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Requirements Regarding the Legality of the Administration of Evidence in Case Files Investigated by the European Public Prosecutor's Office

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Abstract: This paper examines the requirements concerning the legality of the administration of evidence in cases handled by the European Public Prosecutor's Office (EPPO), with particular emphasis on the practical issues arising from the application of the European and national legal framework in Romania. The scholarly analysis proceeds from the premise that, although Regulation (EU) 2017/1939 and Law no. 6/2021 have established a complex institutional mechanism for the protection of the financial interests of the European Union, several aspects concerning the functional competence of European Delegated Prosecutors, the procedure for the allocation of cases, and the administration of evidence remain insufficiently regulated, thereby generating uncertainties with a direct impact on the right of defence. The paper is structured into four main sections, preceded by an analysis of preliminary aspects concerning the handling of cases by EPPO. The first section examines the applicable legal framework and the competence of EPPO, highlighting the types of offences falling within its remit, as well as the mechanisms of cooperation with national authorities, including the procedure for evocation. The nature of the five-day time limit laid down in Article 27 (1) of the Regulation is also analysed. The second section addresses the central issue of the functional competence of European Delegated Prosecutors, considered in relation to the territorial offices in which they perform their duties (Bucharest, Cluj-Napoca, Iași and Timișoara). The third section is devoted to an analysis of criminal prosecution conducted by a European Delegated Prosecutor to whom the case was not allocated by a decision of the Permanent Chamber, pursuant to Article 10 (4) (d) of the Regulation. Finally, the fourth section addresses the right of the defence to consult the register containing the information obtained by EPPO pursuant to Article 24 of the Regulation, emphasising that such information becomes an integral part of the case file and must be made available to the defence and transmitted to the court together with the act by which the case is committed for trial. It is concluded that, where such information is missing, the preliminary chamber judge must order the completion of the case file.

Keywords: European Public Prosecutor's Office; Office of the European Delegated Prosecutor in Romania; evocation; nullity; preliminary chamber.

JEL Classification: K14; K19

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1. Preliminary Aspects Concerning the Handling of Cases by the European Public Prosecutor's Office

1.1. Applicable Legal Framework and Competence of the European Public Prosecutor's Office

The European Public Prosecutor's Office (E.P.P.O.) is a body of the European Union established by COUNCIL REGULATION (EU) 2017/1939 of 12 October 2017.

The functions of the E.P.P.O. consist in investigating, prosecuting and bringing to trial the perpetrators of offences against the financial interests of the Union and of offences inextricably linked thereto.

Pursuant to Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, the offences affecting the financial interests of the Union are:

a. Fraud affecting the financial interests of the Union

Pursuant to Article 3 (2) of Directive (EU) 2017/1371, the following shall constitute fraud affecting the financial interests of the Union:

(a) in relation to non-procurement-related expenditure, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or wrongful retention of funds or assets from the budget of the Union or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted;

(b) in relation to procurement-related expenditure, at least where committed with the intent of obtaining an unlawful gain for the perpetrator or another person by causing a loss in respect of the financial interests of the Union, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, resulting in the misappropriation or wrongful retention of funds or assets from the budget of the Union or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, thereby prejudicing the financial interests of the Union;

(c) in relation to revenue other than revenue derived from own resources based on VAT referred to in point (d), any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, resulting in the unlawful diminution of the resources of the budget of the Union or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of a legally obtained benefit, with the same effect;

(d) in relation to revenue derived from own resources based on VAT, any act or omission committed in cross-border fraudulent schemes concerning: (i) the use or presentation of false, incorrect or incomplete VAT statements or documents, resulting in the diminution of the resources of the budget of the Union; (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or (iii) the presentation of correct VAT statements for the fraudulent concealment of non-payment or the unlawful creation of rights to VAT refunds.

b. Money laundering, where property is involved that is derived from the commission of offences covered by Directive (EU) 2017/1371

Pursuant to Article 1 (3) of Directive (EU) 2015/849, the offence of money laundering consists, when committed intentionally, in:

- (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person involved in the commission of such activity to evade the legal consequences of that person's actions;
- (b) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property or of rights with respect to property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
- (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is derived from criminal activity or from an act of participation in such activity;
- (d) participation in, association to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

c. Passive and active corruption

“Passive corruption” means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or herself or for a third party, or accepts a promise of such an advantage, in order to act or refrain from acting in accordance with his or her duties or in the exercise of his or her functions in a manner which prejudices or is likely to prejudice the financial interests of the Union, pursuant to Article 4 (2) (a) of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

“Active corruption” means the action of a person who, directly or through an intermediary, promises, offers or gives an advantage of any kind to a public official, for himself or herself or for a third party, in order to act or refrain from acting in accordance with his or her duties or in the exercise of his or her functions in a manner which prejudices or is likely to prejudice the financial interests of the Union, pursuant to Article 4 (2) (b) of the Directive on the fight against fraud to the Union's financial interests by means of criminal law.

d. Misappropriation of funds

“Misappropriation of funds” means the action of a public official who is entrusted, directly or indirectly, with the management of funds or assets, in the sense of committing or disbursing funds or appropriating or using assets contrary to the intended purpose in any manner which prejudices the financial interests of the Union, pursuant to Article 4 (3) of the Directive on the fight against fraud to the Union's financial interests by means of criminal law.

EPPO is also competent in respect of offences relating to participation in a criminal organisation where the principal criminal activity of such organisation is to commit any of the offences referred to above.

Pursuant to Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, a “criminal organisation” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences punishable by deprivation of liberty or a detention order for a maximum period of at least four years or by a more severe penalty, in order to obtain, directly or indirectly, a financial or other material benefit.

“Structured association” means an association that is not formed randomly for the immediate commission of an offence and that does not necessarily have formally defined roles for its members, continuity of membership or a developed structure.

The Member States have transposed into national law the criminalisation of the acts referred to in Directive (EU) 2017/1371, in which context the investigation, prosecution and bringing to trial of the perpetrators of such offences also fall within the competence of the national prosecuting authorities.

For this reason, Council Regulation 2017/1939 of 12 October 2017 provides both for the possibility for E.P.P.O. to initiate its own investigations and for the possibility of evoking cases initiated by the prosecuting authorities of the Member States.

1.2. Structure of the European Public Prosecutor’s Office

Pursuant to Article 8 of Council Regulation 2017/1939 of 12 October 2017, the E.P.P.O. is organised at both central and decentralised levels, located at the seat of EPPO. The central office consists of the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director.

At the decentralised level, it consists of European Delegated Prosecutors located in the Member States.

As regards its hierarchical structure, it comprises the European Chief Prosecutor, two Deputy European Chief Prosecutors, European Prosecutors and European Delegated Prosecutors.

The European Chief Prosecutor is the head of EPPO. The European Chief Prosecutor organises EPPO’s activities, directs its operations and adopts decisions. Although in national criminal procedural systems the chief prosecutor is usually the person who takes all final decisions concerning matters related to criminal prosecution, the same logic does not apply to EPPO’s European Chief Prosecutor, since central decision-making power in criminal prosecution matters lies with the Permanent Chambers, which constitute the operational core of EPPO’s central structure (Ligeti, 2024, p. 467).

The European Prosecutors supervise the investigations and prosecutions for which the European Delegated Prosecutors handling cases in their respective Member States of origin are responsible.

The European Delegated Prosecutors act on behalf of EPPO in their respective Member States and have the same powers as national prosecutors with regard to investigations, prosecutions and bringing cases to trial. As a rule, investigations conducted by EPPO should be carried out by European Delegated Prosecutors in the Member States. They should act in accordance with Council Regulation 2017/1939 of 12 October 2017 and, with regard to matters not covered by the Regulation, in accordance with national law. European Delegated Prosecutors should perform their duties under the supervision of the supervising European Prosecutor and under the direction and instructions of the competent Permanent Chamber (Díez & Herlin-Karnell, 2018, p. 1203).

1.3. Initiation of Investigations

Pursuant to Article 26 (1) of the Regulation, where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence falling within the competence of EPPO is being or has been committed, a European Delegated Prosecutor from a Member State who, under its national law, has jurisdiction in respect of the offence shall initiate an investigation and record this in the case management system.

