

# European Union - Eap - Moldova. Reflections on the Perspectives of the Emergence of Transnational Justice on Anti-Corruption and Anti- Fraud Dimension

*Andrei PÂNTEA\**, *Serghei PÂNTEA\**

## Abstract

*This research analyzes comprehensively the perspectives of the emergence of European transnational justice on the anti-corruption and anti-fraud dimension. Following the analysis of jurisprudence, the normative framework, trends and historical evolution, both in the member states of the European Union, in their relation with the institutions of the Union, as well as the relation of the Union with the third states, it is considered that the involvement, or the interest of supranational institutions, as well as of the Union as a whole, for the defense of its financial interests is inevitable. The involvement through the financing of the various projects, the allocation of different funds or, as a generic category, their management, will be closely monitored. When elaborating on the findings and conclusions, the emphasis was placed on analysis and synthesis, forecasting method, and in some aspects, it was attempted to extrapolate, or to extend in the future, the dynamics and expected results, with emphasis on investigations in third countries, within the meaning of the conventional framework. The theoretical and scientific support of the paper is extensive, applying the logical, historical, comparative and systemic methods of research.*

*Keywords: Justice, criminal proceedings, investigations, prosecution, safeguards, EPPO*

*JEL Code: K14, K19, K39, K49*

---

\* Andrei Pântea, Ph.D, is a researcher and associate professor at the University of European Studies of Moldova

\* Serghei Pântea is a researcher, holds a Master of Laws at the Moldova State University, and works for the Ministry of Internal Affairs of the Republic of Moldova. E-mail: pantea.serghei@gmail.com

## 1. Introduction

Following the analysis of the jurisprudence, normative framework, trends and historical evolution in the member states of the European Union, in their relationship with the institutions of the Union, as well as the relation of the Union with the third countries, the involvement of the supranational institutions, as well as of the Union as a whole, for the defense of their financial interests, is inevitable. These judgments refer with regards to the financing of various projects, allocation of funds or, as a generic category, *their management*, which will be closely monitored.

It is necessary to point out that, although appreciated as effective, the activity of the European Anti-Fraud Office (*hereinafter OLAF*), together with other instruments in the area of Justice and Home Affairs at Union level, is facing some difficulties, which has generated to some extent, though not primarily, the establishment of an enhanced cooperation, or as broadly known, of a European Public Prosecutor's Office (*hereinafter EPPO*). Reasonings in this regard can be concluded from the arguments invoked by stakeholders during the negotiations at different stages on the necessity of establishment of this form of cooperation.

This paper addresses general principles regarding the evolution of normative framework and the EPPO activity, perspectives of cooperation with mainstream institutions such as OLAF, Eurojust and Europol, in terms of legality, subsidiarity and complementarity; safeguards within the European Charter (*hereinafter Charter*) and findings of the Court of Justice of the European Union (*hereinafter the CJEU*); the implications of this activity in the member states, non-member states and, in particular, third countries, implicitly its relationship with national law enforcement authorities.

The research is not focused on the description of the processes and negotiations regarding the establishment of an EPPO, or on the dynamics of the processes in the regulatory field, about investigations, or judicial cooperation between the bodies of the Union and the authorities of the member states, non-members or those of third countries, but it aims at essential aspects regarding the category that can be generically referred to as *transnational justice* and *its emergence*, to generate a shift of the paradigm.

The paper targets key issues, especially the activity in third countries (*within the meaning of the conventional framework, a.n.*), such as the Eastern Partnership (*hereinafter EaP*), the Republic of Moldova, of the EPPO and OLAF, because from our point view, these are the bodies with the main vocation in the field of combating

fraud and corruption, and related issues, which involve the budget of the European Union, but implicitly also the national budgets of the states. Also, we will try to answer the question whether the investigations of the European bodies will be conducted in third countries and the forms of interaction for the achievement of such goals.

The outlined issues are important, as the society expects, that in certain cases related to public interest, which affects the financial interests of the Union and the public property of the states inextricably linked to external financial processes and flows, whether it is a member of the Union or a third state, to be addressed appropriately.

It should also be mentioned that sometimes, at the general level of perception, society becomes aware of various events, including through mass sources of information but, that the investigation is not an abstract process or a theoretical exercise, it is not a random one, but strictly regulated, and it is required in all cases to respect the safeguards, which imply stages and requirements of form and content, as well as procedural exigency (*e.g., the legality of initiating the proceedings, the means and content of the notification about the commission of an alleged illegal act or misconduct; the existence or absence of immunities; the competence to investigate; evidence rules; authorization of actions or special measures of investigations; arrest, seizure and confiscation; forms of cooperation, including cross-border cooperation*), as well as other intrinsic aspects to these processes. We will also note preliminarily that, the transnational justice is emerging for several areas, especially those targeting the financial interests and management of funds in a narrow sense (*without taking into account, for e.g. the phenomenon of terrorism that is a specific topic and has a somehow distinct regulatory and institutional background*), but not only, and during the process a number of uncertainties and collisions may occur (*e.g. in matters of jurisdiction, declination/negative conflict of competence, either positive conflict competence/vocation to investigate a case*), and not only, given the differences of jurisdictions and procedures, belonging to and/or use of mechanisms on the one hand, and those still inaccessible or requiring approximation in some countries on the other hand (*e.g., European arrest warrant; European investigation order; safeguards, directives, etc.*).

