The Establishment of the European Public Prosecutor’s Office

A note on its legal and policy perspective, and its possible role in the Western Balkans

Fisnik Korenica

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The Programme is coordinated by the CEPS Justice and Home Affairs Unit and counts with the involvement of several CEPS Senior Research Fellows. This publication has been supervised by Sergio Carrera, Head of CEPS Justice and Home Affairs Unit.

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Introduction
After proposals for a single European army, the EU’s accession to the European Court of Human Rights and the establishment of an EU Investment Court, one legitimate question rightly appears in front of us: is it the right moment to think of a new twist in the EU’s institutional architecture, especially in the area of criminal law and policy, or, put it more narrowly, is it the right time to think of an office who would prosecute perpetrators at the behest of the EU’s interests? The establishment of the European Public Prosecutor’s Office is the most recent development in the EU’s institutional landscape that occupies attention of many academics, policymakers and observers of EU law and relations.

The Treaty on the Functioning of the European Union (TFEU) is the stepping stone for this initiative, more specifically Art. 86, para. 1 thereof provides for sufficiently clear and adequate legal basis for the establishment of the EPPO. The text reads as follows:

In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

When cautiously reading the foregoing provision, five conclusions may prima facie be drawn. First, the provision stipulates a clear and concise mandate for the EPPO, namely combating crimes affecting the financial interests of the Union, which can be extended to serious, cross-border crimes by decision of the European Council, ex. Article 86, para. 4 Second, it determines that the EPPO is to be established through a regulation, a directly applicable legislation that does not require transposition by the Member States to be directly enforceable. Third, it establishes a special legislative procedure for the adoption of the act, by requiring unanimity within the Council, thus showing how delicate is the issue is for the Member States. Fourth, the EPPO may be established from Eurojust, linking the role of judicial cooperation served by this agency with the enhanced capabilities represented by the proposed EPPO. If this assertion holds true, then prosecutors seconded by Member States to Eurojust Member State could serve at the EPPO, accordingly. Fifth, the legislative procedure employed for the adoption of
regulation on the establishment of the EPPO, requires Council to act unanimously which is not often the case, as the EU legislation is most often passed with qualified majority voting, and of course European Parliament’s involvement is a must.

The relevance of establishing an EPPO can be also seen in Art. 86, para. 1 second indent, according to which, ‘In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption’. What can be inferred from the said provision is that under an entirely speculative case scenario Justice and Home Affairs Council configuration may disagree and as a result fail to establish EPPO. Moreover, the reference to the European Council indicates the need for a tough political consensus between all member states.

A number of Member States argue that the establishment of EPPO may run contrary to national constitutions, especially if this double function of prosecution and investigation is exercised by national and EPPO. For instance, Poland feared that the EPPO would encroach on the competences of national prosecution offices, while the Netherlands had reservations regarding the independence of the institution (the Public Prosecution Service of the Netherlands is dependent on the Ministry of Justice. These reservations are completely in line with the Lisbon decision of the German Constitutional Court (BVerfG) which averred that along with monopoly of force, control over public revenue and expenditure, family and education, decisions relating to criminal law form the core of German constitutional identity not to be encroached upon by European integration.\footnote{\textit{A fortiori}, the Member States’ reluctance to establish EPPO may not entirely be seen as divested of argument. However, the TFEU also paved the way for the establishment of an EPPO under an enhanced cooperation mechanism if at least nine Member States decide to move forward at the level of the European Council, the highest level of political representation of the EU Member States. Under the said formula a \textit{backdoor} still enables for adoption of the regulation if European Council comes to a consensus.}

Lately, 20 Member States have proceeded further with the proposal for the establishment of EPPO. The official statement proposing the Regulation for the Establishment of EPPO states: ‘the regulation establishing the European Public Prosecutor’s Office (EPPO) was adopted by those Member States which are part of the EPPO enhanced cooperation.’\footnote{Council of the EU, PRESS RELEASE, 580/17, 12/10/2017 “20 member states confirm the creation of an European Public Prosecutor’s Office”, available at: http://www.consilium.europa.eu/en/press/press-releases/2017/10/12/eppo-20-ms-confirms/pdf.} This suggests that EPPO is to be grounded as a body under enhanced cooperation, rather than strict EU supranational structures. This modality certainly shows the political unwillingness of some member states to transfer competences on issues of criminal procedure to the EU institutions, though they in principle agree to establish a supranational EPPO. Consequently, the legitimacy
and legal standing of the EPPO’s can be considered quite weak and contested compared to the original setup.

