

**THE FUNDAMENTAL COMPETENCE OF THE EUROPEAN  
PUBLIC PROSECUTOR'S OFFICE – ROOM FOR DISPUTES OR  
EFFECTIVE CO-OPERATION\***

**AZ EURÓPAI ÜGYÉSZSÉG ALAPVETŐ HATÁSKÖRE – AVAGY  
A VITÁK VAGY HATÉKONY EGYÜTTMŰKÖDÉS HELYE**

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**Abstract:** In the article, the author deals with the institute of the European Public Prosecutor's Office, the reasons for its creation and the existing structure. It lists the various fundamental powers of the European Public Prosecutor's Office and defines its competence under the Regulation. She points out the facts how the adoption of the Regulation on the European Public Prosecutor's Office affected the national regulation in member states. Last but not least, the author points to the issue of exercising the powers of the European Public Prosecutor's Office in the individual participating states that are signatories to the Regulation, but also points to the issue of exercising the powers of the European Public Prosecutor's Office between non-participating states and third countries that are not even members of the European Union.

**Keywords:** *European Public Prosecutor's Office, European Prosecutor, competence, regulation, investigation, co-operation*

**Absztrakt:** A cikkben a szerző az Európai Ügyészség intézetével, létrehozásának okaival és a meglévő struktúrával foglalkozik. Felsorolja az Európai Ügyészség különféle alapvető hatásköreit, és meghatározza a rendelet szerinti hatáskörét. Rámutat azokra a tényekre, hogy az Európai Ügyészségről szóló rendelet elfogadása milyen hatással volt a tagállamok nemzeti szabályozására. Végül, de nem utolsósorban a szerző rámutat az Európai Ügyészség jogköre gyakorlásának kérdésére a rendeletet aláíró egyes részt vevő államokban, de rámutat az Európai Ügyészség jogköre gyakorlásának kérdésére a nem részt vevő államok esetében és olyan harmadik országok tekintetében, amelyek nem is tagjai az Európai Uniónak.

**Kulcsszavak:** *Európai Ügyészség, hatáskör, szabályozás, nyomozás, együttműködés*

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## Introduction

The European Public Prosecutor's Office is a new body of the European Union with legal personality, which was established in 2017. It is a unique body of the European Union, whose main task will be to investigate and prosecute perpetrators in the event of crimes affecting the financial interests of the European Union. A similar body to protect the European Union budget at Member State level has never been set up, and we can therefore consider the establishment of a European Public Prosecutor's Office to be an important step in protecting the European Union's financial resources. The European Public Prosecutor's Office was established on the basis of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation for the establishment of the European Public Prosecutor's Office (hereinafter also referred to as the "Regulation"). It is possible to share the view that this project is an important manifestation of the unification of European criminal law and a departure from traditional judicial co-operation between states towards the unification and directed investigation of crimes against the financial interests of the European Union throughout its territory.<sup>1</sup> According to the Commission and the European Parliament, the initial idea of setting up a European Public Prosecutor's Office was the need for an effective instrument to protect the European budget, which the Member States were not able to provide sufficiently. The European Union therefore decided to draw up a proposal for the harmonization of criminal law more than 20 years ago, together with a proposal for a European Public Prosecutor's Office called *Corpus Juris*, which, following a discussion and incorporation of comments, was published under the name *Corpus Juris 2000*.<sup>2</sup> It follows from the above that the discussions on the establishment of this institute had their supporters but also opponents<sup>3</sup>, which eventually led to the fact that on 8

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<sup>1</sup> JELINEK, J.: The future of the European Public Prosecutor's Office. In the collection of scientific contributions of the nationwide interdisciplinary scientific conference with an international participation: *1st Košice days of criminal law – Perspectives on the development of European criminal law perspectives*, 424, EQUILIBRIA, s. r. o.

<sup>2</sup> M. DELMAS-MARTY – J. A. E. VERVAELE: *Corpus Juris 2000: Criminal law for the protection of financial interests of the European Union (European Prosecutor)*. Iura Edition, Bratislava, 2003. The European Public Prosecutor's Office was to be the body of the European Community responsible for investigating, prosecuting and bringing to judgment cases, representing the prosecution at the main hearing and enforcing decisions in the Member States concerning exhaustively listed offences against European Community funds. See also J. FENYK: Project of the model criminal law *Corpus Juris* and the right to a fair trial in Protection of the fundamental rights and freedoms in the Europeanization of criminal law process. *AUC Iuridica* 1/2006, 37.

<sup>3</sup> The reason for the discussion on the establishment of the European Public Prosecutor's Office was also based on the fact that individual Member States are not able to ensure adequate protection of the European Union's financial interests. However, it considers important to emphasize the fact that the proposal for a regulation establishing the European Public Prosecutor's Office was not preceded by basis and analysis as to whether