We anticipate that the operationalization of the EPPO will lead to a major shift of paradigm, and not only for the member states of the Union, non-member states of the initiative, but also third countries but, these particularities must be analyzed, because there are conventional limits and more than that, it is entrusted

with a specific mandate, regulated in particular by a Regulation, in connection with a Directive (*with certain explanations with regard to the reference provisions, a.n.*).

Moreover, once established, it would be necessary to prepare (*if so far there is not yet, or at least negotiate the final form and approve rules of procedure and conventions with third countries*) and other documents, which could be a process of an indefinite length, with uncertain results. This does not exclude the fact that, in prospects, the competence cannot be extended or limited, either to be invested with attributions and additional conventional instruments.

These generalities and eventual affirmation of the safeguards already consolidated within the Union through the CJEU could explain to the society certain processes. At the same time, we anticipate an increase of the importance, amount, and quality of the national jurisprudence of the states, with effects on the whole European legal construction.

The paper contains some conclusions, summarizing the key issues, some forecasts regarding the criminal investigations carried out by the EPPO where the Union has financial interests, either implicitly in a form or another, the Union contributes to the development of these societies.

Of a certain importance will be the delimitation of the consolidated capacities of EPPO and other European bodies, of their incapacities in relation with national authorities because these are conventional instruments, and the limits of action in these cases can be narrowed or restricted by a sovereign, national discretion, and in special cases, by express or *tacit* resistance.

This study aims to develop complex research that could serve as the basis for policy documents on anti-corruption and anti-fraud dimension, with emphasis on the *financial interests* of the European Union, and eventually, the harmonization of the national legal system. The study also aims to clarify the subject to those interested in these important processes that we are witnessing in real-time.

### **3. Materials and methods**

While elaborating on the topic, the national normative framework, community acquis (*Directives and Regulations*), and conventional material were consulted, with appropriate references and the explanations. At the same time, the available specialized articles with emphasis on the establishment of the EPPO were studied, highlighting the contribution of authors such as *Cucchiara M., Hodges, L., Asselineau V., Sarlet M.*

The analysis observed, through systemic and logical methods of research, key issues such as: the structure and dynamics of the processes of investigation and prosecution, especially those that concern the budget of the Union, the public property of member states and/or third countries; EPPO and its close cooperation with OLAF, Eurojust, Europol and national authorities; safeguards during proceedings. The research analyzes the period starting with 90’.

The theoretical and scientific support is comprehensive, applying: the logical; systemic; historical; comparative; forecasting methods of research, and where possible to extrapolate the dynamics and results.

#### 4. Current issues

The allocation of various funds and financial support, as well as through different other means and instruments by the European Union is one of the most eloquent instruments of supporting the democracies and economies of third countries, including the states of the EU partnerships, implicitly the EaP and the Republic of Moldova.

Currently, the Union is expanding the issue for which it provides support, examining new dimensions in this regard, as these are usually mutually conditioned. Considering that the main conditions that candidate states have to meet are mainly the Copenhagen criteria, they still fulfill the incidence function, or, as it has been observed, the indicated criteria must be taken into account when evaluating, for example, the risk that a generalized deficiency to the rule of law represents for the principles of adequate *financial management* (EC, 2018). Thus, the generalized deficiencies regarding the rule of law and to the stability of democratic institutions can have a decisive impact on the proper financial and economic management, and when assessing the situation, the criteria will be incidental to the test of *adequate management*, but not only.

In order to solve various security challenges, such as cross-border and transnational crime, terrorism, migration, energy security, substantial financial means are allocated by the Union in order to improve the security environment. These funds are protected by the competent national authorities but also by supranational entities already established, or in process of establishment, whose primary task is the protection of the financial commitment of the European community, implicitly evaluate areas affected by the *fraudulent management* of these funds.

In order to comply with these requirements, the Union's agreement with the Republic of Moldova, for example, contains provisions in the chapter regarding financial control, as well as other corresponding obligations.

Some experts noted that although the Union has in place a variety of tools and mechanisms to ensure the full and correct application of the principles and values set out in the Treaty on European Union, there is currently no immediate and effective response of the EU institutions, especially when it comes to ensure proper financial management (EC, 2018). However although, there is a special anti-fraud office, which is in charge of investigating cases where there are suspicions about the misuse of funds allocated from the EU budget or the evasion of taxes and fees to the EU budget and which can analyze cases of alleged serious misconduct by officials, irregularities in the conduct of tenders, conflicts of interest, counterfeiting of money, infringement of intellectual property rights and corruption - both at European and international level (Antifraud, 2018).