**What model of governance for the EPPO?**

The discussion on the model of governance of the EPPO’s office should start with examining the Commission’s textual proposal. In terms of institutional setting, the present model opts in favour of an integrated office with separate legal personality, yet in terms of operational structure it establishes a closer link with national prosecution services and law enforcement agencies. This, according to the Commission not only makes this structure more acceptable by national jurisdictions, but also makes its operations more efficient and effective in terms of practical administration of justice. Based on the premise of *lex loci delicti commissi*, national jurisdictions are in the best position to conduct the preliminary investigation of supposed crimes, but this also complies with the division of labour between the EU institutions and Member States, and fits neatly with the principle of subsidiarity. Therefore, one can reasonably conclude that EPPO’s model of governance is a hybrid one, with close institutional bonds maintained with national jurisdictions as EU agents in this regard.

However, let us elaborate more thoroughly on the two-tiered model of governance of the EPPO, which was struck only after intense bargaining within the Council and with the Parliament.  

The regulation cautiously defines EPPO as an “*indivisible Union body operating as one single Office with a decentralised structure*”. It therefore establishes both a central office and decentralized operating teams. The central office shall consist of the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. The European Public Prosecutor and its four deputies shall be appointed by the Council based on a transparent process and open competition with the consent of the Parliament, and are the driving forces behind the entire endeavour.

The decentralized layers, the so-called European Delegated Prosecutors, are national prosecutors who will be appointed and act under the authority of the EPP. Each Member State shall supply with a list of least three nominees per position. They operate under a ‘double-hatted’ status; tied to national prosecution services as they serve the function of national prosecutors, yet simultaneously attached to the supranational EPPO. This “double hat” should serve as a guarantee of integration in their respective criminal justice systems while keeping an eye on EU law. The European Delegated Prosecutors, as far as the model of operation that the Regulation adopts foresees, will be the frontrunners of the investigations, prosecutions and bringing cases to judgment. Their paired standing, as a national prosecutor and a European

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3 For more information, see Mitsilegas, Valsamis and Giuffrida, Fabio (2017), “Raising the bar? Thoughts on the establishment of the European Public Prosecutor’s Office”, p. 11.

4 Regulation, art. 8, para 1.

5 Weyembergh, Anne and Briere, Chloé (2016), “Towards a European Public Prosecutor’s Office (EPPO)”, p. 23;
Delegated Prosecutor shall entitle them to undertake any actions required to further the investigation or to request them from the competent national authority, where applicable.

Competences of the EPPO and the relationship between the EU and national law

The EPPO jurisdictional scope is shared quite explicitly in vertical terms. Regulation 2017/1939 ‘provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union, based on the right of evocation of the EPPO.’

‘EPPO will [therefore] always have to rely on national authorities, particularly for bringing a case to judgment before the national courts. This is evidenced by the wording of Art. 86(2) TFEU (1.3.2.).’

A core concern during the negotiations was that EPPO’s right to evocate a case from national authorities to its own jurisdiction, a matter that could be applied to the detriment of the Member States’ authorities. The principle of sincere cooperation is also explicitly embedded in the Regulation (Art. 5 (6)), obliging Member States to comply with each other’s requirements for mutual judicial cooperation and investigative assistance. On top of this, in light of the principle of subsidiarity, the Regulation seems very careful in establishing a jurisdictional perspective for the EPPO that respects the national traditions of criminal law, the latter being a core domain of sovereignty. In the Preamble of the Regulation, paragraph 20 refers to this, mentioning that the structure of the Office must ensure that ‘all national legal systems and traditions of the Member States are represented in the EPPO, and that prosecutors with knowledge of the individual legal systems will in principle handle investigations and prosecutions in their respective Member States.’ It suggests that EPPO should not underestimate the legal tradition of Member States, and that prosecutors assigned to a case should be familiar with the individual peculiarities of criminal law in the relevant social and legal context. This mirrors the rather strong opposition of the Council to the supranational character of EPPO, a phenomenon that was made explicit by the creation of overseeing structures within the office that follow an intergovernmental logic, such as the Permanent Chambers, which can direct prosecutors to an extent, and even decide on referring a case to national authorities.

