

**Maja Munivrana Vajda\***

## **QUESTIONING THE JURISDICTION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE**

Even before the European Public Prosecutor's Office starts to function, initiatives for change have already been made, in particular for the extension of its substantive jurisdiction, where the most articulate proposals have probably been those related to the extension of jurisdiction over terrorism. Recent appeals from the French President Macron and the President of the European Commission, Jean-Claude Juncker, go beyond academic debate, and indicate that at some levels at least there is political will to extend the Office's jurisdiction. The preconditions for such extension are regulated by Art. 86(4) of the Treaty on the Functioning of the European Union, which provides for the possibility of extending powers to other "serious crime having a cross-border dimension". It is not entirely clear whether these are the same criminal offences as those mentioned in Art. 83 TFEU, which regulates the EU's harmonisation powers – the power to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of "particularly serious crime with a cross-border dimension" – or whether the EPPO's authority can be extended to a wider range of offences. In any case, terrorism can be subsumed under both Art. 86(4) and Art. 83. For legislative changes to occur, the European Council must take a unanimous decision, with the prior consent of the European Parliament and after consulting the Commission. It seems that support in the European Parliament already exists – especially after the recent terrorist attacks in Europe in 2015 and 2016. As for the Commission, on 12 September 2018, in his State of the Union 2018 address, President Juncker said: "Europeans rightly expect their Union to keep them safe. This is why the Commission is today proposing .... to extend the tasks of the newly established European Public Prosecutor's Office to include the fight against terrorist offences. We need to be able to prosecute terrorists in a more coordinated way across our Union. Terrorists know no borders. We cannot allow ourselves to

---

\* Maja Munivrana Vajda, PhD, Associate Professor, Faculty of Law, University of Zagreb. This paper is the author's presentation at the international conference "Integration of the EPPO in National Criminal Justice Systems" held in Zagreb on 11 and 12 April 2019. It was co-financed by the Croatian Science Foundation under the project "Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future" (CoCoCrim).

become unwitting accomplices because of our inability to cooperate". Although the Commission does not have the right of legislative initiative, this does not prevent it from informally advocating change. In its communication to the European Parliament and the European Council, the Commission already advocated for a "Europe that protects" and, consequently, for an extension of the EPPO's jurisdiction to cross-border terrorism. However, academic circles have been more cautious. Most consider it unwise to expand jurisdiction until a preliminary assessment of such a need is carried out and before the Office begins to operate. With respect to criminal offences against the EU's financial interests, there is a low rate of convictions due to the indifference of individual Member States and on account of irresponsibility towards the EU budget. When it comes to terrorism, on the other hand, the Member States usually have an interest in prosecution, and, at the same time, the Member States are generally reluctant to give up any further sovereignty in the field of criminal law.

Should Art. 86 TFEU be amended, the Commission would propose, by a special legislative procedure, to amend the Regulation. It has already indicated that it would not allow for a different approach to material jurisdiction by either old or new State Parties to the EPPO.

The reasons to enlarge jurisdiction to cover terrorism can be found in the existing fragmented investigations and in the parallel fragmented proceedings in different Member States, which fail to address all aspects of cross-border terrorism and terrorist cells. The role of the current mechanisms – Eurojust, Europol and Joint Investigation Teams – is limited as it depends on requests for assistance from States Parties. Furthermore, these bodies are not empowered to give binding orders to States. Terrorism involves and affects all Member States, and therefore represents shared responsibility. It also has a financial dimension and affects the common budget and staff. Empowering the EPPO would constitute an additional mechanism for the more successful resolution of potential conflicts of jurisdiction which have so far not been effectively resolved within the EU (*pro futuro*, but only through the limited and retroactive effects of the *ne bis in idem* principle).

Today, decisions resolving conflicts of jurisdiction are not legally binding. The 2009 Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings provides only a channel for communication and consultation due to the reluctance of Member States to adopt binding rules that would limit their ability to prosecute. In this regard, the adoption of some hierarchical rules through the jurisdiction of the EPPO can be assessed as a step forward. Given that the EPPO will apply national law, deciding where to prosecute seems crucial. However, there is no judicial control over this extremely important decision, which can greatly affect fundamental rights. In the *Camilleri v. Malta* case of 2013, the European Court of Human Rights found that a national law providing for two different sanctions,

depending on the procedure chosen by the Attorney General, was not foreseeable and violated Art. 7 of the Convention. The criteria for choosing EPPO jurisdiction are very vague and have implications on legal certainty. Particularly controversial is the establishment of jurisdiction based on the so-called “focus of activity” and the place where the “bulk of the offences” were committed. In addition, problems can occur when applying the provision that jurisdiction is determined according to the place where the main financial damage occurred, especially from the perspective of Croatian law, since, according to the criminal offence of subsidy fraud under Art. 258 of the Croatian Criminal Code, damage is not an element of the offence. Thus, it is possible for Croatia to lose jurisdiction, even when under Croatian law the offence is committed exclusively on Croatian territory.