1.4. Evocation of Cases

According to legal doctrine, the right of evocation must be viewed from a dual perspective. On the one hand, it constitutes a loss of competence on the part of the Romanian prosecuting authorities in respect of cases under investigation in relation to which EPPO could exercise its competence pursuant to Articles 22 and 25 (2) and (3) of the Regulation. On the other hand, it constitutes a *sui generis* situation in which a case pending before the Romanian prosecution offices is taken over by the European Public Prosecutor's Office (Udroiu, 2025, p. 120).

Where a judicial or law-enforcement authority of a Member State initiates an investigation into an offence in respect of which EPPO could exercise its competence, or where, at any time after the initiation of an investigation, it becomes apparent to a competent judicial or law-enforcement authority of a Member State that the investigation concerns such an offence, that authority shall inform EPPO without undue delay so that EPPO may decide whether to exercise its right of evocation.

Pursuant to Article 27 (1) of the Regulation, after receiving all relevant information from the competent authorities of the Member State, EPPO shall decide whether to exercise its right of evocation as soon as possible, but no later than five days after receiving the information from the national authorities, and shall inform the national authorities of that decision. The European Chief Prosecutor may, in a specific case, take a reasoned decision to extend the time limit by a maximum of five days and shall inform the national authorities accordingly.

We consider that the five-day time limit laid down in Article 27 (1) of the Regulation is mandatory rather than merely indicative. In the event of failure to comply with this time limit, it should be considered that EPPO has not exercised its right of evocation, and the national prosecuting authorities shall continue the investigation.

2. Functional Competence of European Delegated Prosecutors

European Delegated Prosecutors exercise their duties under the supervision of the European Prosecutor responsible for the case and under the direction and instructions of the competent Permanent Chamber.

Given that European Delegated Prosecutors have the same powers as national prosecutors with regard to investigations, prosecutions and bringing cases to trial, and given that national legislation provides that the prosecutor's competence is determined by reference to the competence of the prosecution office in which the prosecutor performs his or her duties, while European legislation contains no express provisions in this regard, we consider that situations may arise in judicial practice capable of giving rise to divergent case-law.

Competence is the legally recognised authority of a judicial body, whether a prosecuting authority, a judge of rights and liberties, a preliminary chamber judge or a trial court, to investigate or adjudicate a particular criminal case, or to rule on applications concerning acts and measures restricting the fundamental rights and freedoms of a person, on the legality of the act by which a case is committed for trial and of the evidence on which it is based, or on acts carried out during the criminal investigation, as well as on the legality of decisions not to commit a case for trial (Udroiu, 2014, p. 130).

Pursuant to Article 16 (7) of Law no. 6/2021 establishing certain measures for the implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO): European Delegated Prosecutors remain within the establishment and staffing structure of the prosecution office from which they

originate and actually perform their duties in Bucharest, Cluj-Napoca, Iași and Timișoara, as applicable. Upon termination of their activity as a European Delegated Prosecutor, the prosecutor shall return to the prosecution office from which he or she originated or to which he or she was effectively promoted, in accordance with the law.

Furthermore, Article 20 of Law no. 6/2021 provides that, in the case of offences in respect of which criminal prosecution has been conducted by the European Public Prosecutor's Office pursuant to the EPPO Regulation, territorial jurisdiction lies with: (a) the Bucharest, Cluj, Iași and Timiș tribunals, with regard to first-instance adjudication not assigned by law, on the basis of the status of the person, to other courts; (b) the Bucharest, Cluj and Iași Courts of Appeal and the Timișoara Court of Appeal, with regard to appeals against criminal judgments delivered at first instance by the tribunals referred to in point (a), as well as first-instance adjudication where jurisdiction based on the status of the person lies with the courts of appeal; (c) the High Court of Cassation and Justice, with regard to first-instance adjudication and appeals where its jurisdiction is triggered by the status of the person.

Moreover, Article 22 of Law no. 6/2021 provides that whenever national legislation governing the activities of law-enforcement authorities refers to a prosecutor or a prosecuting authority, that reference shall be deemed to include the European Delegated Prosecutor and, where appropriate, the European Prosecutor, insofar as this ensures the exercise of the powers conferred upon them under the EPPO Regulation.