One can legitimately question what are the competences vested with the EPPO. Art. 4 in this regard reads:

The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.

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6 COUNCIL REGULATION (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office.

As one could observe, EPPO is tasked with three aspects of the criminal procedure, namely to investigate, to prosecute and to submit to the court a criminal indictment. It suggests that there is a rather strong police related scope of competence handed over to it, and thus the capacity to establish a smooth work relation with the available judicial police will be critical.

In regards to the material scope of the competence, the Regulation frames the material jurisdiction of the EPPO in the contours of Directive 2017/1371 as if it were a national prosecutorial body before a national court. In the case of a conflict of applicable law, Art. 22 (1) stipulates that EPPO remains competent ‘irrespective of whether the same criminal conduct could be classified as another type of offence under national law’, thus establishing the primacy of the Regulation over national Laws.

According to Art. 3 of the Directive, frauds against financial interests of the Union include four types of violations, one, non-procurement related frauds, two, procurement related frauds, three, non-VAT revenue related frauds, and, four, VAT related revenue frauds committed in cross-border fraudulent schemes only as regards ‘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 EUR 10 million’. As for the nature of these violations, the Directive refers to acts and omissions leading to the use of presentation of false statements or documents in regards to EU funds or assets, non-disclosure of information in violation of a specific obligation in relation to EU funds, misapplication of EU funds or assets, misapplication of legally obtained benefit, non-disclosure of VAT related information, presentation of VAT certificates for the purposes of illegal refunds, etc.

Furthermore, Article 22 (2) of the Regulation extends the competence of the EPPO to investigate and prosecute organized crime, provided that the relevant activities being prosecuted fall within the scope of the Framework Decision 2008/841/JHA, on the Fight Against Organized Crime affecting the financial interests of the Union. This could seriously broaden the scope of activities undertaken by the EPPO. On top of this, Art. 22 (3) assigns EPPO with the jurisdiction to prosecute all other crimes that are ‘inextricably linked to criminal conduct that falls’ within the Directive’s scope of financial frauds. The ‘inextricably linked’ jurisdiction becomes a rather broad space for EPPO to exercise its investigation and prosecutorial activities, allowing it to engage with crimes that are not necessarily only financial but that could indirectly affect financial interests as well, which provides EPPO with a high leeway to gradually extend its activities.

In regards to the relationship between the EU law and national law, Art. 5 (3) of the Regulation reads:

\[\text{The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national}\]

\[\text{Art. 22 (1) of the Regulation.}\]
law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.

According to this, National Law in practice becomes subsidiary. This ‘is understandable in light of the requirement imposed by Art. 4(2) TEU and Art. 67(1) TFEU to respect national diversity.’ Doubts are however whether this system could ‘respect other constitutional objectives, i.e. endeavouring a high level of security (Art. 67(3) TFEU) and ensuring effective protection of the Union’s financial interests (Art. 325 TFEU).’

Primacy to the EU law, namely to the Regulation and Directive concerned, is fully acknowledged, for instance regarding ‘how national and EU law tend to collide in the field of admissibility of evidence’.