The investigations initiated by OLAF are of administrative nature, including when there is an extension of disciplinary actions in administrative proceedings, and that does not fully clarify the whole spectrum of issues concerning the implications of these investigations on the *suspect's* rights, *subsequent criminal investigations* and evidence gathering, financial investigations, seizures and confiscations, other legal issues inherent to these processes, especially when referring to the case-law of the CJEU. Such examples could refer to cases of challenging the admissibility of evidence and the lawfulness of other relevant procedural components; denial of recognition of EU acts for purposes of ongoing criminal proceedings (Schonard, 2012, p. 63); relying on evidence newly or separately gathered after "inspiration" by EU information; uncertainties about the admissibility of the OLAF Final Report; repeating investigative acts already performed by OLAF; forwarding of information by OLAF to national authorities, or the requests by Eurojust to conduct such investigations or similar requests by Europol (Schonard, 2012, p.65); cases that implies a duplication of efforts (EP DGIPU, 2017, p.7) and that is detrimental to both the procedural economy and the rights of the person under investigation.

In order to fully figure out the proportions of the issue in question, it is estimated that the EU budget is damaged with about 6 billion euros by fraud. The special report of the European Court of Auditors of 2019 displays that, OLAF investigations generated (*subsequent, a.n.*) criminal prosecution in less than half of cases, and resulted in the recovery of less than one third of the funds (ECA, 2019), which might seem incredible from the point of view of efficiency but also of the

operational potential, thus suggesting the need for alternative methods of conventional intervention. It isn't a coincidence that these methods are alternative and not subsidiary or complementary because, from our perspective, this emphasizes the explicit nature of the conventional intervention, though both visions are taken into account.

In the same line of ideas, the extent of tax evasion and tax avoidance phenomena, according to the European Commission, estimates in amounts up to 1 billion euros per year (EC, 2018). The negative impact of such practices on the budgets of the member states and the Union, and on the citizens is obvious, and that it could affect confidence in democracy. If EPPO is not yet operational, we could imagine its capabilities and prospects by comparing the generic data delivered by OLAF, which, between 2010 and 2017, reported more than 1,800 investigations carried out, with the recommendations to recover over 6.6 billion euros to the EU budget, as well as issuing of more than 2,300 recommendations to the competent authorities of the member states and the EU, to take legal, financial, disciplinary and administrative measures.

If so far OLAF is not entirely an almighty body, with coercive instruments and powers typical to national authorities, as well as the difficulties during the investigation process, can it be said that the EPPO will rise to the level of expectations?

The awaited answer is that the considerable efforts of the institutions, in particular the EPPO and OLAF, will be adjusted in combating fraud and corruption in member states of the Union and inevitably in third countries, especially in the countries where there are invested substantial financial resources, allocated funds, development grants, carried out infrastructure projects and other cooperation tools.

We mention that these investigations, but also those that are going to be initiated by EPPO, are not always perceived adequately by the society, the capacities of the institutions are not fully inferred, the same refers to the legal investigation proceedings, their efficiency, and purposes, and that when issues related to funds are analyzed, an extremely important aspect refers to the problematic of delimiting external and internal funds, when they are the subject of *fraudulent management* or misappropriation, especially when it comes to proper investigation of that kind of allegations, prosecuting the perpetrator and recovering the damages. From these reasonings, it can't be said that any cooperation that has a financial component can be the subject of an investigation in the matter set out.

#### 4.1. Developments

Searching for means to strengthen the capacity and cooperation in security areas, including the financial issues, a research done at the end of the 90's, namely *the Corpus Juris* (ELA, 2000), proposed that a European Public Prosecutor be created with an inquisitorial system of prosecution, and that it would delegate prosecution to representatives in member states. It observed also that complication to investigations were that crimes were not necessarily committed in EU member states and that the fraudsters could be based outside the EU, but be stealing EU funds. (SEE, 2011, p.2). However, this research was never meant to propose or to create a single criminal code or criminal procedure along EU, but to rather bring legal principles that would be valid across all member states when dealing with a financial crime that related to the EU (SEE, 2011, p.1). This was one of the cornerstones of today's reality. Although by now, these ideas are distorted by some currents, whether derived or assimilated, spreading the idea of a *Pan-European federal criminal justice system*, some of the proposed ideas were adopted and implemented in the later years, especially the findings regarding the budget and financial issues are actually more than ever.

The system of the bodies which are concerned to some extent with investigations, including criminal ones, at Union level is mainly composed of Eurojust, Europol, and OLAF (*considering the specific nature of the activities carried out for the purposes of the topic*), and the newly established the EPPO that is to become operational (*estimated November 2020, which does not fully reflect the exact meaning of operationalization, a.n.*).

From the economy of the provisions of the EU Regulation 2017/1939 (CEU, 2017) adopted under the Treaty on the functioning of the European Union (TFEU) art. 86, *financial interests* of the Union are all the revenues, expenses and assets covered, acquired through or due to the budget of the Union and the budgets of the institutions, bodies, offices, and agencies established under the Treaties, as well as the budgets managed and monitored by them (CEU, 2017) . This Regulation represents a major innovation in the European Area of Freedom, Security and Justice (Speiza, 2018, p.135) to strengthen the efforts at the European supranational level by implementing a genuine form of enhanced cooperation.