June 2017, 20 EU Member States reached a political agreement on the establishment of a European Public Prosecutor's Office within the framework of enhanced co-operation. The Regulation establishing the European Public Prosecutor's Office was adopted by the Justice and Home Affairs Council on 12 October 2017 with effect from 20 November 2017. On 1 August 2018, the Commission confirmed that the Netherlands had joined the European Public Prosecutor's Office and on 7 August 2018 also confirmed that Malta has become the 22nd EU Member State to participate in the European Public Prosecutor's Office. Until now, only Poland, Hungary, Sweden and Denmark have remained non-participating Member States. Under the Regulation, the European Public Prosecutor's Office is empowered to take over the powers on a date to be determined by the European Commission, which may not be earlier than three years from the date of entry into force of the Regulation. It follows from the above that the European Public Prosecutor's Office will be entitled to exercise its powers only from 20 November 2020. Although there was a strong expectation that the European Public Prosecutor's Office would take over the tasks entrusted to it as soon as the "preparatory" three-year period had expired, this was not the case. The date on which the European Public Prosecutor's Office took over the tasks of investigation and prosecution entrusted to it by the EPPO Regulation was set by Commission Decision on 1 June 2021<sup>4</sup>. These 22 member states have become part of a very important EU project, which will bring a great benefit to the union as well as its states. The European Public Prosecutor's Office, which has become part of the EU's institutional system, is the only EU body equipped with the authority to investigate and prosecute preparators of crimes affecting the financial interests of the European Union, as well as to file charges against them.<sup>5</sup> The European Public Prosecutor's Office is an indivisible body of the Union, which acts as a single office with a decentralized structure (Article 8, paragraph 1 of the EPPO Regulation), which has its own legal personality (Article 3 of the EPPO Regulation), which is independent in the performance of its tasks (Article 6 EPPO Regulation). Investigations and prosecutions on behalf of the European Public Prosecutor's Office are governed by the EP Regulations, but in cases where the EP Regulation does not regulate a specific matter, the relevant national law will also apply to you [Article 5(3) of the EP Regulation]. Due to the fact that the Regulation on EP regulates many issues of the functioning and performance of the activities of the European Public Prosecutor's Office only as a framework, in fulfilling its tasks, the European Public Prosecutor's Office will often rely on the provisions of the applicable national law of one of the 22 participating member states, whose substantive and procedural criminal law standards are significantly

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the protection of the EU's financial interests could not be sufficiently achieved at Member State level.

<sup>4</sup> Commission Implementing Decision (EU) 2021/856 of 25 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks.

<sup>5</sup> Article 4 EPPO Regulation.

different. Given that the establishment and exercise of the authority of the European Public Prosecutor's Office significantly changes the current concept of EU criminal law, it was necessary for the member states that decided to participate in enhanced cooperation also to adapt to this change. The European Public Prosecutor's Office was established by a regulation that is binding in its entirety and is directly applicable in all participating Member States<sup>6</sup>, which means that its application in the Member States is automatic without the need for further implementation measures by the Member State. However, in order to ensure the effective application of the regulation in practice, especially when conducting investigations and prosecutions led by the European Public Prosecutor's Office in individual participating member states, it was necessary to adopt various legislative measures in these member states.<sup>7</sup> The adopted measures aimed to prepare the member state and its national authorities for the operation of the European Public Prosecutor's Office, primarily to adjust the status and powers of European prosecutors and European delegated prosecutors and to determine the applicable national law that will be applied in the member state to investigations and prosecutions conducted by the European Public Prosecutor's Office.<sup>8</sup> It is the three-year "preparatory" period established by Art. 120 par. 2 of the EP regulation, should have provided the participating member states with enough time to adopt the necessary implementation measures. Whether the European Public Prosecutor's Office is effective is a very subjective question, if we look at its results so far, we can state that during the first 6 months of office, the EPPO received 2832 criminal reports and started 576 investigations, in which the damage caused to the EU budget was estimated to EUR 5.4 billion. Compared to OLAF's 2020 annual report, where 290 new investigations were launched in 12 months of work and €293.4 million was recommended to be recovered to the EU budget. From this point of view, it is obvious that the work of EPPO was able to save incomparably more funds from the EU budget and investigate a much larger number of crimes damaging the Union's financial interests in half the time. The purpose of this article, therefore, is not to examine the structure of the European Public Prosecutor's Office itself, but in particular to point out how the exercise of the powers of European Public Prosecutors, but especially European Delegated Prosecutors, may affect co-operation in the performance of tasks related to investigations and prosecutions, and in particular whether the exercise of powers will be more of a space for co-operation or will cause considerable problems in practice.

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<sup>6</sup> Article 288 TFEU.

<sup>7</sup> R. KERT: Specific Aspects of the Implementation of the EPPO Regulation in Austria. In: K. LIGETI – M. J. ANTUNES – F. GIUFFRIDA (eds.): *The European Public Prosecutor's Office at Launch: Adapting National Systems, Transforming EU Criminal Law*. Wolters Kluwer Italia, Milano, 2020, 137–148.

<sup>8</sup> H.-H. HERRNFELD: Implementation of the EPPO Regulation: A Perspective from Germany. In: K. LIGETI – M. J. ANTUNES – F. GIUFFRIDA (eds.): *The European Public Prosecutor's Office at Launch: Adapting National Systems, Transforming EU Criminal Law*. Wolters Kluwer Italia, Milano, 2020, pp. 149–162.

## 1. The fundamental competence of the European Public Prosecutor's Office and its jurisdiction

The material competence of the European Public Prosecutor's Office is regulated in Section 1 Chapter IV of the Regulation, in particular Articles 22 and 23 of the Regulation. The European Public Prosecutor's Office shall be competent in respect of the criminal offenses affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud affecting the financial interests of the Union ("the Directive"). The Directive is not generally binding on individual states and must therefore be transposed into national law. Nor can the directive itself determine how the individual facts of the offenses are to be worded in national law, and it is therefore for the national authorities to adapt the wording of the individual facts, at least to such a standard as to satisfy the conditions laid down in the Directive. For example, in the Slovak Republic by adopting Act no. 214/2019 Coll., amending and supplementing Act no. 300/2005 Coll., the Criminal Act, as amended, and which amends some laws, has fully transposed the Directive into the legal order of the Slovak Republic. *The quoted Directive replaces the EU Convention of 26 July 1995 on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995) and its Protocols, to which the Slovak Republic acceded in 2004 and the content of which was reflected in the legal order of the Slovak Republic. Therefore, most of the requirements of the Directive are already met. However, unlike the Convention, the Directive strengthens the protection of the European Union's financial interests and lays down minimum rules concerning the definition of criminal offenses and penalties in connection with the fight against fraud and any other illegal activities affecting the European Union's financial interests. Given the relationship of the Directive with Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation in order to establish a European Public Prosecutor's Office (OJ L 283, 31.10.2017) (Ú. v. EÚ L 283, 31.10.2017), the provisions of the Directive are crucial for the proper functioning European Public Prosecutor, who refers to a directive defining his competence.*<sup>9</sup> Under Article 22 of the Regulation, *'The European Public Prosecutor's Office shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national'*. The powers of the European Public Prosecutor's Office are also somewhat narrower in the sense of the Regulation. These are, in particular, criminal offenses affecting the financial interests of the European Union, of a less serious nature, which it leaves within the competence of the national authorities.<sup>10</sup> The territorial competence of the European Public

<sup>9</sup> Explanatory memorandum to Draft Act no. 214/2019 Coll.