However, one must note that national law could play an important role given that the Directive and Regulation leave many of the criminal violation figures blurred and not sufficiently defined. Consequently, the criminal laws of the Member States will play an important role when defining what specifically fraud means in a specific national context. This is especially the case with regard to financial crimes, which are complex and require more detailed case-law to deconstruct their defining elements in practice. In those scenarios, which in our view will be quite frequent, the EPPO would have to rely quite substantially in the laws and case law of the Member States and their courts. Divergent positions of the Member States in this regard could hamper the uniform application of the Regulation in the territory of the EU by EPPO, and therefore make the effectiveness of the EU law (namely the Regulation and Directive) questionable from several perspectives. For example, VAT exemptions have different forms and meaning in several Member States. The presentation of certificates for those does not always follow the same cycle, which makes it harder for EPPO to define whether somebody intended to receive illegal refunds for VAT. In such a scenario, EPPO would have to rely on the national law and practice to channel the indictment, a scenario that could seriously hurt the uniform outlook of EPPO’s material jurisdiction.

Of significant importance in this regards is Art. 5 (1) of the Regulation, which establishes that the ‘EPPO shall ensure that its activities respect the rights enshrined in the Charter.’ This poses a number of balancing challenges between the different legal systems and an effective, uniform cross-border prosecution. For instance, Art. 53 of the Charter makes it explicit that national courts can avoid the priority of EU law if it is regarded as restricting the standards of the ECHR or national fundamental rights. This could make the role of EPPO before national courts quite problematic, if human rights standards are viewed from a national perspective by national courts. A Member State court could therefore well dispose EPPO’s procedural safeguards to

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Art. 53 of the Charter, requesting EPPO to defer to national human rights law or ECHR before the Regulation and Directive.

Judicial Review of EPPO measures

Art. 42 of the Regulation makes a division of labour between the Court of Justice of the European Union (CJEU) and national courts in regard to the judicial review of EPPO measures. National courts will deal with all acts relating to the criminal case brought before them (Art. 42 (1)). Thus, they fulfill an ordinary criminal justice role, reviewing the procedural aspects of those prosecutorial activities undertaken by the EPPO with effects over third parties.

Contrary to this, the CJEU has been assigned with a more ‘constitutional’ jurisdiction to review the EU law compliance of EPPO acts. More specific to this, Art. 42 (2) assigns CJEU with a very specific jurisdiction over the EPPO, resulting from heated debates. Inter alia, this includes the review of actions executed by the EPPO regarding their legal basis, the treaty meaning of the Regulation and EPPO mandate, and the potential conflicts of competence between the EPPO and other bodies of the Union. The judicial review of EPPO acts therefore seems quite well separated on vertical basis, the national courts remaining competent for criminal procedure affecting the individual criminal status, whereas the CJEU remaining competence for more general EU law constitutional compliance of EPPO not directly affecting the criminal status of the claimant before but rather the EPPO’s constitutional mandate. There is however one exception to this separation. By virtue of Article 42(3) of the Regulation, a decision of dismissing a case based solely on EU Law shall be contested not before national courts, but in Luxemburg. Other than that, in practical terms, ‘EPPO would be under the judicial control of the Member States, and not of the Court of Justice of the European Union (CJEU).’¹¹ This is certainly an extraordinary situation for an EU Agency, as no other EU body finds itself in such a situation, and can hardly be justified solely by the special nature of the EPPO.¹²

EPPO’s contribution to the fight against financial crimes in the Western Balkans

EPPO may certainly play an important role in the fight against financial crimes in the purview of the EU’s engagement with the Western Balkans. The EU has a quite large portfolio of financial assistance dedicated to the countries in the region, an assistance that is supposed to support potential and candidate countries to smoothly address their internal reforms. That financial assistance is often subject to abuse in both financial and decision-making terms, usually stemming from complicit actions taken by EU-employed officials and local personnel within its Delegations deciding on the beneficiaries of said assistance. The EPPO may therefore further complement the European Anti-Fraud Office (OLAF) in this regard, providing the missing layer


of prosecutorial function to these cases, therefore playing an important role in the fight against crimes falling within the scope of EU financial interests from an extraterritorial perspective.

