingly hinder the development of united European integration, therefore concerning the operation of the body, a clear and sharp line should be kept between the participating and non-participating MS.

Accordingly, it is of utmost importance from the aspect of non-participating MS that how would the EPPO cooperate with the other bodies of the EU and the so-called 'schismatic' MS. Pursuant to Article 99 the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union, with the authorities of non-participating member states, moreover with the authorities of third countries and international organizations; for the realization of this purpose may primarily conclude technical and/or operational working agreements with them – which however would not have legally binding effects on the Union nor the MS. The Regulation contains

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specific provisions for the Prosecutor's Office's relation with i) Eurojust ii) Europol iii) OLAF iv) other bodies of the Union v) third countries and international organizations vi) at last, with the non-participating member states. Considering the subject of the present study, we will only focus on the EPPO's relation with OLAF and the non-participating MS.

### 2.1. The Cooperation with OLAF

It becomes clear from the phrasing of the Regulation that the EPPO beyond question has an advanced partner, OLAF. The two bodies shall establish and maintain a close relationship mainly based on information exchange aiming "to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO". In compliance with the complementary nature of the bodies, the Regulation stipulates that where the EPPO conducts criminal investigation, OLAF shall not open any parallel administrative investigation. On the other hand, the Prosecutor's Office may request OLAF to support or complement its activities, specifically with i) providing information, analyses (including forensic analyses), expertise and operational support ii) facilitating the coordination of specific, administrative actions of either national authorities or the bodies of the Union, furthermore iii) conducting administrative investigations. In line with the principle of mutual co-operation, the Prosecutor's Office may as well provide relevant information to OLAF on cases where the EPPO has decided not to conduct investigation or has dismissed a case.

The relation between the EPPO and the OLAF apparently presupposes a closer and deepened co-operation compared to other (administrative) bodies of the Union. Among others a study (hereinafter: 'OLAF-study') prepared in 2017 by the Directorate General for Internal Policies of the Union on the future

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cooperation of the two bodies also proves this standpoint stating that “it is undeniable that OLAF constitutes the privileged partner of the EPPO”, although the complementary nature of OLAF’s activities is also emphasized. This specific nature of the two bodies may bear utmost relevance when ‘risks of overlap and competition among EU bodies become even more real than before’. Moreover, even the OLAF-study admits that in absence of the revision of the regulation defining the frame of OLAF’s operation, the future cooperation between the two bodies may become “particularly complex [...] in a rather “unsettled context”. Therefore, the revision of OLAF’s operation and concluding work arrangements determining the details of such cooperation seem to be crucial. Regarding the complementarity of the two bodies the study declares that ‘the co-existence of OLAF and the EPPO will allow to determine on a case-by-case basis which proceedings – administrative or criminal – are best suited to pursue a specific behavior [...] [therefore] their cooperation will be essential to foster new synergies and improve the efficiency of PIF’ .

In accordance with the Regulation, the study distinguishes the following three main dimensions of the future cooperation: i) the demand of avoiding simultaneous administrative and criminal investigations into the same facts, ii) mutual exchange of information iii) further supporting activities of OLAF. However, even the study warns that the current rules of the Regulation are rather general, therefore more detailed regulation would be much needed. Furthermore, the question has apparently still not been decided: what future role will be granted to OLAF by the Union? Basically, two visions emerged concerning this issue: according to one of the concepts, the OLAF would become the chief operational supporting partner of the Prosecutor’s Office, meaning that it would be transformed in the “EPPO’s investigatory arm” , an authentic and absolute investigative authority, yet bound to obey the EPPO’s orders. This solution

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would raise OLAF from the sphere of administrative criminal law and would create a supranational investigative authority. OLAF has always been challenged by that at the end of its procedure the Bureau could ‘only’ lodge a recommendation to the national authorities thus could only monitor and follow-up the development of the investigation allegedly initiated by the competent national authorities, but could not participate in the criminal proceedings on its merits.