<sup>10</sup> An example may be given of the financial fraud involving VAT, where the European Public Prosecutor's Office has competence only if the intentional conduct concerns the territory of two or more Member States and the total damage caused is at least EUR

Prosecutor's Office under the Regulation<sup>11</sup> is given only if the criminal offense falling within the material competence of the European Public Prosecutor's Office was committed in the territory of one or more States.<sup>12</sup>

## 2. Conduct of an investigation by the European Public Prosecutor's Office in a participating State

Article 4 of the Regulation defines the fundamental role of the European Public Prosecutor's Office "The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of." As Ondrejová states: "For all participating States, Article 4 of the Regulation will apply verbatim within the extent 'The European Public Prosecutor's Office' shall be responsible" for investigating and prosecuting matters within its competence.<sup>13</sup> Although the European Public Prosecutor's responsibility for investigations and prosecutions is laid down in the Regulation, in reality the European Public Prosecutor himself is dependent on the functioning of national authorities in conducting investigations and prosecutions, carrying out criminal proceedings. Given that the European Public Prosecutor, despite being a body of the European Union, still has a position within national structures, which in our view may cause considerable problems in the conduct of investigations, as the powers of prosecutors and national authorities in conducting investigations may not be the same in each participating state.

Pursuant to Article 4 of the Regulation, the European Public Prosecutor's Office conducts investigations and prosecutes. Article 28(1) of the Regulation allows the European Delegated Prosecutor, in accordance with the Regulation and national law, to undertake the investigation measures and other measures himself/herself or to order them to be carried out by the competent authorities in his/her Member

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10,000,000. The Regulation also defines the competence of the European Public Prosecutor's Office in a negative way, stating that the competence of the European Public Prosecutor's Office does not include criminal offences relating to national direct taxes. This means that the European Public Prosecutor's Office has no competence in relation to the functioning of the tax administration of the Member States. See in more detail: A. ONDREJOVÁ: European Public Prosecutor's Office – structure and competence. *Advocacy Bulletin* Vol. 3, 2018, 31.

<sup>11</sup> See in more detail Article no. 23 of the EPPO Regulation.

<sup>12</sup> Of course, in the sense indicated, it is only the Member States that are participating in enhanced cooperation within the meaning of the Regulation.

<sup>13</sup> A. ONDREJOVÁ: European Public Prosecutor's Office – new entity, new questions, part 1: Scope of public prosecution surveillance – power to conduct investigations and other measures. *Advocacy Bulletin* Vol. 4, 2018, 6.

State. Pursuant to Article 26 of the Regulation, the European Delegated Prosecutor shall open an investigation in his or her Member State if, in accordance with national law, there are reasonable grounds for committing or having committed an offense within the competence of the European Public Prosecutor's Office. These are most likely to be acts which have been committed on the territory of several States, so the Regulation provides that *"a case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed"*.<sup>14</sup>

This raises the question of in which cases the investigations will be conducted by the delegated prosecutors themselves and in which cases they will use the opportunity to order it to the competent national authorities. Article 30 of the Regulation partially answers the question of when the European Delegated Prosecutor will be able to order the investigation measures. At least in cases where the offense under investigation can be punishable by a maximum term of imprisonment of at least four years, Member States shall ensure that European Delegated Prosecutors are empowered to order or request such investigation measures. These are standard security actions within the investigation, such as interception, recording of telecommunication activities, monitoring of controlled deliveries, inspection of all premises and others.<sup>15</sup>

Ondrejová<sup>16</sup> states that the European Delegated Prosecutor cannot entrust the investigation as a whole to national authorities, but must participate in it on an ongoing basis. It follows that the active participation of the European Delegated Prosecutor should include, in particular, ordering of the necessary investigation measures and the ongoing supervision, which must be active. Responsibility for the activities of national authorities will be exercised through the supervision of the European Public Prosecutor's Office, exercised through the supervision of the European Delegated Prosecutor. Here we encounter one fundamental problem, and that is that the European Delegated Prosecutor can also perform the role of prosecutor in terms of national status under the Public Prosecutor's Act. *"The European Delegated Prosecutor may also perform the tasks of a prosecutor of the Office of the Special Prosecutor's Office during the secondment, to the extent that he / she does not prevent him/her from fulfilling his/her obligations under a special regulation. The European Delegated Prosecutor, if he/she acts as a prosecutor of the Special Prosecutor's Office, has the status of a prosecutor of the Special Prosecutor's Office."*<sup>17</sup> In our view, the European Delegated Prosecutor can very easily run counter to his or her independence, as he or she is subject to the exercise of the

<sup>15</sup> See in more detail Article 30 of the Regulation.

<sup>16</sup> ONDREJOVÁ, A.: European Public Prosecutor's Office – new entity, new questions, part 1: Scope of public prosecution surveillance – power to conduct investigations and other measures. *Advocacy Bulletin* Vol. 4, 2018, 26.

