

Resourcing the EPPO—Starting out with Hands Tied Behind Its Back?

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The European Public Prosecutor’s Office (“EPPO”) is a new European Union body responsible for investigating and prosecuting criminal offences affecting the Union’s financial interests in 22 of its 27 Member States.¹

Even though the plan was for the 22 members of the EPPO College of European Prosecutors to be collectively appointed by the end of 2019, this did not happen until 27 July 2020² following the resolution of the impasse created by the inability of Malta to present three eligible candidates for consideration by the selection panel.³ Now that the College of European Prosecutors has been appointed⁴ it needs to adopt a number of rules, policies, and procedures in order for the EPPO to be able to commence active investigative work as planned, in November 2020.

It would be unfortunate if the delay in appointing the College actually delays the EPPO’s appearance on the EU’s criminal enforcement scene into early 2021. However, larger and increasing concerns centre on whether the EPPO will have the resources to be effective once it does become operational. These concerns are set against a background of an increasingly challenging enforcement landscape and high hopes for the nascent prosecuting body.

High Expectations

Addressing the European Parliament Committee on Civil Liberties, Justice and Home Affairs (“LIBE”) in early February 2020, European Chief Prosecutor Laura Codruța Kövesi stated that, based on partial statistics from the Member States, her office has calculated that the EPPO will start operations with a backlog of approximately 3,000

¹ Please see the [Debevoise EPPO resource page](#) for information, commentary, and documentation.

² See Council Implementing Decision (EU) 2020/1117 of 27 July 2020: [available here](#). See for further information on the College of European Prosecutors our update: [available here](#).

³ ‘Malta delays the start of EU office to fight corruption’, Times of Malta, May 17, 2020: [available here](#).

⁴ See our update profiling the members of the College: [available here](#).

cases and expects to have to handle 2,000 new cases every year.⁵ This was a daunting caseload even before the current Covid-19 pandemic prompted the exceptional expenditure of EU funds to support medical relief and research, as well as alleviate the economic impact of the lockdown imposed to combat the virus. With a recovery programme of EUR 750 billion and a EUR 1,074.3 billion EU Multiannual Financial Framework (“MFF”) for 2021-2027⁶, as well as a corresponding increase in the risk of fraud and corruption affecting the EU budget, chances are that the workload of the EPPO will increase dramatically.

References to the EPPO are now appearing in EU funding decisions, which illustrates the hope that the EPPO will provide a welcome, additional check on the use of EU funds.⁷ According to the recently published PIF report⁸, the number of detected and thus reported fraudulent activities in the member states is rather low, with a mere 939 irregularities reported as fraudulent in 2019. The PIF report stresses that this number and the associated amount (EUR 461.4 m for 2019) are not a direct indicator of the level of fraud affecting the EU budget but rather an indication of the level of detection and reporting of potential fraud by the member states and the EU bodies.⁹

Given the threats to the rule of law in certain Member States, voices have also been raised to tie the disbursement of any additional EU funds to EPPO supervision and participation.¹⁰ This is particularly controversial given that these concerns centre on two Member States (Hungary and Poland) not party to the EPPO.

Against this background, serious questions arise concerning the adequacy of the budgetary and human resources allocated to the EPPO, at both central and national levels, to meet these challenges and expectations.

⁵ ‘New EU Public Prosecutor’s Office chief says it has insufficient funds and staff’, The Parliament Magazine, February 11, 2020: [available here](#).

⁶ See the European Commission’s main results on the recovery package and the European budget 2021-2027 published on July 21, 2020: [available here](#).

⁷ See e.g. references in loan agreements pursuant to Decision (EU) 2020/701 of the European Parliament and of the Council of 25 May 2020 on providing macro-financial assistance to enlargement and neighborhood partners in the context of the COVID-19 pandemic: [available here](#).

⁸ See 31st Annual Report on the protection of the European’s financial interests – Fight against fraud – 2019, COM (2020) 363 final, September 3, 2020 (“PIF report”): [available here](#).