On the other hand, the other concept envisages the OLAF to remain one of the closest – if not the closest –, but independent administrative partner of the EPPO, remaining in its current legal status from this aspect. According to my standpoint, the first vision would be apparently incompatible with the Union’s rule of law and neither does Article 86 of the TFEU grant any such authorization. Over and above, the regulation on OLAF is far removed from ensuring properly the fundamental criminal procedural rights of those ‘suspected’ (the persons concerned) by the Bureau, nor does it guarantee the simultaneous control of its activities: neither the judicial one or by the defense counsel. It may be reassuring, that even the Regulation seems to have taken the second vision as the basis of its related provisions. According to draft revised OLAF Regulation published by the European Commission in May 2018 it seems that principally OLAF will remain an administrative body, however the regulation is not the least finalized yet, the European Parliament made numerous amendments to the text in April 2019, even though the amended OLAF Regulation is expected to enter into force before the EPPO starts work.

From a practical aspect, at least two further issues emerge concerning the cooperation of the EPPO and the OLAF. In one respect, pursuant to the Regulation the details of the regulation shall be clarified in work arrangements: ‘However, one can wonder whether it is a good option to leave the details to a

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working arrangement. In the past, bilateral arrangements between EU agencies and bodies have proven to be delicate to negotiate, and sometimes remained dead letters'. Moreover, this entails the risk of a lack of transparency and democratic deficit'.

Further to this it seems worrisome that the complementary operation of the two bodies, the mutual exchange of information is not regulated in detail, whereas the Regulation does not contain any specific rule concerning the admissibility of evidence collected by one body but forwarded and used by the other. Therefore, pursuant to the Regulation it may be possible that a given case would be initiated by the EPPO but due to the explored circumstances will be transferred to the OLAF, or vice versa. Moreover, ad absurdum it could happen that the OLAF starts the investigation of a case, then the EPPO takes it over, but at last the Prosecutor's Office request the OLAF to conduct an administrative investigation for supporting its operation.

Further to the above, it is worth considering that the DG IPOL's recent study concludes that despite "OLAF's legal authority in the Member States not participating in the EPPO will remain basically unchanged", but "OLAF's responsibility for the non-participating Member States will de facto increase". According to the study: "if the expectation becomes reality that the establishment of the EPPO might lead to the detection of many more criminal offences in the participating Member States, leaving criminal offences affecting the Union's interests undiscovered in the non-participating Member States, it would create a situation of considerable injustice. Therefore, OLAF would be better to concentrate its work on the Member States that do not take part in the EPPO, especially Hungary and Poland, identified as particularly risk-prone [...] for as long as these Member States do not join the EPPO".

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It is clear from the above citation that the EU intends to use OLAF as an instrument to impose additional pressures on the non-participating MS to join the EPPO. However, it is truly controversial whether this intention could in principle be justified by legal grounds concerning the independent MS's sovereignty, or only by political reasons. Furthermore, it is also doubtful whether OLAF as an administrative body lacking real investigative competence could at all fulfill this purpose, or the 'strengthening' of its role will only result in a load of administrative cases ending without substantial results.

## 2.2. The Cooperation with Non-Participating MS

The Regulation seems to be rather laconic concerning the issue of the relation between the EPPO and the non-participating MS: the EPPO may endeavor to establish working arrangements with these MS aiming the exchange of strategic information, the secondment of liaison officers to the EPPO, and if possible the designation of contact points. It has determining relevance that in the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the non-participating MS, all other, participating MS shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with non-participating MS. This results that "a literal interpretation of this paragraph would mean that once recognized as a competent authority by the participating member states the EPPO would autonomously rely on EU instruments to cooperate with non-participating member states".

