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Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort



Ladies and Gentlemen,

- It is an honour to be here today, and I am grateful for this most timely opportunity to discuss with you what the launch of the European Public Prosecutor's Office means in particular for defence lawyers.
- As you know, the EPPO started operations on 1 June. We investigate fraud involving EU funds of over 10,000 EUR and cross-border VAT fraud involving damage above 10 million EUR, when committed in a participating Member State or by a citizen from a participating Member State. Just to recall it, there are 22 participating Member States at this stage.
- After 100 days of operation, we have already registered and verified more than 1700 reports of criminal activities under our competence.
- We have started more than 300 investigations for an estimated damage to the EU budget of almost 4.5 billion EUR.
- We all know that this is only the beginning. Not because more Member States might decide to join or because some Member States are already considering opening discussions on extending our competence.
- It is only the beginning because we are the first of our kind, and the impact of us assuming the responsibility for a certain category of criminal investigations will be manifold.



- For instance, I have no doubt that our activity will change the paradigm of how cross-border investigations are run in the EU, create a wealth of jurisprudence, and trigger more legislative changes both at European and national levels.
- We are not a coordinator, we are not a network, and we are not an EU agency issuing recommendations to responsible national authorities. We are a single – and specialized - prosecution office.
- Our European Delegated Prosecutors – and you can meet some of them today - are embedded in the respective national systems with full prosecutorial powers. 91 of them have already been appointed, and we count on up to 140 in this initial phase of our deployment. When dealing with the EPPO, you will probably meet known faces, as many of our European Delegated Prosecutors have already made an outstanding name for themselves in the profession.
- Like so many others, I have been following the negotiations on the EPPO regulation from a distance. Once the regulation was adopted, I still read it with a mixture of admiration for all those who shaped it and some perplexity, identifying potential issues only in abstracto. It is not until now where we had to transform the text into a workable reality, that I have fully grasped the complexity and the potential of what has been created.



- One of the guiding principles in our activity is that the EPPO investigations and prosecutions must respect the highest procedural standards, including the rights of the defendants and of the defence, as you have rightly stated in the Autumn's Conference subtitle "striving for the highest standards of fair proceedings in Europe".
- Our investigations and prosecutions have to follow the same procedures that are established in each of the Member States today and would apply anyways, would the case be handled by the national prosecution service.
- This being said, the unique structure and mandate of the EPPO indeed bring about some novel issues where simple reference to national procedural safeguards will not offer all the necessary solutions.
- You address many of them at this conference. With your permission, I picked four. Most of you will be very familiar with the EPPO legal framework, and my choice of issues is, of course, not exhaustive.
- These topics are:
 - The choice of the handling European Delegated Prosecutor;
 - Challenging procedural acts of the EPPO;
 - Cross-border measures;
 - The use of evidence.



The choice of the handling European Delegated Prosecutor

- The question to which European Delegated Prosecutor a cross-border investigation will be assigned has been worrying many defence lawyers for years now.
- Can the EPPO put a European Delegated Prosecutor in charge of an investigation at whim? Can the EPPO do “forum shopping”?
- The answer is clear and simple: no.
- Article 26(4) of the EPPO regulation obliges us to concentrate the case in the Member State where the bulk of the offenses has been committed. Any other choice is only possible where it is duly justified to deviate from this principal rule.
- Even then, EPPO is bound by other criteria, which follow an order: first, the residence of the suspect, second the nationality of the suspect, and only as third, the place of the main financial damage.
- Some of these criteria do leave room for interpretation, such as what determines the “bulk of offences”? On this, we will have more clarity with developing case law, notably decisions by the Member States’ courts and ultimately the European Court of Justice.



- However, contrary to what some critics believe, the possible penalty or differing chances to recover assets are not permissible criteria and are not to be taken into account.
- Furthermore, I would like to underscore that the EPPO can assign a case only to those European Delegated Prosecutors who are from those Member States that have jurisdiction over it, as per Article 26(1) and (3) of the Regulation.
- In fact, the need to allocate a report about a suspected crime is not a novelty. The same situation may well appear without the EPPO. Any crime with links to more than one jurisdiction can be investigated and prosecuted by more than one prosecution office.
- The reality is that there are parallel investigations into the same set of facts and concerning the same suspects. In theory, it is possible for prosecution authorities to coordinate among themselves. In practice, however, this does not happen routinely.
- Even though Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings sought to improve this, suspects and accused still face uncertainty and parallel investigations, and they are not safe from a transfer of jurisdiction.
- With EPPO, on the other hand, we have for the first time a structured and transparent mechanism, which comes with binding decisions that are subject to legal remedies under Article 42 of the Regulation, as clarified by recital 87.