An analysis of these provisions shows that, from an organisational perspective, at national level, European Delegated Prosecutors perform their duties within the Offices of the European Delegated Prosecutor in Bucharest, Cluj-Napoca, Iași and Timișoara. In turn, the Offices of the European Delegated Prosecutor are organised according to the territorial jurisdiction of the courts referred to in Article 20 of Law no. 6/2021.

Thus, the issue under consideration concerns the functional competence of the European Delegated Prosecutor, namely whether it is determined by reference to the prosecution office (office) in which he or she performs his or her duties, as in the case of a national prosecutor.

We refer to a situation arising in national case-law in which the place where the offence was committed was Bacău County, the case having been evoked by a prosecutor performing his duties within the Office of the European Delegated Prosecutor in Iași.

Pursuant to Article 20 (2) of Law no. 6/2021, jurisdiction to adjudicate such a case at first instance lies with the Iași Tribunal.

Before the criminal investigation was completed, the European Delegated Prosecutor was transferred and began performing his duties within the Office of the European Delegated Prosecutor in Cluj-Napoca.

The criminal investigation conducted was a mixed one, in the sense that some activities were carried out in Cluj-Napoca and a substantial part in Iași, through the delegation of the criminal investigation body.

It is also relevant that the Iași Tribunal was seised by the Office of the European Delegated Prosecutor in Cluj-Napoca.

We consider that, in such a situation, given that Council Regulation 2017/1939 of 12 October 2017 and Law no. 6/2021 contain no provisions derogating from those set out in Article 56 of the Code of Criminal Procedure, the Iași Tribunal could be seised only by a European Delegated Prosecutor performing his or her duties within the Office of the European Delegated Prosecutor in Iași.

However, the Iași Tribunal was seised by the Office of the European Delegated Prosecutor in Romania in Cluj, in breach of Article 56 of the Code of Criminal Procedure.

Following the termination of the prosecutor's activity within the Office of the European Delegated Prosecutor in Iași, the case should have been reallocated to another prosecutor performing his or her duties within that office.

The legal literature has taken the view that, from the perspective of subject-matter competence to investigate offences affecting the financial interests of the Union (P.I.F.), the European Delegated Prosecutor should be a prosecutor from the National Anticorruption Directorate, pursuant to Law no. 78/2000 on preventing, discovering and sanctioning acts of corruption. As a directorate within the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate operates ipso facto in connection with that court (Bocșan, 2016).

Similarly, we consider that the territorial Offices of the European Delegated Prosecutor in Romania should operate in connection with the courts referred to in the Annex to Law no. 6/2021, namely the Bucharest, Cluj, Iași and Timișoara Tribunals/Courts of Appeal.

We are of the opinion that, in a situation such as the one described above, the preliminary chamber judge should declare null and void the acts of criminal investigation carried out by a prosecutor lacking functional competence, and should likewise declare null and void the act by which the court was seised.

3. Criminal Prosecution Conducted by a European Delegated Prosecutor to whom the Case was not Allocated

Pursuant to Article 10 (4) (d), (e) and (f) of Council Regulation 2017/1939 of 12 October 2017, the Permanent Chambers have the power to allocate or reallocate a case and to approve a decision by a European Prosecutor to conduct the investigation him- or herself.

It follows that, for a European Delegated Prosecutor to handle a case, there must be a decision allocating the case by the Permanent Chambers.

With reference to the same case mentioned above, the defence established that criminal investigation acts had been carried out both by the European Delegated Prosecutor who had exercised the right of evocation and by another prosecutor who had initially decided not to exercise that right.

The criminal investigation file contained no decisions of the Permanent Chambers concerning the allocation of the aforementioned case.

Pursuant to Article 2(5) of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, the "European Delegated Prosecutor handling the case" means a European Delegated Prosecutor responsible for the investigations and prosecutions which he or she has initiated, which have been assigned to him or her, or which he or she has taken over by exercising the right of evocation in accordance with Article 27.