Consequently, once recognized as a competent authority, the EPPO may theoretically rely on all EU instruments, especially to issue or request to issue European Arrest Warrants or European Investigation Orders. This regulation –

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at least in case of the real cooperation of the non-participating member states – may seem to guarantee the effective cooperation, whilst other authors even note that at least in that regard the EPPO “should act as a truly European body relying on European laws without any mediation of national legislation”. It should however be outlined, that effective cooperation may only be ensured if the EPPO’s requests are apparently implemented by the non-participating MS. This would be a compulsory duty of the concerned MS not only deriving from the Regulation and the norms of the given instrument, but from the Treaties as well. On one hand, it could be deduced from principle of sincere cooperation as defined in Article 4 paragraph 3 of the TEU, on the other hand Article 325 of the TFEU provides a general obligation for all MS to take the necessary measures to effectively counter fraud and any other illegal activities affecting the financial interests of the Union. In case of enhanced cooperation, although Article 327 of the TFEU states that any enhanced cooperation shall respect the competences, rights and obligations of the non-participating MS, but also “oblige those member states not to impede its implementation by the participating member states”. Given these provisions, it is hard to make a sharp distinction between the participants and non-participants, because essentially, they may allow the EPPO to operate in non-participating MS as well.

On the contrary, it seems that even the European legislator does not absolutely trust the above, one single provision of the Regulation and the underlying further norms could effectively ensure the smooth cooperation. The Council – based on the prior concept of the Commission – invited the Commission with its declaration of 7 June 2017 to submit appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and the non-participating MS, which “should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully

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respecting the Union *acquis* in this field as well as the duty of sincere cooperation”. It is obvious from the phrasing that the Council is not speaking of the principle of sincere cooperation, but literally duty which probably already foreshadows the logic of the future regulation. Concerning this issue, it might be worth citing the following thoughts of Péter Polt, General Prosecutor of Hungary: “the establishment of an effective European Prosecutor’s Office may – in long term – result crucial changes, much needed by the EU in the field of combating cross-border crimes. However, profound preparation is the ‘condition *sine qua non*’ of a useful legal instrument”.

### 2.3. Reflections

It is clear from the above presentation and the related critical thoughts that the EU would not like to rely ‘only’ on the MS’s sympathy and will to cooperate with the EPPO, but struggles to give the EPPO real powers and develop an effective supranational investigative authority. The compromise is the current operational structure of the EPPO that in case of participating MS, the EPPO may lead an investigation which however will be carried out – in line with the orders of the EPPO – by the national investigative authorities. By this way, the EU reached to have a supranational criminal investigative authority although its activity and the effectiveness of its measures are limited by and to the MS’s actual will to cooperate. However, the controversialism of this compromise become apparent in case of non-participating MS as in case of these MS, the EU seems to be lacking even the theoretical possibility to investigate and implement criminal measures against offences even substantially threatening the EU’s financial interests. This results a huge leak in the European integration which not only threatens the effective protection of EU’s – EU taxpayers’ – financial

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interests, but might also generate conflicts between the MS, as the participating MS may sense this as injustice.

However, the currently existing EU bodies would not provide enough effective help for the Prosecutor's Office to achieve its goals in the non-participating MS as well. Europol and Eurojust fulfill rather coordinative purposes and lack the competences of a virtual investigative authority. Further to that OLAF seems to contribute to the EPPO's mission more on its merits, e. g. with the findings/recommendations of its administrative investigation or with the professional expert assistance provided to the EPPO. However, in regard of the Bureau's role it should be considered that neither it is a real investigative authority. Moreover, OLAF's administrative investigative competence is strictly bound by limitations compared to a national criminal investigative authority. Moreover, an administrative investigation preceding an alleged criminal procedure – regardless if the latter is carried out by EPPO or a national investigative authority – is not the least advantageous from criminal tactical aspects. Practically, this means that such a duplication of 'investigative' procedures may lead to the situation that the alleged perpetrators will already be well-prepared for the subsequent criminal procedure, and the criminal investigative authority will have to face the extra challenges deriving from such a situation (e.g. already prepared defense strategy, suspect's and witness statements, alleged concealment of evidence, etc.).