⁹ See PIF report, p. 13: [available here](#).

¹⁰ See, e.g. proposals from Renew Europe, the third largest group in the European Parliament: [available here](#) and [here](#).

Central Level—Under-Resourced Skeleton Crew?

In her remarks before the European Parliament in early February 2020, European Chief Prosecutor Kövesi expressed concerns that the EPPO budget only allowed for four case analysts at central office. She queried how this level of staffing would allow the EPPO effectively to review 3,000 cases.¹¹ Her remarks appear to some extent to have been taken on-board, with the European Council on 27 March 2020 presenting an amendment to the EU budget including an increase of the EPPO's 2020 budget by EUR 3.3m¹² to EUR 11.7m in total.¹³

Although welcoming this increase, Kövesi maintained that the EPPO's funding would still be inadequate given its caseload.¹⁴ For its part, the European Parliament issued a motion on 3 June 2020 to the European Commission stating that it "is concerned about the insufficient level of funding and staff provided to the EPPO in the course of the 2020 budgetary procedure and, with a view to 2021, calls on the Commission to increase staff and resources for this institutional body."¹⁵ The new draft general budget for 2021 proposes increasing the EPPO's 2021 budget to EUR 37.7m¹⁶ and there are reports that the number of European Delegated Prosecutors ("EDPs") will be increased to 140.¹⁷ Kövesi again welcomed the proposed increase but her office estimated the financial needs of the EPPO to be at EUR 55m for 2021.¹⁸ Although the day-to-day investigative work will be carried out by EDPs at the national level, and therefore be paid for out of Member State budgets (with the exception of the EDPs' salaries), the relatively sparse budgetary and human resources allocations at the central level – even taking into account the proposed increase for 2021 – nevertheless raise concerns in two principal respects.

First, all significant investigative and procedural decisions proposed by EDPs in individual cases need to be approved at the central level by the Permanent Chamber comprising European Prosecutors to which the case is allocated.¹⁹ In order for this intended supervision and co-ordination at the central level to be effective and,

¹¹ 'La Procura europea parte in salita: mancano soldi e giudici', *lavalibera*, February 6, 2020: [available here](#).

¹² Draft amending budget no. 1 to the General Budget 2020, COM(2020) 145 final, March 27, 2020: [available here](#).

¹³ The definitive adoption of the original budget allocated €8,372,000 to the EPPO; see [here](#).

¹⁴ See 'Virus response opens way for corruption: EU chief prosecutor', *Reuters*, May 12, 2020: [available here](#).

¹⁵ See Motion for a European Parliament Resolution, 3 June 2020: [available here](#).

¹⁶ See Draft General Budget of the European Union for the financial year 2021, volume 3, COM (2020) 300, [available here](#).

¹⁷ See "Laura Kövesi și propunerea de creștere de buget pentru Parchetul European", *RFI Romania*, July 17, 2020: [available here](#) or "The law is equal for everyone": Laura Codruța Kövesi, Europe's first public prosecutor, *The Guardian*, August 3, 2020: [available here](#).

¹⁸ See, "Laura Kövesi și propunerea de creștere de buget pentru Parchetul European", *RFI Romania*, July 17, 2020: [available here](#).

¹⁹ See our previous update on the structure of the EPPO: [available here](#).

importantly, in real-time, there needs to be an institutional capacity to, at a minimum, stay abreast of the cases being actively investigated by the EDPs at the national level. With the number of case analysts currently budgeted for, there is a clear risk of bottlenecks and delays at the central level.

Second, the EPPO framework provides for the possibility for EDPs to apply for financial assistance from central funds to pay for particularly costly investigative steps.²⁰ It seems fairly clear that the most complex cases within the EPPO's jurisdiction, in particular those involving investigations into suspected offending by or within large corporate structures and/or public administrations, will require costly investigative steps. The most obvious example is collecting large amounts of electronic data and then processing and deploying it in a forensically sound way. Such often essential inquiries present severe budgetary challenges to national enforcement agencies to the point where large-scale fraud often goes un-investigated. At current budget levels, the EPPO would be hard-pressed to provide much added value.