The Regulation statues that EPPO shall be responsible for investigating, prosecuting and bringing to judgment, the perpetrators of, and accomplices in, offenses against the Union's financial interests and that it shall exercise the functions of prosecutor in the *competent courts of the member states*.



It is undeniable that most of the provisions of the Regulation are of specific importance, as regards the transfer of operational data between member states and/or third countries, the protection of such data, generalities regarding the hierarchy of subjects during the investigations, the roles and competencies of the subjects, other aspects relevant to cooperation, however, it is necessary to delimit some distinct generic hypotheses that should be addressed when question of cooperation is put in place: EPPO investigations and cooperation in the member states of the initiative; EPPO and EU states non-members of the initiative; EPPO and partner third countries (such as the Republic of Moldova); EPPO and other third countries. If the first hypothesis does not generate major deficiencies, the second only a few, then the last two hypotheses could generate serious legal and practical concerns.

*The first aspect* involves the compatibility of the legislation of third countries with the *Community acquis*. Although the harmonization of the national laws of the member states of the Union and of the partner third countries (*with "European aspirations"; which have been engaged in a form of intense cooperation, a.n.*) is achieved through the conventional Union instrumentation, for the initiation and conduct of investigations and/or tangential in third countries, this is not an absolute premise. We also note that, through the Regulation, it is a must that the EPPO should have its competence defined *by reference* to the *criminal law* of the *member states* that criminalizes acts or omissions affecting the Union's financial interests, in particular, Directive 2017/1371.

*Subsequently*, the obligation to protect the funds through criminal legislative measures was established in the Association Agreement of the Republic of Moldova with the EU (*hereinafter Agreement*), and also in its implementation action plan. Also, this is due to the need to approximate the national legislation to the community *acquis* as a whole. Thus, for example, the Criminal code of the Republic of Moldova incriminates misconducts at the special provisions of art. 240 (*Use against the destination of the means of the internal loans or of the external funds*), 332<sup>1</sup> (*Fraudulent obtaining of the means of external funds*), 332<sup>2</sup> (*misappropriation of the means of external funds*) of the Criminal Code, in conjunction with the provisions of art. 126<sup>1</sup> Criminal code, which explains the means of external funds, all of the above being complementary to the general and special regulations settled by the criminal law, including criminalized illegal conduct with a similar object. These amendments were made by Law no. 105/2017 (CrimLaw, 2017). In addition to the arguments presented and other implicit ones that served the basis for adjustments, arguments can be found in the Government Decision no. 302/2016 on

approving and proposing the adoption of the draft law mentioning that, - *at the present stage, the Republic of Moldova is beneficiary of over 2.87 billion euros in the form of grants and preferential loans that are implemented in the framework of 838 projects at the national level.* Although the Agreement does not contain any details on the EPPO and couldn't at that time, we consider that cooperation with EPPO should and will be a priority for the national authorities for obvious reasons.

Thus, as mentioned earlier, article 16 of the Agreement, establishes that the parties shall cooperate on preventing and combating all forms of criminal and illegal activities, organized or otherwise, including those of transnational characters, such as smuggling and trafficking in human beings; smuggling and trafficking goods, including small arms and illicit drug trafficking; illegal economic and financial activities such as counterfeiting, fiscal fraud and public procurement fraud; as well as fraud, as referred to in Title VI (*Financial assistance, and anti-fraud and control provisions*) of the Agreement, in projects funded by international donors; active and passive corruption, both private and public sector, including as regards to the abuse of functions and influence; forging documents and submitting false statements; and other offences.

The Agreement also states that the parties shall enhance bilateral, regional and international cooperation among law enforcement bodies including strengthening cooperation between Europol and the relevant national authorities, being committed to implement effectively the relevant international standards, and in particular those enshrined in the UN Convention against Transnational Organised Crime of 2000 and its three Protocols, the UN Convention against Corruption of 2003 and Council of Europe relevant instruments on preventing and combating corruption.

Title III of the Agreement (*Justice, Freedom, and Security*), article 20 paragraph 2, states that regarding to judicial cooperation in criminal matters, the parties will seek to enhance cooperation on mutual legal assistance, that would include, where appropriate, accession to, and implementation of, the relevant international instruments of the UN and the CoE and closer cooperation with Eurojust.

As to the *financial assistance, and anti-fraud and control provisions*, especially article 421, establishes that the provisions shall be applicable to any further agreement or financing instrument to be concluded, and any other financing instrument to which Moldova may be associated, and that the parties shall take effective measures to prevent and fight fraud, corruption, and any other illegal activities, *inter alia* by means of mutual *administrative assistance* and *mutual legal*

*assistance (a.n.)*. For these purposes, the competent authorities of Moldova and EU authorities shall regularly exchange information and, at the request, shall conduct consultations. OLAF may agree with its counterparts on further cooperation in the field of anti-fraud, including operational arrangements. The national authorities shall check regularly that the operations financed with EU funds have been properly implemented and take *inter alia* any appropriate measure to prevent and remedy irregularities and fraud, prevent and remedy any active or passive corruption practices and exclude conflict at any stage of the procedures related to the implementation of the funds.