Challenging procedural acts by the EPPO

- This brings me to the second topic: how to challenge procedural acts of the EPPO. We will dedicate a panel discussion to this question today, but let me sketch out briefly where I personally see the strengths and the weaknesses of the EPPO Regulation in this regard.
- In line with Article 42 of the EPPO Regulation, the EPPO is in the same position as a national prosecution office. The principle is that, according to Article 42(1), procedural acts will be reviewed by the competent national courts in accordance with the requirements and procedures laid down by national law. EPPO will be held responsible by the same national courts and in the same way as the respective national prosecution service.
- The European Court of Justice is competent for preliminary rulings under Article 42(2). Of course, the possibility of preliminary rulings by the European Court of Justice is not necessarily new to criminal proceedings in the Member States but I guess it is fair to assume that possibility will be taken more often now.
- The interplay between Regulation and special structure of the EPPO on the one hand and the national law on the other hand has led to a special rule, Article 42(3).



- It provides that dismissals by the EPPO are to be reviewed by the European Court of Justice, but only if they are contested directly on the basis of Union law. However, would a dismissal be grounded in national law, it could be challenged before the national courts and according to national law.
- To add some more background: Article 39 of the EPPO Regulation is the central provision on dismissal decisions. According to it, the Permanent Chamber takes the decisions to dismiss for a number of grounds, listed in Article 39(1). Recital 81 establishes that the grounds for dismissal of a case are exhaustively laid down in this Regulation. This both raises mainly two sets of questions about judicial review and procedural safeguards:
- First, concerning the scope of Article 42(3). When does the EPPO base the decision to dismiss the case directly on Union law, and the challenge should accordingly be based in Union law? When does the EPPO rely on national law to dismiss a case, which would then have to be contested before national courts? What is the exact scope of dismissals for “lack of relevant evidence”? Would a case where the existing evidence as such is not contested, but the European Delegated Prosecutor dismisses for purely legal reasons, also be a “lack of evidence”?



- Second, the claimed exhaustiveness of the dismissal grounds according to Article 39(1) of the Regulation needs to be interpreted reasonably. Just one example: How should we deal with a suspect, other than dead or insane, who is not fit to stand trial? Would the EPPO have to bring this suspect to trial, just to have the court dismiss the case?

Cross-Border Measures

- Let us now touch upon judicial review, notably of cross-border investigations measures under Article 31 of the EPPO Regulation.
- Based on the concept of the EPPO as a single office, Article 31 intends to go beyond mutual legal assistance or mutual recognition between EU Member States. The first months of operations have demonstrated that the cooperation between European Delegated Prosecutors is much faster than between national prosecutors from different Member States.
- For national prosecutors, it is sometimes difficult to identify a good contact point in another Member State and the competent authority to turn to. The European Delegated Prosecutors know whom to turn to and receive assistance from the EPPO Central Office.



- For a national prosecutor, it can take months to have requested measures executed abroad. For European Delegated Prosecutors we have seen this delay shrink to a few weeks.
- One important aspect where the EPPO working regime differs from traditional judicial cooperation would be judicial authorization for an investigatory measure. Traditional judicial cooperation may involve double judicial authorization or review: in the first Member State, but also in the second Member State, although usually not going to the merits of the case as the execution in the latter is not a full criminal procedure in itself.
- Within the EPPO, the handling European Delegated Prosecutor assigns investigatory measures to an assisting European Delegated Prosecutor in another Member State. In order to streamline the procedure on the judicial side as well, Article 31(2) establishes the principle that only one judge or court would decide on the authorization.
- For more intrusive measures, where judicial authorization would be needed in both Member States, the judicial authorization would fall abroad to the judge or court of the Member State of the assisting European Delegated Prosecutor.