National Level – Lack of Will?

The EPPO Regulation²¹ states that each participating Member State shall appoint at least two EDPs.²² With 22 participating states, that would suggest a minimum number of 44. However, the EPPO Regulation also provides for the possibility of EDPs dividing their time between acting as such and working as national prosecutors.²³ A significant number of participating Member States had first opted for “double-hatted” EDPs as, according to reports, the initial plan for the EPPO was to start out with a mere 32 1/4 (sic) EDPs. According to recent reports, this relatively small overall number has been increased to 140 EDPs²⁴ How many of these EDPs will be “double-hatted” and if this increased number will be able to handle the expected increasing caseload remains to be seen.

Kövesi has pointed to early signs that greatly increased EU budgetary expenditure and relaxed rules on how EU money can be spent in response to the current pandemic have indeed led to an increase in suspicious practices and a consequent, almost inevitable, further increase in the EPPO's caseload.²⁵ The recently published PIF report highlights

²⁰ Article 91(6) of the EPPO Regulation.

²¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office: [available here](#).

²² Article 13(2) of the EPPO Regulation.

²³ See our previous update: [available here](#).

²⁴ See Debevoise Update, The EPPO and the EU's covid-19 rescue package – Italian anti-mafia report outlines future challenges, Global Investigations Review, August 10, 2020: [available here](#).

²⁵ ‘Virus response opens way for corruption: EU chief prosecutor’, Reuters, May 12, 2020: [available here](#).

the risks associated with the current situation and stresses that the Commission will “step up its fraud prevention work to ensure that EU money continues to get the highest possible level of protection against fraudsters”.²⁶

The EPPO would also point out an important distinction with respect to its expected caseload: The current backlog of 3,000 cases represents current national investigations falling within the EPPO’s jurisdiction and in respect of which it will need to decide whether or not to exercise its right of evocation.²⁷ However, the expected annual caseload of 2,000 new cases represents the number of cases for which the EPPO considers that it will have sole jurisdiction and therefore the obligation to investigate.²⁸ This number excludes the likely significant number of cases where national authorities retain residual jurisdiction.²⁹ The EPPO therefore considers that the number of EDPs it has requested represents the minimum number of prosecutors required for it to carry out its legal mandate. This number is still confidential but is reportedly in the “hundreds”.³⁰

It is easy to imagine that powerful interests in some participating Member States with a less than stellar record on preventing frauds on the EU budget do not relish the prospect of a new cadre of wholly independent prosecutors solely focused on this issue.³¹ However, assuming the best intentions from most of them, it is easy to see that participating Member States face somewhat of a dilemma: Although the salaries of EDPs are paid out of the EPPO’s budget, the costs of the investigations they conduct will in principle be borne by national budgets.³² In addition, prosecutors specialised in economic and financial crime take years to train, which means that the starting point for national criminal justice systems is that each EDP appointed means one removed from the national system. From this perspective, the increase from 32 1/4 to 140 “EDP FTEs” is significant and it remains to be seen how quickly suitably qualified candidates can be found and appointed.

²⁶ See PIF report, p. 32: [available here](#).

²⁷ Article 27 of the EPPO Regulation.

²⁸ Article 26(1) of the EPPO Regulation on its face creates a system of compulsory investigation of all cases where there are “reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed”.

²⁹ See our previous update on the EPPO’s jurisdiction: [available here](#).

³⁰ ‘Virus response opens way for corruption: EU chief prosecutor’, Reuters, May 12, 2020: [available here](#).

³¹ There are, for example, reports that the Bulgarian government has preemptively sought to stymie the effectiveness of the EPPO in the country; see e.g. [here](#) and [here](#).