Moreover, article 425 (*Investigation and prosecution*), puts the burden on the authorities of the Republic of Moldova to ensure investigation and prosecution of suspected and actual cases of fraud, corruption or any other irregularity including conflict of interest, following national or EU controls and where appropriate, OLAF may assist in this task. The authorities of the Republic of Moldova shall transmit to the Commission without delay *any information* on suspected or actual cases of fraud, corruption or any other irregularity, including conflict of interest, in connection with the implementation of EU funds. In case of suspicion of *fraud* and *corruption*, OLAF shall also *be informed*, and it shall be authorized to carry out on-the-spot checks and inspections in order to protect the EU's financial interests against fraud and other irregularities. The authorities of the Republic of Moldova shall take any appropriate measure to recover EU funds unduly paid and carry out an approximation of its legislation to the EU acts and international instruments referred (*e.g., Annex XXXV*).

Concerning the competence of examination and judgment, there might be a competition for the investigation (*criminal prosecution*) between the EPPO (*being seconded by OLAF*) on the one hand (*and implicitly between them, the balance is shifted towards the EPPO, a.n.*), and the national authorities on the other hand (*conflict of competence, a.n.*), though some might say that there are subsidiarity and complementarity relationships. However, there are some remedies to these situations in the case of the member states, although not exhaustive. As mentioned in the Regulation, to this point, it provides for a system of shared competence between the EPPO and national authorities of the member states, based *on the right of evocation* of the EPPO, but not in the EPPO relationship with third countries. This aspect concludes the limits of the evocation to a narrow circle of subject such as the states that are members of the initiative, as opposed to the non-member states of the initiative members of the Union, and especially the case of third countries.

It should be mentioned that the Regulation generally explains who investigates, who supervises and who decides upon a case, with the supremacy of the Regulation, but with the subsidiarity of the national law. It is important to mention that the last word to say on the attribution of competence is given in all cases to the competent national authorities, which means *any judicial authorities, which have the competence to decide on the attribution of competence in accordance with the national law*. Therefore, the findings regarding the right of evocation are valid to some degree, whilst not being fully applicable or explained in the case of third countries.

In July 2017, the Directive 2017/1371 *on the fight against fraud to the Union's financial interests by means of criminal law* (EP/CEU, 2017) (*hereinafter PFI Directive*) was adopted, preceding the adoption of the Regulation and the establishment of the EPPO. The PFI Directive and the EPPO Regulation explains the range of material competence, establish *inter alia* offenses affecting the financial interests of the Union, with explanations and signs of *these elements*.

The PFI Directive protects the 'Union's financial interests', meaning all revenues, expenditure, and assets covered by, acquired through, or due to the Union budget; the budgets of the Union institutions, bodies, offices, and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them. Article 4 explains that by other criminal offenses affecting the Union's financial interests the Directive understands money laundering as described in article 1 of Directive 2015/849; passive and active corruption; misappropriation. All acts committed must embrace the intentional form of guilt, and that the intentional nature may be inferred from objective, factual circumstances. Offenses which do not require intention are not covered by the Directive.

As regards, for instance, the *corruption* offense, the PFI Directive considers that giving of bribes in order to influence a public official's judgment or discretion and taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country concerned. For these purposes, a 'public official' shall be understood by reference to the definition of 'official' or 'public official' in the national law of the member state or *third country* in which the person in question carries out his or her functions. Regarding the immunities, the Directive states precisely that the provisions on the lifting of the immunities contained in the relevant EU regulations, or similar provisions incorporated in national law should apply.

On the other hand, the Regulation applies also to 'inextricably linked offenses' considered in light of the relevant case-law which for the application of

the *ne bis in idem* principle, retains the identity of the material facts (*or facts which are substantially the same*) as the relevant criterion, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space. The Directive does not affect the proper and effective application of disciplinary measures or penalties other than of a criminal nature. For other sanctions, the principle of prohibition of being *tried* or *punished twice* in criminal proceedings for the same criminal offense (*ne bis in idem*) should be fully respected.

We note that, the PFI Directive replaces the Convention on the protection of the ECs' financial interests as of July 1995, with effect from 6 July 2019 and that by this date, member states should have adopted and published laws, regulations and administrative provisions necessary to comply. For partner third countries, this situation is also important from the perspective of succession of acts and the legal action of the replaced Directive (*having clear references to this end in the Agreement*). At last, according to article 120 of the Regulation, the EPPO shall exercise its competence with respect to any offense within its competence committed *after the date* of the entry into force of the Regulation.