<sup>17</sup> See in more detail Act no. 153/2001 Coll. On the Prosecutor's Office, as amended.

powers of the European Delegated Prosecutor directly by the Regulation and by national law in the performance of his or her duties. Another problem that needs to be perceived very sensitively is the mutual co-operation of the Delegated European Prosecutor with national authorities. Under the Regulation, the European Delegated Prosecutor is fully dependent on the work of national authorities, and even the national prosecutors themselves. The European Delegated Prosecutor will thus have to rely, not entirely on will, but on the efficiency of the work of the individual national authorities. Nor has the provision of the Regulation shed light on this issue, providing for the national authorities to take urgent measures, in accordance with national law, to ensure an effective investigation.<sup>18</sup> Ondřejová believes that this is a wider range of acts such as urgent acts in accordance with Section 10(17) of Act no. 301/2005 Coll., the Criminal Procedure Code as amended. De facto, these should be the acts that need to be taken to ensure an effective investigation. However, Ondřejová does not specify these acts in more detail, and therefore, although we would agree with her opinion on this issue, these acts should be defined in approximately the same way in the national regulations of individual states, so that effective co-operation can take place in this direction as well.

Another problem that can be identified, and which can be considered crucial in relation to the position of the European Public Prosecutor's Office, is the fact that the criminal offenses in which the European Public Prosecutor's Office has competence to participate are cross-border in nature and are therefore committed on the territory of several states. Although the European Public Prosecutor's Office is an independent body, even in this case it will have to rely on criminal co-operation between Member States. This will also apply to national authorities conducting investigations under the supervision of the European Public Prosecutor's Office. It is clear that the national laws of individual states do not have uniform legislation concerning both substantive and procedural criminal law. This applies in particular, but not only, to the issue of gathering evidence in criminal matters, which takes place in the context of cross-border co-operation, only according to the rules of national law, which may differ fundamentally. If the European Public Prosecutor's Office declares that its aim is to make the investigation of crimes affecting the interests of the European Union more effective, the European Union needs to think about a minimum common standard for gathering evidence in criminal matters. In this situation, the co-operation of the national authorities of the participating Member States may indeed give rise to disputes as to the admissibility of evidence, but also as to the safeguarding of the fundamental procedural rights of the accused, including the application of possible and admissible remedies. The case of withdrawing an investigation from one Member State and assigning it to another Member State also remains an unanswered question. Pursuant to the application of Article 26(5) of the Regulation, according to which the Permanent Chamber may decide to change the allocation of a case until a decision to prosecute. Thus, the Permanent Chamber may change the state in which the decision to prosecute is to be

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<sup>18</sup> Article 28(2) of the Regulation.



made and thus the legal regulation of criminal proceedings, which raises questions as to whether such proceedings will be in accordance with the accused's right to a fair trial, and in which cases the Permanent Chamber will exercise this right. If part of the investigation is carried out in one of the participating States under the rules of national law, there is no guarantee that the Member State to which the case is referred will not have to repeat the procedural acts because the acts performed do not meet that Member State's standards and are therefore not applicable in criminal proceedings. This cannot be removed even by the European Public Prosecutor's Office's supervision itself, as it cannot provide guarantees of legality in the individual participating States, as long as they are carried out under national law, despite the fact that the co-operation itself will be regulated by Union law. The indicated complications will also manifest themselves in the co-operation of individual Delegated Prosecutors of the Participating States as not in all Participating States does the prosecutor have the same status, especially with regard to the pre-trial part of criminal proceedings. In the Slovak Republic, the supervision and actions of the prosecutor are regulated in Act no. 301/2005 Coll., The Criminal Procedure Code, in its valid wording (hereinafter referred to as the "Criminal Procedure Code") and also in Act no. 153/2001 Coll. on the Prosecutor's Office as amended (hereinafter referred to as the Prosecutor's Office Act). Pursuant to Section 230 of the Criminal Procedure Code, supervision of compliance with the law before the commencement of criminal prosecution and in preparatory proceedings is performed by the prosecutor. Similarly, in accordance with the Prosecutor's Office Act, the prosecutor supervises compliance with the law before the commencement of criminal proceedings and in preparatory proceedings. Within the scope of the right to exercise supervision, the prosecutor is also entitled to carry out the entire investigation in accordance with the above-mentioned provisions. This authorization is not consistently applied, as it is usually investigated by a police officer, to whom the prosecutor is directly superior and issues instructions to the police officer on how to proceed in the said criminal case. The supervision of the prosecutor can be called subsequent supervision, after the execution of individual procedural acts and after the end of the investigation itself, or after performing some of the procedural acts within the criminal proceedings. The scope of competence of national prosecutors and European Prosecutors does not differ fundamentally, as the European Prosecutor is also able to conduct an investigation himself/herself. We see the difference mainly in the limits of the exercise of the powers of European Delegated Prosecutors. While the legal regulation in the Slovak Republic allows the Prosecutor's Office and also the Criminal Procedure Code to decide independently on the decision to prosecute, it follows from the provision of Section 231 of the Criminal Procedure Code<sup>19</sup>, European Delegated Prosecutors do not have this competence. Under this Regulation, only the permanent chambers of the European Public Prosecutor's Office have this power. Thus, after the investigation has been completed, the European Delegated Prosecutor will have to send the entire file to the relevant Permanent

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<sup>19</sup> Act no. 301/2005 Coll., The Criminal Procedure Code in force.

Chamber, which will decide on the further procedure.<sup>20</sup> *When the handling European Delegated Prosecutor considers the investigation to be completed, he/she shall submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure in accordance with Article 34, 39 or 40. The supervising European Prosecutor shall forward those documents to the competent Permanent Chamber accompanied, if he/she considers it to be necessary, by his/her own assessment.*<sup>21</sup> Whatever the effectiveness of co-operation or the competence is, the functioning of the European Public Prosecutor's Office is lost here. As mentioned above, the Permanent Chambers have three members, consisting of individual European Prosecutors. They will have to study and decide on the whole file.<sup>22</sup> Such rights are available to prosecutors independently in the conditions of the Slovak Republic. It is not clear why the European Prosecutor himself/herself cannot decide on the decision to prosecute, but he/she has to submit this assessment to the Permanent Chamber composed of European Prosecutors from several participating States and therefore the whole file must be translated into one of the working languages, which greatly complicates and certainly does not make co-operation in the exercise of the powers of the European Public Prosecutor's Office more effective.