The prosecutor who had not exercised the right of evocation did not qualify as an "assistant European Delegated Prosecutor" either, since, pursuant to Article 2 (6) of Council Regulation (EU) 2017/1939, this status presupposes a European Delegated Prosecutor located in a Member State other than the Member State of the European Delegated Prosecutor handling the case, where an investigation or another measure assigned to him or her is being carried out.

However, the aforementioned case presented no cross-border elements, the entire criminal activity having been committed within the territory of Romania.

Pursuant to Article 28 (1) of the Regulation, entitled “Conduct of the investigation”, “the European Delegated Prosecutor handling a case may, in accordance with this Regulation and with national law, either undertake investigative measures and other measures on his or her own initiative or instruct the competent authorities of his or her Member State to do so”.

Since the prosecutor who had not exercised the right of evocation was not a “European Delegated Prosecutor handling the case”, he or she could not carry out criminal investigation acts.

We consider that, in such a situation, in the absence of a decision by the Permanent Chambers allocating the case to two European Delegated Prosecutors, the conduct of the criminal investigation by a prosecutor who had not exercised the right of evocation will entail the nullity of the acts and evidence administered, as having been carried out by an incompetent authority.

4. The Defence`s Right to Consult the Register Containing the Information Obtained by EPPO Pursuant to Article 24 of the Regulation, including all Decisions Relating to Such Information

Pursuant to Article 44 (1) of Regulation (EU) 2017/1939, “EPPO shall establish a case management system, held and managed in accordance with the rules laid down in this Regulation and in the internal rules of procedure of EPPO”.

Pursuant to Article 44 (4) (a) of the Regulation: “The case management system shall contain: (a) a register of the information obtained by EPPO in accordance with Article 24, including all decisions relating to such information”.

Pursuant to Article 45 (1) of the Regulation: “Where EPPO decides to open an investigation or to exercise its right of evocation in accordance with this Regulation, the European Delegated Prosecutor handling the case shall open a case file.

The case file shall contain all information and evidence in the possession of the European Delegated Prosecutor relating to the investigation or prosecution conducted by EPPO.

After an investigation has been opened, the information in the register referred to in Article 44 (4) (a) shall become part of the case file”.

Since the information contained in the register referred to in Article 44 (4) (a) of the Regulation forms part of the criminal investigation file, it must be made available to the defence and may be subject to examination in the preliminary chamber proceedings.

Since the aforementioned information “becomes part of the case file”, we consider that it must be attached to the criminal investigation file and transmitted to the trial court together with the act by which the case is committed for trial.

In any event, where such information is missing, the preliminary chamber judge should order the European Public Prosecutor’s Office to submit it to the case file so that it may be examined both by the preliminary chamber judge and by the defence.

5. Conclusions

We consider that European and national legislation should clearly delimit the competence of the European Delegated Prosecutor in order to prevent the emergence of divergent judicial practice.

De lege lata, it remains unclear whether, in the case of a European Delegated Prosecutor, functional competence is determined by reference to the prosecution office (office) in which he or she performs his or her duties, as in the case of a national prosecutor.

Furthermore, we consider it necessary for European legislation to provide, in a transparent manner accessible to the defence, for the manner in which a case is allocated to a European Delegated Prosecutor.

It will remain for the national courts to identify the applicable procedural sanction where a European Delegated Prosecutor carries out criminal investigation acts in a case in respect of which he or she has not been vested with jurisdiction.

Last but not least, we consider that the criminal investigation file must contain the information from the register referred to in Article 44 (4) (a) of the Regulation.

For all these reasons, and in order to prevent divergent judicial practice, the following measures are necessary:

1. clarification regarding the functional competence of the European Delegated Prosecutor through the express regulation, at both European and national level, of the relationship between the prosecutor and the territorial office in which he or she performs his or her duties, including the effects of a change of office on pending cases;
2. transparent regulation of the case-allocation procedure, including an obligation on the Permanent Chambers to issue written, reasoned decisions and communicate them to the parties;
3. establishment of express procedural sanctions for breaches of the rules governing the competence of the European Delegated Prosecutor and the allocation of cases.

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