

The EPPO Permanent Chambers: a new right on the horizon?

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Over the last twenty years, at least, a lot was written on the European Public Prosecutor's Office (EPPO). Before any legislative text existed, the contributions consisted essentially of theoretical analysis of the possible structure and functioning of the Office, starting from the legal bases, which the amendments to the European primary law introduced through the Treaty of Lisbon. Following the presentation of the proposal for a regulation by the European Commission in 2013, and over the following years in which the legislative process progressed, many analyses concerned the text and the legislative negotiation's developments. Following the adoption of the EPPO Regulation in 2017,¹ the focus shifted to commenting on the final text, of which, to date, there is a single article by article commentary², and a very large number of other contributions in the legal literature of the various European States.

Today, a few years after the start of the EPPO's operations, we can start reflecting about the structure and functioning of the Office in practice, analysing their first outcomes, commenting on the facts based on operational experience.

Among all possible aspects, I would like to focus this text on one of the topics that, in the theoretical comments, had raised several doubts and perplexities: the Permanent Chambers (PCs).

1 The Permanent Chambers shall: structure and organisation

The insertion of the PCs in the text of the EPPO Regulation took place only during the negotiations in the Council of the EU and its bodies. They were

1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the European Public Prosecutor's Office (EPPO Regulation).

2 H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021).

not provided for in the proposal for a regulation submitted by the European Commission in July 2013.

Their introduction was the natural consequence of another innovation resulting from the legislative negotiations: the creation of the College and the provision that a European Prosecutor (EP) from each participating Member State would be present at central level.

The Commission proposal provided for a very simple but very operational central structure with a Chief Prosecutor, three deputies, but also a group of investigators who could conduct investigations directly from the central level of the Office, in addition to the ordinary possibility of conducting investigations at a decentralised level. The Member States, on the other hand, preferred the possibility of a collegiate body, composed of a prosecutor from each State, without the provision of *European* investigators. Moreover, in addition to being part of the Office's College dealing with policy issues, the EPs also play an operational role through membership in the PCs.

Indeed, each EP is part of one or more PCs, which are a kind of *mini-panels*, each composed of three EPs, who take some key decisions in the proceedings dealt with by the European Delegated Prosecutors (EDPs).

As of 2023, there are 15 PCs, with three EPs each. A prosecutor may be a member of more than one PC. In particular, according to Article 10(3) of the EPPO Regulation, the PCs decide on the following issues:

- ‘(a) to bring a case to judgment in accordance with Article 36(1), (3) and (4);
- (b) to dismiss a case in accordance with point (a) to (g) of Article 39(1);
- (c) to apply a simplified prosecution procedure and to instruct the European Delegated Prosecutor to act with a view to final disposal of the case in accordance with Article 40;
- (d) to refer a case to the national authorities in accordance with Article 34(1), (2), (3) or (6);
- (e) to reopen an investigation in accordance with Article 39(2)’.

Moreover, where necessary, the PCs shall also take the following decisions according to Article 10(4) of the EPPO Regulation:

- ‘(a) to instruct the European Delegated Prosecutor to initiate an investigation in accordance with the rules in Article 26(1) to (4) where no investigation has been initiated;

- (b) to instruct the European Delegated Prosecutor to exercise the right of evocation in accordance with Article 27(6) where the case has not been evoked;
- (c) to refer to the College strategic matters or general issues arising from individual cases in accordance with Article 9(2);
- (d) to be allocated to a case in accordance with Article 26(3);
- (e) to be reallocated to a case in accordance with Article 26(5) or 28(3);
- (f) to adopt the decision of a European Prosecutor to conduct the investigation himself or herself in accordance with Article 28(4)'.

Unlike in many national systems, where it is the same prosecutor who deals with the case to assess and decide on its conclusion – possibly with a request to the judge, but always on the basis of an assessment made by the individual prosecutor – the handling EDP in the EPPO procedure cannot assess and take certain decisions on the case on their own, but must submit a proposal to the PC, and the latter has the final word.

Another particular feature of this system is that the three members of the PC must be prosecutors from a State other than that of the prosecutor dealing with the case. It is worth mentioning that the expression 'prosecutor coming from a different State' is purely geographical and describes the origin of the prosecutor from a specific national system, but it does not indicate the role and the function of the prosecutor, who remains European, and not a representative of the State or expression of any national interest.

The question that arises from this system spontaneously is how is it possible that three prosecutors from legal systems other than that in which the investigation was conducted by the EDP may take important decisions in it, in particular when it comes to decisions which requires knowledge of the national system. This consideration deserves a further introduction.

The EPPO is a single office in its structure. However, it is not a single office with respect to the law applicable to investigations. Therefore, as provided for in the Regulation, the national law of the Member State in which the investigation is opened applies to the investigation, although it is no longer a national but a European investigation handled by the EPPO. As a result, the role of the law and principles of national criminal procedures remains very significant in EPPO investigations. This, *a fortiori*, reiterates the ratio of the question above, as to how it is possible for a PC of three prosecutors from national systems other than that of the investigation taking *fair decisions* in cases which have unfolded in accordance with legislations unrelated to them.

The answer to this question can be found in the primary and secondary rules governing the EPPO.³ In essence, it is expected, and in practice happens, that the meetings of the Chambers will also be attended by the EP from the national system in which the case under discussion has been opened. In this way, they can ensure that the case complies with national principles, as provided for in the Regulation. To illustrate the sensitivity of this matter in practical terms, a good example to explain the subject would be the application of the legal principles for the prosecution of a case.