The problem, however, is that the powers of the Prosecutor's Office may differ fundamentally in national law. Although in the legislation of the Slovak Republic in the indicated sense, the prosecutor is entitled to conduct the investigation himself/herself, this does not apply in practice. On the contrary, the prosecutor is in a position to supervise the national authorities in the performance of police investigations. The position of the European Prosecutor and the European Delegated Prosecutors does not differ in this respect. In this sense, co-operation in individual non-participating States can cause practical problems.

### **3. Conduct of investigations and co-operation in cross-border investigation of participating States**

Relations between the participating States in the framework of cross-border co-operation are dealt with in Article 31 of the Regulation, entitled "Cross-border investigations", which should replace, at least to a large extent, the traditional legal

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<sup>20</sup> M. DESET – E. SZABOVÁ: *Perspectives of European Public Prosecutor's Office. In the collection of scientific contributions of the nationwide interdisciplinary scientific conference with an international participation: "1st Košice days of criminal law – Perspectives on the development of European criminal law perspectives"*, EQUILIBRIA, s. r. o., 424.

<sup>21</sup> Article 35(1) of the Regulation.

<sup>22</sup> M. DESET – E. SZABOVÁ: i. m. 424.

assistance implemented so far in criminal matters.<sup>23</sup> “*The European Delegated Prosecutors shall act in close co-operation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.*” Based on the quoted text of the Regulation, the European Delegated Prosecutors in each participating State should cooperate closely. The Regulation further provides that the European Delegated Prosecutor to whom a measure has been referred in another participating State may enforce it himself/herself or refer it to the competent national authority for execution. Here again, we come to the problem of delegated prosecutors’ reliance on national authorities, as explained above, as well as the way in which evidence is obtained, which may conflict in national legislation. This is the basic premise that any system of international judicial cooperation should comply with, despite the fact that the EPPO cannot be classified exactly as a model of inter-state cooperation, since the authorities that request and provide the cooperation are integrated into the same supranational structure. Once the EDPs are appointed by the European Public Prosecutor’s Office, even though they keep their powers and functions as national prosecutors, they become part of the supranational structure at the decentralized level.<sup>24</sup> Nor does the Regulation explain, in the event of a referral being carried out, whether the conduct of those acts will still be supervised by the European Prosecutor of the Member State where the investigation is carried out or of the participating Member State where the European Delegated Prosecutor carries out the assigned measure. What impact will the European Prosecutor of a Participating State implementing the assigned measures have if the Delegated Prosecutor of that participating State becomes involved in the investigation. Since there is even more than one delegated European prosecutor in each member state. Each member state must adjust the method of assigning the measures within the framework of national law. It also follows from the mentioned provisions that, in the case of cross-border collection of evidence, the process is not carried out in the sense of the classic sending of a request or order, but simply the assisting European delegated prosecutor assigns the measure to a specific national authority that will carry it out. This body does not examine any of the principles of adequacy or legality of the measure carried out in this way. Only Article 31 part. 5 of the EPPO regulation, which deals with the possibility of the assisting European delegated prosecutor to refuse to carry out the assigned measure, in the event that

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<sup>23</sup> A. ONDREJOVÁ: European Public Prosecutor’s Office – new entity, new questions, part 2: European Public Prosecutor’s Office and cross-border competence. *Advocacy Bulletin* Vol. 5, 2018, 6.

<sup>24</sup> S. PAWELEC: Implications of Enhanced Cooperation for the EPPO Model and Its Functioning. *The European Public Prosecutor’s Office: An Extended arm, or two headed Dragon?* Springer Nature Switzerland AG, 2015.

- (a) *the assignment is incomplete or contains a manifest relevant error;*
- (b) *the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;*
- (c) *an alternative but less intrusive measure would achieve the same results as the measure assigned; or*
- (d) *the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State<sup>25</sup>.*

Any problem that arises in connection with the implementation of assigned measures is solved by the European delegated prosecutors together, by seeking a mutual solution with the supervising European prosecutor, and in the event that the situation cannot be resolved within seven days, the whole matter is referred to the permanent chamber, which proceeds in accordance with Art. 31. part. 8 of the EPPO Regulation.<sup>26</sup>

In the intentions of Art. 31. part. 8 of the EPPO Regulation, the exact procedure is determined in case of such a situation. The relevant permanent chamber primarily hears the interested European delegated prosecutors. In accordance with the national law as well as the regulation, it will decide whether the assigned measure should be implemented and, if so, within what time limit. The obligation to inform the European delegated prosecutors involved is also established. This provision can be considered adequate and reasonable in relation to unjustified delays in the implementation of assigned measures. However, if the missed deadline stems from other practical problems, such as a lack of resources allocated by an individual member state, a lack of personnel substrate<sup>27</sup>, the above-mentioned rules do not solve this. The given determination of the deadline for the problematic aspects outlined above will not solve the problem with the implementation of the measure, and it is not entirely clear how the implementation of the assigned measure will be accelerated. For this reason and in order to implement the prescribed measures within a reasonable period of time, a sufficiently well-equipped and specialized research unit should be established in the member states (sufficient personnel substrate with sufficient funding from the member states). If this does not happen, there is a very real chance that there will be delays. It will not be possible to implement the assigned measure, despite the efforts of the assisting European dele-

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<sup>25</sup> Article 31.5 of the EPPO Regulation.

<sup>26</sup> The competent Permanent Chamber shall to the extent necessary hear the European Delegated Prosecutors concerned by the case and then decide without undue delay, in accordance with applicable national law as well as this Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision to the said European Delegated Prosecutors through the competent European Prosecutor.