#### **4.2. EPPO, the triumvirate of established EU bodies and third states**

The EPPO structure involves key subjects such as the Chief Prosecutor, the College, Permanent Chambers, the European Prosecutors (*hereinafter EP*) and the European Delegated Prosecutors (*hereinafter EDP*), although not all of the subjects are strictly procedural, having roles and duties determined relatively for the cases that may arise during an investigation. We will point out that, as regards the authorization of activities that require such a procedure (*e.g. controlled delivery and technical supervision, wiretapping, monitoring and control of financial and banking transactions*), the list of activities and challenging those, legal limitations, will be performed, with certain exceptions, according to the national law in the competent court of the member state (*e.g., CJEU explain the legal issues, but not on the validity of procedures or procedural documents, a.n.*), and an important part of the activities will be carried out by to the national authorities at the request of the EDPs. For some situations, the EP or the Permanent Chamber will act as a hierarchical control body.

The Regulation states that the EPPO and OLAF should establish and maintain close cooperation aimed at ensuring the complementarity of their respective mandates and avoid duplication. In that regard, OLAF should in principle *not open any administrative investigations* parallel to an investigation conducted by the

EPPO into the same facts. The provisions related to the relationship of the OLAF and EPPO are not very clear except the fact that they should cooperate. To this point, an evaluation of OLAF Regulation 883/2013 is currently ongoing and may lead to legislative changes so as to reflect the future relationship between OLAF and the EPPO (Juszczak and Sason, 2017, p.86). In cases where the EPPO is not conducting an investigation, it should be able to provide relevant information to allow OLAF to consider appropriate action in accordance with its mandate. In particular, it could consider informing OLAF of cases where there are no reasonable grounds to believe that an offense within the competence of the EPPO is being or has been committed, but an administrative investigation may be appropriate, or where the EPPO dismisses a case and a referral to OLAF is desirable for administrative follow-up or recovery. When the EPPO provides information, it may request that OLAF considers whether to open an administrative investigation or take other administrative follow-up or monitoring activities, in particular for the purposes of precautionary measures, recovery or disciplinary action. In the course of EPPO investigation, it may request OLAF to support or complement its activity, in particular by providing information, analyses (including forensic analyses); expertise and operational support; facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union; conducting administrative investigations. Both entities shall have indirect access to information in case management systems on the basis of a hit/no-hit system.

Once an EPPO is established, there is a need to identify mechanisms to protect its financial interests in the non-participating member states and to deal with cross-border cases involving participating and non-participating member states in the EPPO (Cucchiara and Roccatagliata, p.10). For such a case, the College should suggest the need for opening of negotiations on an international agreement. Where the notification of the EPPO for the purposes of multilateral agreements already concluded by the member states with third countries is not possible or is not accepted by the third countries, EDPs may use their status as national prosecutor toward such third countries, as a fallback option (Csonka, Juszczak and Sason, 2017, p. 132), but they should inform and where appropriate endeavor to obtain consent from the authorities of third countries that the evidence collected is used in investigations and prosecutions carried out by the EPPO. This means that an EDP could use its powers as a national prosecutor in relation to a third country that does not a cooperation agreement concluded in order to perform investigations on behalf of the EPPO. The EPPO will be also in a position to make use of the existing instruments of the Council of Europe, in particular, the Strasbourg Convention as

of 1959, once it takes up its investigatory and prosecutorial functions (ECCP, 2019, p.4-5). The EPPO should also be able to rely on reciprocity or international comity vis à-vis the authorities of third countries, carried out on a case-by-case basis.

Further, after consulting and reaching an agreement with the relevant authorities of the member states, the Chief Prosecutor shall approve *inter alia* the functional and territorial division of competences of the EDPs. This could mean also that the territorial division is not limited conventionally to the borders of the member state of the EDP, nor the competence of the Permanent Chamber will, but rather that it could cover member state areas, as well as additional areas in a *non-formal formula*, such as non-member states and third countries, which from the practical point of view could generate some additional issues, though the scenario could embrace the form of liaison contacts in a headquarters-third country relationship additionally to the first one. In this way, article 104 of the Regulation establishes that the working arrangements with the authorities of third countries may, in particular, concern the exchange of strategic information and the secondment of liaison officers to the EPPO and that they may designate contact points in third countries in order to facilitate cooperation.

As regards to the material competence of the EPPO, article 22 establishes that it shall be competent in respect of the criminal offenses affecting the financial interests of the Union that are provided for in Directive 2017/1371, as implemented by *national law*, irrespective of whether the same criminal conduct could be classified as another type of offense under *national law*. This also means that the Regulations and normative framework already adopted by July 2019, or in course of implementation are going to be the pillars for further investigations. As to offences referred in point (d) of Article 3(2) of the Directive, as implemented by national law, the EPPO shall only be competent when *the intentional acts or omissions defined* in that provision are connected with the territory of two or more member states and involve a total damage of at least 10 million euro. The EPPO shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA (CEU, 2008), as implemented in national law, if the focus of the criminal activity of such a criminal organization is to commit any of the offenses referred to offenses defined and any other criminal offense that is inextricably linked to such criminal conduct. In this respect, although there are some provisions regarding the personal and territorial competence of the Regulation, which we will refer to in the following and which, at first sight, would seem to narrow, the incidence to the Decision 2008/841/JHA broadens the competence of the EPPO, especially in third countries. In any case,

the EPPO shall not be competent for criminal offenses in respect of *national direct taxes* including offenses inextricably linked thereto.