³² Articles 91(4) and (5) of the EPPO Regulation.

Perspectives – Slowly but Surely?

At this stage, the resources made available to the EPPO as a whole cast doubt on its ability to carry out its legal mandate, let alone live up to the high expectations placed on it and provide material added value to the fight against fraud on the EU budget. A comparison with the pre-existing European Anti-Fraud Office (“OLAF”) is instructive. OLAF has been allocated approximately EUR 61m for 2020, not counting the budget for its Anti-Fraud Information System (“AFIS”), and some 393 staff.³³ According to its latest annual report, in 2019 OLAF experts carried out 1,174 preliminary analyses, which resulted in the opening of 223 investigations.³⁴ It is difficult to see how the EPPO is meant to tackle a caseload likely twice as big with half the resources made available to OLAF which, in addition, does not have the responsibility of preparing cases for trial.³⁵

The immediate concern ought to be to ensure that the EPPO is in a position to provide material added value to the fight against frauds on the EU budget in the short term. Here, the answer is surely to provide the EPPO at the central level with the financial resources to ensure that the available EDPs have the means, currently lacking in the various Member States, to carry out the complex investigative steps necessary to pursue the most difficult cases.

It is therefore encouraging that the responsible European Commissioner, Didier Reynders, has recently declared that “the EPPO needs to be given the funding it deserves” and that there was a need to increase its budget for 2021, particularly to safeguard the proposed Covid-19 recovery programme.³⁶ As previously mentioned, the European Commission has proposed a new budget for the EPPO of EUR 37.7m for 2021.³⁷

Discussions on the EPPO 2021 budget started during the talks of the EU leaders on the future EU financial framework in July³⁸ and no further official information – apart from

³³ See the EU’s general budget for 2020: [available here](#); Number of staff according to the OLAF report 2019, p. 49.

³⁴ The OLAF report 2019: [available here](#).

³⁵ To this point, Nicolae Ștefănuță, MEP (Renew) submitted the following parliamentary question to the Commission on August 4, 2020: “Considering that in 2018, the European Anti-Fraud Office (OLAF) had 389 staff and carried out 1 259 preliminary analyses, based on which it opened 219 administrative investigations, how many criminal investigations (in full respect of the criminal procedural laws of the participating Member States) does the Commission expect the EPPO to handle with 140 European delegated prosecutors, and does this match its expected workload?": see [here](#). The answer of the European Commission is still outstanding.

³⁶ Remarks at press conference following the video conference of the Justice and Home Affairs Council, June 4, 2020: [available here](#).

³⁷ See Draft General Budget of the European Union for the financial year 2021, volume 3, COM (2020) 300, [available here](#).

³⁸ See, “Laura Kövesi și propunerea de creștere de buget pentru Parchetul European”, RFI Romania, July 17, 2020: [available here](#).

the draft general budget for 2021 – is available. It is encouraging that in their conclusions from 17 to 21 July 2020 on the recovery plan and the MFF for 2021-2027, the European Council stated that “adequate resources will be ensured for the EPPO and OLAF in order to guarantee the protection of the Unions financial interests”.³⁹

Even if the EPPO proves to be an efficient organisation, present levels of resourcing threaten its relevance, let alone Kövesi’s ambition for it to become “a center of excellence in the area of financial investigations and seizure of criminal assets, by implementing advanced standards in forensic accounting and data analysis.”⁴⁰ If agreement is not reached on materially increasing its budget, the risk is that the EPPO will be limited to actively pursuing relatively simple and/or few cases, lacking the means to progress the bulk of its caseload, including precisely those complex cases it was set up to tackle.

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Please do not hesitate to contact us with any questions.

³⁹ See European Council Conclusions from 17-21 July 2020, p. 40: [available here](#).

⁴⁰ Feature article by Kövesi published in GRECO’s 20th General Activity Report (2019): [available here](#).

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