<sup>27</sup> W. L. BACHMAIER: Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance. In: *The European Public Prosecutor's Office: The Challenges Ahead*. Springer Nature Switzerland AG, 2018. s. 125.

gated prosecutor. And it is the setting of deadlines that may not be effective<sup>28</sup>. An important question that must be asked is what the consequences will be of not complying with the deadline set by the permanent chamber. If the given delay has been repeated several times, the possibility of starting proceedings before the Court of Justice of the European Union is allowed. Although such a drastic measure should be considered as a means of ultima ratio due to its political consequences. The regulation does not even provide an answer to the question of how to deal with a member state that does not implement the assigned measures within the specified period or within a reasonable time frame.<sup>29</sup>

The regulation in the quoted article also addresses the issue of the participation of the courts of the participating states in the assigned measures. *If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.* Nothing is unusual in the wording of the Regulation, as the assisting European delegated Prosecutor executing the assigned regulation obtains the consent of the court under the applicable law of his/her country, and is therefore a fully authorized person to appear before the courts and is also entitled to communicate with the courts under the applicable law. However, the Regulation continues with the provision according to which: *However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.* The Regulation very strictly states that “If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment”.<sup>30</sup> Such formulation does not allow the European delegated prosecutor to continue the process of obtaining the assigned measures. Here we could seek for a solution in the interpretation of article 73 of the Preamble of the EPPO regulation according to which: *“The possibility foreseen in this Regulation to have recourse to legal instruments on mutual recognition or crossborder cooperation should not replace the specific rules on cross-border investigations under this Regulation. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with national law implementing the relevant instrument, when conducting the investigation or prosecution.”*<sup>31</sup> If we think a one step further, in practice, there can easily arise a situation where for the measures needs to be the

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<sup>28</sup> W. L. BACHMAIER: Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance. In: *The European Public Prosecutor's Office: The Challenges Ahead*. Springer Nature Switzerland AG, 2018. s. 125.

<sup>29</sup> Ibidem.

<sup>30</sup> Article 31. ods. 3 EPPO Regulation.

<sup>31</sup> Article 73 of the Preamble of the EPPO Regulation.

approval of the court of the Member State where the investigation is primarily conducted, for example in Italy, but the measure is to be carried out in another Member State, for example in Slovakia. In Slovakia, of such a measure in terms of national law, is also needed the court approval. If we were to copy the wording of the Regulation, specifically Art. 72 Preamble that says: “*In cross-border cases, the handling European Delegated Prosecutor should be able to rely on assisting European Delegated Prosecutors when measures need to be undertaken in other Member States. Where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained, but in any case there should be only one authorisation. If an investigation measure is finally refused by the judicial authorities, namely after all legal remedies have been exhausted, the handling European Delegated Prosecutor should withdraw the request or the order.*”<sup>32</sup> It follows from the above that the regulation explicitly requires only one judicial authorization. However, the question really arises here, whether it is really possible to ignore the national regulation when obtaining the judicial authorization of the measure, and whether in fact the evidence obtained in this way, or the measure, could be considered legal.

Also as Ondrejová points out, in this case the European Delegated Prosecutor interferes with the integrity of another participating State when he or she provides legal assistance without the intervention of the participating Member State.<sup>33</sup> The above-mentioned inconsistent procedure for obtaining and presenting evidence in a cross-border investigation is partly addressed by the provision of Article 37 of the Regulation, which states that: “*Evidence presented by the prosecutors of the EPPO or the defendant to a court shall 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.*” This provision could partially eliminate the rejection of evidence in legal proceedings on the grounds that it was not obtained in accordance with the rules of national law. However, we must not forget the fact that the European Prosecutor is bringing a case to prosecution before a national court, where Union law cannot preclude the court from being free to assess that evidence. However, with this provision, the European legislator left the question of the admissibility of evidence in the context of their assessment in the hands of national courts.<sup>34</sup> The power of national courts to freely assess the evidence provided for in Article 37 par. 2 of the Regulation, together with the absence of any determination of reasons for the exclusion of evidence set out in Article 37 of the Regulation in cross-border investigations, gives the possibility of maneuvering and referring to a very

<sup>32</sup> Article 72 of the Preamble of the EPPO Regulation.

<sup>33</sup> A. ONDREJOVÁ: European Public Prosecutor’s Office – new entity, new questions, part 2: European Public Prosecutor’s Office and cross-border competence. *Advocacy Bulletin* Vol. 5, 2018, 6.

<sup>34</sup> V. MITSILEGAS – F. GIUFFRIDA: The European Public Prosecutor’s Office and human rights. In: W. GEELHOED et al. (eds.): *Shifting perspectives on the European Public Prosecutor’s Office*. Springer, Berlin, 2018, 59–98.

wide range of principles and laws at the national level. Article 37 of the Regulation is of course a welcome article, considering the strengthening of the equality between the defender and the prosecution, but many question marks are immediately related to it. This is mainly about ensuring the rights of suspects and accused persons, the right to legal aid, in the state where evidence is obtained in a cross-border investigation. We also consider the issue of collecting evidence in favor of suspects and accused persons to be questionable. The Regulation does not establish in any article the procedure of the, how the European Delegated Prosecutors should proceed in the case of obtaining such evidence European in cross-border investigations and their collection and mutual transfer of such evidence, so that all the rights of accused persons and suspects are ensured and the equality is observed. Inequality in cross-border investigations led by the European Public Prosecutor's Office could lead to a violation of the right to a fair trial recognized by the Charter of Fundamental Rights and also in the European Convention for the Protection of Human Rights.