In relation to the territorial and personal competence, article 23 establishes that the EPPO shall be competent for the offenses referred were committed in whole or in part within the territory of one or several member states; committed by a national of a member state, provided that a member state has jurisdiction for such offenses when committed outside its territory; or were committed outside the territories referred by a person who was subject to the Staff Regulations or to the Conditions of Employment, provided that a member state has jurisdiction for such offenses when committed outside its territory. This means that the EPPO will be competent to investigate in the above-mentioned cases and supplemented with the Decision 2008/841/JHA. We consider that, in all cases, the decision on the attribution of functional and territorial division, the further formal case attribution, and the competence of the Permanent Chamber, respectively a EP will be of the highest importance, in order to cover cases and areas, for the purposes of conducting an investigation of the offence committed outside the territory of the member states of the initiative and even outside the Union.

Where the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct, with the appropriate exemptions. According to article 80, the EPPO may transfer operational personal data to a *third country*, subject to compliance with the other provisions of the Regulation, and where the conditions are met.

The EPPO shall establish and maintain a close relationship with Eurojust based on mutual cooperation within their respective mandates and on the development of operational, administrative and management links between them. In operational matters, the EPPO may associate Eurojust with its activities concerning cross-border cases, including sharing information on its investigations; inviting Eurojust or its competent national members to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, member states of the Union that are members of Eurojust but do not take part in the establishment of the EPPO, as well as third countries.

International agreements with one or more third countries concluded by the Union or to which the Union has acceded in areas that fall under the competence of the EPPO, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO. In the absence of an agreement, the member states shall, if permitted under the relevant multilateral international agreement and subject to the third country's



acceptance, recognize and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of multilateral international agreements on legal assistance in criminal matters concluded by them.

Where the EPPO cannot exercise its functions on the basis of a relevant international agreement, the EPPO may also request legal assistance in criminal matters from authorities of third countries in a particular case and within the limits of its material competence.

Subject to the other provisions of the Regulation, the EPPO may, upon request, provide the competent authorities of third countries, for the purpose of investigations or use as evidence in criminal investigations, with information or evidence which is already in the possession of the EPPO. After consulting the Permanent Chamber, the handling EDP shall decide on any such transfer of information or evidence in accordance with the national law of his/her member state and the Regulation.

Where it is necessary to request the extradition of a person, the handling EDP may request the competent authority of his/her member state to issue an extradition request in accordance with applicable treaties and/or national law.

The third basic aspect refers to procedural safeguards during EPPO investigations. The investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person, which includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, either *motu proprio* or at the request of the defense.

The Regulation requires the EPPO to respect, in particular, the right to a fair trial, the rights of the defence and the presumption of innocence, as enshrined in articles 47 and 48 of the European Charter, as well as article 50 of the Charter, which protects the right not to be tried or punished twice in criminal proceedings for the same offence (*ne bis in idem*). The rights provided for in the relevant Union law, such as Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/1919 as implemented by national law, should apply. Any suspect or accused person should benefit from those rights, as well as from the rights provided for in national law, including the rights concerning evidence. However, certain defense-related issues mentioned by the ECBA are of particular interest and were not diminished fully by this end. These refers particularly to ensuring *equality of arms* and proceedings safeguards, especially during “grey” area of “pre”-investigation; rules for prosecuting and bringing to judgment including judicial review and appropriate remedies for defence before trial; compensation mechanism for

wrongful investigation or prosecution by EPPO (Hogler, Hodges, Aselineau and Sarlet, 2013, p. 1-3).

## 5. Conclusions

The involvement of the the Union by means of supranational institutions to defend its financial interests and those of the taxpayers is of a particular importance, considering the most recent and coherent developments in the normative framework of the European Union, as well as the political struggle within the Union for the operationalization EPPO.

Considering that the investigations are not abstract and random processes, it is necessary to respect the safeguards, including stages and requirements of form and content, and that the gaps that were found in the normative framework that regulates the EPPO activity will be eliminated through the subsidiarity of the national normative framework, but also through creativity and commitment. We anticipate that whenever the case investigated will have an increased social resonance, the result will depend on the commitment and courage of the involved parties. This will lead to a significant paradigm shift, especially for the non-member states of the initiative that are members of the Union and the third countries, as long as the interaction mechanisms are not put fully in place and/or the Union is not a “whole nody” with all the attributes of power.