Therefore, it is indisputable that the set-up of another new, quasi investigative authority would substantially facilitate to achieve the EU's goal regarding the protection of its financial interest and accomplish the mission of EPPO in the non-participating MS. However, the Treaties do not contain such authorization for the EU, nonetheless it was the non-participating MS's clear effort to secure their sovereignty as much as possible concerning criminal

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matters. Consequently, it seems that the EU is in need to develop a strategy to force somehow the outsider MS to join the EPPO.

### 3. Final Conclusions

According to the above reflections, the EU seemingly intends to impose pressure on the non-participating MS to join the EPPO, which intention is clearly confirmed by the latest declarations of the EU's competent officers and studies of the EU bodies, furthermore from the recent practical experiences as criminal defense lawyer.

Therefore, based on the findings of the present analysis, the innovative step to join the EPPO by all MS extending the Prosecutor's Office's jurisdiction to the full territory of the EU seems to be unavoidable sooner or later. This would comply with the mission of EPPO as defined in the TFEU and make the Prosecutor's Office a statutory body of the EU, giving the Community a fully-fledged real supranational investigative and prosecution authority whose measures and decisions are to be abided by all MS.

However, at first the EU have to face the challenge of the non-participating MS' serious resistance against EPPO. On one hand, based on the literal interpretation of the Treaties the EU seems to be lacking proper legal instruments to deal with this problem. Despite of this, on the other hand, from a practical aspect the EU seems to have various available instruments for tackling this challenge and achieve its goals, both of political and financial nature – considering the alleged use of rule of law mechanism and DG COMP inspections besides the already well-known OLAF investigations –, despite of the fact that none of these leverages are truly meant to be used for such purposes and nor would the EU openly admit their use for such goals. Therefore, the concrete ways of reaching the acceptance of the EPPO by all MS remain yet

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uncleared and may range from a future statutory obligation or ‘financial blackmail’, making the participation a pre-condition for receiving any EU funds to considerably softer and more sophisticated solutions. Concerning this issue it has also to be considered that it would definitely draw a better picture if the still non-participating MS would join the EPPO by their own will and not by the coercive force of a binding obligation – even if the MS’s such ‘autonomous decision’ would be closely assisted and highly recommended by the EU.

As a final remark, it has to be also mentioned that despite of the analyzed clear tendencies and the EU’s seemingly huge enthusiasm regarding the birth of EPPO and its struggle to make it an effectively operating supranational investigative and prosecution authority – yet the newly elected European Chief Prosecutor, Laura Codruta Kövesi complained in February 2020 that the Prosecutor’s Offices’s ‘preliminary estimate makes the legislative financial framework under which the EPPO regulation has been adopted obsolete’ and currently ‘has just four staff to tackle 3,000 cases’ (although it has to be mentioned that according to the Commission’s latest proposal the budget of the EPPO may be revised). In light of this, according to our standpoint the Chief Prosecutor also defined and concluded to the most significant question of the Prosecutor’s Office future: ‘Do we want to have an EPPO just to say we have one, or do we want it to be efficient?’

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*Critical Reflections on the Cooperation between the EPPO and OLAF and the Non-Participating Member States*

After a whole host of regulation concepts and a legislative procedure challenged by many difficulties the European Public Prosecutor's Office has become to life. However, its external relations with other EU bodies, especially with OLAF, its so-called 'advanced partner' are not the least clarified or seem to effective from a practical aspect. Moreover, a small group of 'outsider' Member States still refuse to join the enhanced cooperation of the EPPO. This also seems to result serious discrepancies in the EPPO's operation, moreover, leads to severe tension between the European legislator and the non-participating Member States. The present study aims to briefly analyze this situation and draw some critical remarks on the accepted regulation.

**Key words:** international criminal law, European law.

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