A more complicated situation arises in co-operation in criminal matters, between member states that are not participating Member States within the meaning of the adopted Regulation on the European Public Prosecutor's Office. Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation for the establishment of the European Public Prosecutor's Office came to practice at 20. November 2017. It follows from the very name of the regulation that the EPPO was established as a form of enhanced cooperation. The essence of this method is the cooperation of some member states in specific areas with the use of EU institutions, while if some member states do not want this cooperation, they are not obliged to participate in it, but they cannot block it. The reasons given by several states for not adopting the regulation are directly related to the issue of sovereignty. Based on the study entitled *Sovereignty conflicts in the European Union*<sup>35</sup>, we can divide this issue into four areas. These are areas related to democracy and the rule of law, economic affairs, and membership in the Union itself. The issue of sovereignty is precisely the argument used by the member states to justify their position not to participate in enhanced cooperation. In the case of Hungary, the current Minister of Justice Judit Varga announced that these are issues of sovereignty and the Hungarian government does not see the need to be part of the EPPO, as it already takes the fight against corruption seriously enough at the national level. This caused some "raised eyebrows" in Brussels. Because OLAF closed 43 investigations related to the financial interest of the EU in Hungary in the period 2015–2019, which is the most in the entire EU. OLAF advised the Commission to recover almost 4% of the EU funds provided in Hungary, and this number is 10 times higher

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<sup>35</sup> N. BRACK – R. COMAN – R. A. CRESPI: *Sovereignty conflicts in the European Union. Les Cahiers du Cevipol* 2019/4 (N° 4). s. 3–30. <https://www.cairn.info/revue-les-cahiersdu-cevipol-2019-4-page-3.htm>.

than the figure representing the average across EU states.<sup>36</sup> Even the chief prosecutor of Hungary, Péter Polt, developed the so-called a network model, which, in his opinion, offers a more effective solution to problematic issues that the models of the European Public Prosecutor's Office do not properly solve. According to the network model based on the concept of the decentralized model, the European Public Prosecutor's Office would function as a decentralized network of delegated European prosecutors whose task is to manage cases within the competence of the European Public Prosecutor's Office at the level of the Member States, within the national legal order. The network would be connected, managed, supported and supported by a strengthened, enhanced and reinforced central coordination unit organized in Eurojust or attached to Eurojust.<sup>37</sup>

The Regulation contains several provisions on the issue of judicial cooperation between the European Public Prosecutor's Office and non-participating states. This is a provision in Chapter X of the regulation containing Article 99, point 1–3 of the regulation, which discuss the basic rule, that if necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union in accordance with their respective objectives, and with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations. Point 2 states that as relevant the EPPO may, in accordance with Article 111, directly exchange all information, with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in this Regulation. Finally point 3 says, that for the purposes set out in paragraphs 1 and 2, the EPPO may conclude working arrangements with the entities referred to in paragraph 1.<sup>38</sup> Such a working arrangements was sign between European public prosecutor's office and the office of the prosecutor general in Hungary at March 26 2021.<sup>39</sup> The agreement directly refers to Art. 99 of the EPPO regulation and thus that the said institutions will apply this article directly. The most important part in this case can be considered Chapter II of the working arrangement, which draws attention to judicial cooperation in criminal matters. The agreement is very weak as it stipulates that the parties shall grant each other the widest possible assistance in the application of the relevant legal instruments for judicial cooperation in criminal matters. However, the arrangements does not elaborate on this cooperation further. Pursuant to Article 105 of the Regulation *In the absence of a legal instrument relating to co-operation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of*

<sup>36</sup> E. INOTAI – T. GOLSING – E. SZEKERES – C. CIOBANU: Democracy digest: Hungary and Poland refuse to join EU justice league. *Reporting Democracy* 2021. <https://balkaninsight.com/2021/06/04/democracy-digest-hungary-and-poland-refuse-to-join-eu-justiceleague>.

<sup>37</sup> UDVARHELYI B.: Az Office-tól a College-ig – Gondolatok az Európai Ügyészség szervezeti felépítéséről. *Ügyészek Lapja* 2021/1., <https://ugyeszeklapja.hu/?cat=284>.

<sup>38</sup> See art. 99 of the Regulation.

<sup>39</sup> Dostupné na Working\_arrangement\_Hungary.pdf (europa.eu).



*the European Union which do not participate in enhanced co-operation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial co-operation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced co-operation on the establishment of the EPPO.* According to the wording of the Regulation, for the purposes of cooperating in investigations, the European Prosecutor will be designated as a national authority, which may lead to a significant divergence in the exercise of his powers. On the one hand, as a European Prosecutor, he/she is independent and bound exclusively in the exercise of his/her competence by Union law, however, it will continue to have to act in terms of legal assistance in criminal matters only on the basis of national legal acts, which, however, are concluded by states as such and are not governed by Union law. When performing individual tasks, it must be clear in which cases the prosecutor acts as the European Prosecutor and when as the National Prosecutor. Non-participating Member States are not bound by the Regulation. We therefore consider that, even if the participating States are entitled to designate European Prosecutors as a national authority for the purpose of co-operation in criminal matters, there is no act governing the procedure of non-participating States in cooperating in the European Public Prosecutor's Office, thus it follows that these States are not obliged to tolerate the exercise of the powers of the European Public Prosecutor's Office on their territory, which would significantly interfere with the integrity of individual States. This idea is only supported by the provision of the preamble of the EPPO regulation, specifically point 110 "Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation. The Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO. This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union *acquis* in this field as well as the duty of sincere cooperation in accordance with Article 4(3) TEU". The duty of sincere cooperation in accordance with Article 4(3) is a strong argument for the claim that a non-participating state is obliged not to block the activities of the European Public Prosecutor's Office on its territory, but in no case does it provide a sufficient legal framework for effective cooperation between a non-participating state and the European Public Prosecutor's Office. Therefore, it would be necessary to completely omit the wording "if appropriate" in this context, so that it is clear that the Commission is obliged to adopt such a legal framework for effective cooperation. It basically only concerns Poland as a member state that refuses to accept the European Public Prosecutor's Office as an institution at all. This follows from the EPPO annual report. Considering Poland's position, it will be interesting to watch further developments in the functioning of the EPPO. However, it can be concluded that the Commission, perhaps for such a reason mentioned above, is not

quite pushing for the adoption of any legal framework for the purpose of effective cooperation in criminal matters, since the only state that refuses to cooperate is Poland.<sup>40</sup>