Although the harmonization of the national laws of the member states of the Union and of the partner third countries is achieved mainly through the conventional instruments, for the initiation and conduct of investigations, this is not an absolute premise. For instance, the obligation to protect the funds was stipulated in the Association Agreement, and although those documents do not contain any details about the EPPO and could not at that time, the interaction of the national authorities with the EPPO will be a priority, including but not limited to the mere fact that the subsequent financing, as well as the support of the entire international community, are conditioned by the implementation of reforms and the eradication of fraud and corruption. These refer to the entire dialogue of the Union with third countries, starting with the monitoring process, and up to the evaluation.

Although it is not an absolute premise, we strongly consider and recommend that once an EPPO is established, there is a imperative need to identify mechanisms to deal with cross-border cases involving participating and non-participating member states, as well as third countries, by means of negotiation of amendments

to the bilateral and multilateral agreements, as well as the creation of professional networks.

We conclude, therefore, that EPPO is a conventional instrument, which has its limitations, but also brings innovation that will change the situation in the field of justice, especially anti-fraud and anti-corruption dimension, and which has strong prospects to expand and overcome the conventional borders of the EU.

## References

- Antifraud synthesis (2018), retrieved from [https://eur-lex.europa.eu/summary/chapter/fight\\_against\\_fraud.html?root\\_default=SUM\\_1\\_CODED%3D22,SUM\\_2\\_CODED%3D2201&locale=ro](https://eur-lex.europa.eu/summary/chapter/fight_against_fraud.html?root_default=SUM_1_CODED%3D22,SUM_2_CODED%3D2201&locale=ro)
- Consolidated Version of the Treaty on the functioning of the European Union (TFUE). Retrieved 23.02.2018 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>
- Csonka, P., Juszczak, A., Sason, E. (2017), *The Establishment of the European Public Prosecutor's Office*, EuCrIm 2017/3, Freiburg: Max Planck Society for the Advancement of Science
- Cucchiara, M., Roccatagliata, L. (2017), *Combating Fraud affecting the European Union Budget. The Role of the European Anti-Fraud Office (OLAF). Interview with Giovanni Kessler*. Retrieved April, 2017 from <http://www.giurisprudenzapenale.com/wp-content/uploads/2017/04/Download-the-interview-with-Giovanni-Kessler-ENG.pdf>,
- Decision 2008/841/JHA of 2008 on the fight against organized crime (OJ L 300 as of 11.11.2008). Retrieved 23.02.2018 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0841&from=EN>
- Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198/28 as of 28.7.2017). Retrieved 13.05.2019 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN>
- European Committee on Crime Problems (2019), *Building cooperation in criminal matters with the European Public Prosecutor's Office*, Strasbourg
- European Court of Auditors (ECA) (2019), *Special Report no.1*, Luxembourg. Retrieved 04.03.2019 from [http://www.europarl.europa.eu/cmsdata/159120/SR\\_FRAUD\\_RISKS\\_EN.pdf](http://www.europarl.europa.eu/cmsdata/159120/SR_FRAUD_RISKS_EN.pdf)
- European Lawyers Association (ELA), *Corpus Juris. Guiding Principles*, European University Institute. Retrieved on 23.02.2018 from [https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/corpus\\_juris\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/corpus_juris_en.pdf)
- Policy department for Budgetary Affairs of the European Parliament (DGIPU) (2017), *The protection of the procedural rights of persons concerned by*

*OLAF administrative investigations and the admissibility of OLAF Final Reports as criminal evidence*

- European Comision (2018), *Report on the proposal for a regulation of the EP and the Council on the protection of the Union budget in case of generalized deficiencies in the rule of law in the Member States*. COM 0324 as of 17.12.2018
- Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), (OJ L 283/1 as of 31 October 2017). Retrieved on 23.05.2019 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=EN>
- Senior European Experts (2011), *Corpus Juris – A criminal law system for the EU?*, retrieved from: <https://senioreuropeanexperts.org/wp-content/uploads/2011/01/corpus-juris-a-criminal-law-system-for-the-eu.pdf>
- Schonard, P. (2012), *Judicial Review of EU Acts affecting criminal proceedings*, Criminal Law Unit European Commission, EuCLR
- Spiezia, F. (2018), *The European Public Prosecutor's Office. How to implement the relations with Eurojust?*, Eucriim, 2018/2, Freiburg: Max Planck Society for the Advancement of Science
- Law no. 105/2017 regarding the modification and completion of the Criminal Code of the Republic of Moldova no. 985-XV as of 18 April 2002 (OJ no. 184-192), Retrieved on 24.06.2019 from [http://www.legis.md/cautare/getResults?doc\\_id=93532&lang=ro](http://www.legis.md/cautare/getResults?doc_id=93532&lang=ro)
- Juszczak, A., Sason, E. (2017), *The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)*, Eucriim, 2017/2, Freiburg: Max Planck Society for the Advancement of Science
- Hogler, M., Hodges, L., Asselineau, V., Sarlet, M. (2013), *Cornerstones for a draft regulation on the establishment of a European public prosecutor's office ("EPPO") in accordance with art. 86 par. 1-3 TFEU*, European Criminal Bar Association