- In practice, this confronts us with tough questions: Shall the judge be provided with the full case file, even if the European Delegated Prosecutor presenting the case to that judge is only assisting and does not manage the case file? Shall the case file, which the handling European Delegated Prosecutor manages in his or her own language, be translated for the judge in the other Member State?
- Moreover, if the justification and adoption of the cross-border measure shall be governed by the law of the Member State of the handling European Delegated Prosecutor, as the second sentence of Article 31(2) provides, will the judge in the other Member State actually have to apply foreign law? What will be the consequences of diverging judicial decisions if a handling European Delegated Prosecutor assigns essentially the same measure to assisting European Delegated Prosecutors in two other Member States, but the measure is approved in one and rejected in the other?



The use of evidence

- Finally, I would like to touch briefly upon the admissibility and use of evidence that EPPO investigations generate. The topic of a “free circulation of evidence” has been discussed for long time; some scholars have made the point evidence is nothing like tomatoes or toys and an unrestricted flow of evidence across Europe would endanger the checks and balances established in the national systems. In my view, we all can agree on this general caveat!
- But what does the EPPO Regulation in its final version actually regulate and say?
- It does not harmonize the criminal procedure as such. Generally, Article 5(3) of the EPPO Regulation points to the law of the handling European Delegated Prosecutor for all the matters that the EPPO Regulation does not regulate.
- The EPPO Regulation does not contain rules on the use of evidence. Therefore, as a matter of principle, the law and hence the criminal procedure of the Member State of the handling European Delegated Prosecutor apply.



- Article 37(1) of the EPPO regulation addresses the scenario of evidence gathered in one Member State or in accordance with the law of one Member State but presented to a court in another Member State. However, what does it actually regulate about admissibility of cross border evidence? Not a lot, just that admission shall not be denied “on the mere ground” it was gathered in another Member State.
- This said, the paragraph does not positively order admissibility in the sense of a free circulation of evidence in any way. It only forbids national legislation that would prohibit introducing any foreign evidence before its courts.
- Therefore, and in line with paragraph 2 of Article 37, the question of how to deal with foreign evidence is still tied to the law of the court in the forum state. The Regulation does not introduce any change to the Status Quo.
- In my view, this gives us the answer to possible prohibitions on the use of evidence under the national law of the Member State where the EPPO seeks to bring a case to judgment according to Article 36.
- It is the law of the handling European Delegated Prosecutor that determines whether prosecution is possible or has become impossible, as Article 39(1) states.



- I realize that the reference to national law may not give a straightforward answer for individual cases or scenarios. The rules on the recognition of foreign evidence and the inadmissibility of evidence vary considerably among the Member States and quite often they are not even codified but have been developed by jurisprudence in the national case law.
- This leaves some uncertainty and raises questions which, however, are not new or tied in any way to the creation of the EPPO. Please allow me to underscore again that an EPPO case is allocated to one European Delegated Prosecutor in a defined Member State.
- That European Delegated Prosecutor investigates and prosecutes within the respective national judiciary with a view to finishing the case within the legal framework of that Member State and before one of its courts. It would be foolish, and of course unlawful, for a prosecutor to generate evidence in the course of investigations if the applicable law attaches prohibitions to its use in trial.
- Transfers of jurisdiction by re-allocating a case to a European Delegated Prosecutor in another Member State are possible. However, the EPPO has to make sure that the evidence meets all the legal requirements in the Member State where the case would be transferred as well.



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- This being said, this scenario is not really new either. A national prosecutor can also come to the conclusion that there is no point in pursuing a case in his or her own jurisdiction. A reason for this may be that the case overlaps with a flipside case investigated in another Member State, which covers more accused or a larger set of events, or where the essential evidence is located. Eventually, in practice, shifting the whole case to a new jurisdiction will never be easy.



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Ladies and gentlemen,

- I have tried to address four particular issues today, and now it seems that I gave you more questions than answers.
- It is unavoidable though, there is no precedent for what we are trying to accomplish and only practice and time can tell.
- However, be assured we know that our decisions will directly affect the fundamental rights of European citizens. We have a unique competence, great powers and responsibility.
- We are very much aware that the success of the EPPO is a matter of credibility for the European Union. We need an intense exchange and cooperation with all the actors of the judiciary if we want the EPPO to be a success story.
- Thus, thank you very much again for the opportunity to speak to you, thank you for your attention and I will be happy to answer your questions.