We consider the most debatable point to be co-operation in criminal matters between the participating States that are signatories to the Regulation and between States that are not only non-participating States but are neither Member States of the European Union. The problem here is the position of the European Public Prosecutor's Office as an institution. The reason is that the co-operation in criminal matters between Member States and third countries works in most cases on the basis of international law and thus international conventions to which these individual states are signatories. The European Union, and therefore the European Public Prosecutor's Office itself, is not entitled to be a party to such a convention and to carry out any co-operation in criminal matters. The provision of Article 104 provides that: *“International agreements with one or more third countries concluded by the Union or to which the Union has acceded in accordance with Article 218 TFEU in areas that fall under the competence of the EPPO, such as international agreements concerning co-operation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO.”* However, such agreements have not been concluded to date. Thus, the Regulation also considered this possible scenario, where the Regulation states that *In the absence of an agreement pursuant to paragraph 3 of this Article or a recognition pursuant to paragraph 4 of this Article, the handling European Delegated Prosecutor, in accordance with Article 13(1), may have recourse to the powers of a national prosecutor of his/her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities. In that case, the European Delegated Prosecutor shall inform and where appropriate shall endeavour to obtain consent from the authorities of third countries that the evidence collected on that basis will be used by the EPPO for the purposes of this Regulation. In any case, the third country shall be duly informed that the final recipient of the reply to the request is the EPPO.* However, the exercise of the competence of the European Public Prosecutor's Office remains a problem, as indicated above, as third countries are not obliged to accept the European Public Prosecutor's Office as an institution. It must be noted that the interest of third countries to participate in cooperation with the EPPO is visible as the EPPO has already concluded working agreements with, for example, Ukraine or Montenegro, which can be considered a significant step forward in relation to the functioning of the EPPO.<sup>41</sup>

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<sup>40</sup> Other states are in the “Opt-out” mode, Denmark and Ireland are exempt from the entire area of freedom, security and solidarity.

<sup>41</sup> Working Arrangement published on Documents | European Public Prosecutor's Office (europa.eu)

## Conclusion

On 24 March 2022, the European Public Prosecutor's Office (EPPO) published its annual report since the beginning of its activities in June 2021. In the annual report, the EPPO informs about its organization and functioning (the activities of the College, the permanent chamber, the College support unit, the system for case management and IT, on human resources, on financial resources and their management, on transparency and relations with the general public and the press, on the activities of the legal service, etc.). Also about EPPO operations by participating Member States, crimes, seizures, number of accusations and other key data. It is certainly worth mentioning the fact that since the beginning of EPPO's operation, i.e. since. On June 1, 2021, 576 investigations were initiated. As of December 31, 2021, there were 515 active investigations. Also, the amount of damage is interesting information, where the total estimated damage within active investigations was EUR 5.4 billion.<sup>42</sup> On the positive side, it is not possible to deny the European Union's efforts to unify criminal law, including by putting the institute of the European Public Prosecutor's Office into practice. It should not be forgotten that practice alone will show a number of application problems that will prove to be fundamental. In the article, we have tried to point out the problems that are considered to be the most acute, which need to be addressed in order for the European Public Prosecutor's Office to function effectively. We have identified as the most pressing the problems related to the exercise of the competence of the European Public Prosecutor's Office, both within the participating States but also regarding non-participating States, as well as co-operation in criminal matters with third countries. The least problematic seems to be the co-operation between the participating States, i.e., the States that have adopted Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation for the purpose of establishing a European Public Prosecutor's Office. As mentioned in the article, European Prosecutors, and in particular European Delegated Prosecutors, must always, in exercising their powers, keep in mind their competence and independence, which derives from their position, and they should also not forget to work closely with each other, as it is directly ordered by the Regulation. Co-operation between individual European Prosecutors and European Delegated Prosecutors can be very effective in complying with the strict rules of the Regulation and in avoiding certain application problems that we have pointed out in the article. We consider the exercise of the competence of the European Public Prosecutor's Office within non-participating States and third countries to be the most problematic. It is the Union's duty, if it wants the European Public Prosecutor's Office to be able to function from the outset, to take measures to eliminate as far as possible the issue and disputes in the exercise of its competence. The European Union needs to adopt documents addressing co-operation in criminal matters between non-participating States – especially how European Prosecutors are to exercise their powers, but especially to address the

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<sup>42</sup> Annual report EPPO, see EPPO\_Annual\_Report\_2021 (1).pdf.

issue of exercising the competence of the European Public Prosecutor's Office with third countries. At first sight, the functioning of the European Public Prosecutor's Office in the exercise of its competence seems quite clear. Investigations are also conducted by the European Prosecutor through European Delegated Prosecutors, who know how to delegate this competence to national authorities. The defence of the accused will be carried out by persons entitled to do so by the national authorities (mostly lawyers), and the charges will be brought before the national courts. Here, however, it is necessary to reflect on the fact that the exercise of individual professions will be affected by the exercise of the competence of the European Public Prosecutor's Office, and therefore a minimum knowledge of the European Public Prosecutor's Regulation is required to effectively ensure the accused's right to defence, their fundamental right to defence and for judges to adhere to the letter of the principle of the right to a fair trial. On the other hand, we cannot deny the EPPO's efforts for effective cooperation, which is underlined by the number of signed working agreements. It only follows from the above that the effort of individual states to cooperate with the EPPO is there, and therefore there is nothing left but to state that in the future it will really only be an area of effective cooperation.

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