In some States, the principle of mandatory prosecution may be applied in the absence of clear evidence showing the innocence of suspect. In other States, the principle can be expressed in the sense that, on the contrary, prosecution can only be carried out if there is reasonable evidence of the guilt of suspect. Two different principles which, if applied incorrectly, may have serious consequences for the suspect, and lead to a negative conclusion of the case for the EPPO.

For that reason, the role of the ‘Supervising European Prosecutor’, coming from the national legal system of the case, is intended to ensure that the PC, composed of three prosecutors from different systems, takes a decision as much as possible in line with the principles of national law of the EDP handling the case.

This system is showing a clear practical consequence. As foreseeable, practical experience shows that the workload of pending cases in the EPPO varies between the participating Member States. The consequence of this situation is that supervisors from States with a high number of EPPO cases will have to participate frequently in meetings of the various PCs to discuss related issues, while supervisors from States with a lower number of EPPO cases will be ‘guests’ of the PCs less frequently.

On the other hand, in order to avoid workload imbalances, the latter are members of more than one PC, and thus constantly engaged in that quality, more than in the quality of ‘Supervising Prosecutor invited to the Permanent Chamber meeting’.

The role of the PCs is therefore crucial. This holds true, moreover, not only from a decisive point of view in the investigation, but also as a

3 ‘Secondary rules’ refers to the internal rules of procedure adopted by the EPPO on the basis of Article 10(8) of the EPPO Regulation: Internal Rules of Procedure of the European Public Prosecutor’s Office as adopted by Decision 003/2020 of 12 October 2020 of the College of the EPPO and amended and supplemented by Decision 085/2021 of 11 August 2021, 026/2022 of 29 June 2022 and 010/2024 of 7 February 2024 of the College of the EPPO.

visible expression of the autonomy and independence of the office. Since the decision in the investigation is taken by three prosecutors from different legal systems and Member States other than the one in which the investigation was conducted, autonomy of judgment, independence and complete impartiality are, in fact, guaranteed.

It is very important to affirm these principles, and it is very important for the legitimacy of the EPPO itself, which has acquired authority from this procedure.

2 The functioning of the Permanent Chambers

After this broad outline of the composition of the PCs, their functioning is governed in detail by the secondary rules of the EPPO. The Internal Rules of Procedure⁴ and a Decision of the College⁵, in particular, govern the system for allocating cases to the Chambers, the possibility of reallocating a case from one Chamber to another and the voting rules.

In my view, based on the concrete experience, the most interesting aspect of the decisions of the PCs is that of the decision-making dynamics, highlighted by the functioning of the PCs.

It is true that, as stated above, decisions must be in line with the national law of the State in which the trial is taking place, but the dynamics of the decision are more complex. Although the supervisor can explain the national legal principles applicable to the individual case, it is clear that this is still a simplified, extremely brief exposure.

It is then, at this stage, that a very interesting dynamic of the decision emerges: the Chamber certainly relies on the explanations provided by the Supervising EP, but each member also transposes them in the light of their own national principles, mixed with EU law when necessary, adding a component of what could simply be called 'common sense'. The latter can be defined as the apparent reasonableness of the decision according to a generally acceptable opinion, without excluding an assessment also in the light of European law, namely the specific rules of the EPPO, when it comes to the case in question.

4 Internal Rules of Procedure of the EPPO (n 2).

5 Decision on the Permanent Chambers as adopted by Decision 015/2020 of 25 November 2020 of the College of the EPPO and adopted by Decision 085/2021 of 11 August 2021.

It can therefore be said that, in many cases, the decision of the Chamber is the result of a synthesis of at least three components: national law, European law, and, to a certain extent – perhaps not predominant, but none the less important – common sense. This creates a very interesting phenomenon, establishing a completely new decision-making practice, of which only now, after three years, the main features emerge and whose analysis would be very useful in the future. Of course, this is not the case law of a court, since the PCs are not an external adjudicating body; they are part of the EPPO and therefore the decision is always the result of an internal analysis at the prosecution's office. However, although internal, these decisions are always taken in a collegiate form which can be analysed further in the coming years.

The influence of European law in these decisions is also very interesting. Although it has been stated that the decision is predominantly adopted under national law, as provided for in the Regulation, there are certain situations in which the presence of European law is decisive.

An example for all: among the few provisions of the Regulation which attempt to regulate a procedural institution at European level, Article 39 on the dismissal of proceedings is one of the most important ones. The EPPO Regulation was intended to create a 'closed' system of dismissal, established at European level. This question is, however, more complex as there are ways in the national systems to dispose of criminal proceedings which are not easily framed under Article 39. In these cases, it is the task of the PCs to find a 'sum' of national and European law. It must therefore be noted that, in the European context, measures resulting from the combination of three components are starting to be introduced: national law, European law and, to a certain extent, common sense or, if so, fairness.

Does it make such decisions less 'legal' than those taken based on strict national law? This does not seem to be the case. Rather, the question arises whether this is the beginning of a 'new' European law, a truly common right which is the sum of principles of national law that have been revised or, at least, interpreted in the light of written European law and, may seem strange to say, of a certain amount of what we could define as 'fair'.

This has important consequences. Of course, it is worth reiterating that the assessments of the PCs are made internally within the EPPO; the decisions on the outcome of the proceedings are taken by the national courts, on the basis of national law and, where appropriate, European law. However, the process of how decisions of the EPPO are 'ripening' is interesting.

In this sense, the EPPO confirms itself to be an innovator of European law in this respect; a laboratory of new ideas and experiences, which are merged and summarised.