The EU assistance for the Western Balkans is quite extensively regulated in EU law. Regulation 231/2014 on Instrument for Pre-Accession (IPA II)\(^\text{13}\) defines the procedures for the financial assistance awarded to potential candidates and candidate countries in the Western Balkans, amongst others. This is complemented with Regulation 236/2014,\(^\text{14}\) which lays down the specific procedures on basis of which IPA II is to be implemented in practice. Art. 7 (3 & 4) of the latter provides the following clause relating to IPA abuses:

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The European Anti-Fraud Office (OLAF) may carry out investigations, including on-the-spot checks and inspections [...] with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union in connection with a grant agreement or grant decision or a contract funded under this Regulation. [...] [C]ooperation agreements with third countries and with international organisations, contracts, grant agreements and grant decisions, resulting from the implementation of this Regulation shall contain provisions expressly empowering the Commission, the Court of Auditors and OLAF to conduct such audits, on-the-spot checks and inspections, according to their respective competences.

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As one could observe, the current regulation does not provide any clause authorizing EPPO to engage in the prosecution of crimes relating to abuse with IPA funds. However, in a teleological interpretation, EPPO may well use that basis to extend its jurisdiction on funds deriving from this regulation as well, whenever certain requirements set forth in the Regulation are met.

While EU law provides the basis on which the financial assistance is to be framed and awarded in these two regulations, additional instructions exist in regards to the bilateral regulation of the assistance with the benefiting countries. Art. 8 of Regulation 231/2014 establishes the obligation of concluding framework and subsidiary agreements with these countries. Such agreements should specify issues such as priority areas of activity, budgetary amounts, and performance and expenditures control.

In these agreements, the form of the award of financial assistance and the means to monitor their performance in implementation are also set up. Usually, the institution charged with managing the financial assistance is either the respective EU Delegation or the national government, in this case under a strict monitoring from the Delegation. Therefore, abuse usually takes place within one or both these institutions. It is important to mention that this assistance, on the basis of Art. 4 Regulation 236/2014, usually comprises of grants, procured


\(^\text{14}\) Regulation (EU) No 236/2014\(^\text{14}\) Of The European Parliament And Of The Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union’s instruments for financing external action.
projects (either for infrastructure or soft technical assistance), and direct budgetary support. *Ratione materiae*, these financial crimes specified in the Directive 2017/1371 may appear in all forms of assistance described above. To note, this abuse may be committed by the following authorities alone or in complicity: persons employed by the EU Delegations in IPA countries (who may be both EU citizens or local contracted staff under EU regulations), the national government employees in charge for awarding the assistance or monitoring its performance in implementation, and auditing bodies contracted to monitor the performance of EU assistance projects on the ground. The main question therefore is whether EPPO could prosecute those abuses, considering that IPA falls well within the scope of the ‘financial interests’ of the Union and crimes defined *ratione materiae* in Directive 2017/1371?

Art. 23 of the EPPO Regulation defines the territorial and personal jurisdiction of EPPO. EPPO is assigned with territorial and personal jurisdiction if crimes:

- a) were committed in whole or in part within the territory of one or several Member States;
- b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
- c) were committed outside the territories referred to in point (a) by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

As one could observe, Art. 23 clearly grants the EPPO jurisdiction over crimes committed outside the territory of the EU, in certain circumstances. Under the extraterritorial jurisdiction clause, in order to assert its jurisdiction, the EPPO would need to assure that two conditions apply; the crime must have been committed someone who is employed by the EU, and it must fall under the extraterritorial jurisdiction of an EU Member State. This in practice means that those in charge of the implementation of IPA within EU Delegations or contracted companies all fall within that scope. National government officials in charge with IPA certainly fall outside of the EPPO’s reach, unless otherwise is provided in bilateral agreements between the IPA countries and the Commission. However, in order to implement that extraterritorial jurisdiction, EPPO could first rely on Art. 104 (3) of the Regulation, which reads:

> International agreements with one or more third countries concluded by the Union or to which the Union has acceded in accordance with Article 218 TFEU 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.

For the Western Balkan countries, the existing Stabilization and Association Agreement serve as that ‘international agreement’. Two arguments support the latter point: first, SAAs with the Western Balkans countries include a chapter relating to judicial cooperation in criminal matters.
with strong emphasis on joint actions that will promote that work. Second, SAAs establish the rules for the financial assistance, serving as the primary legal basis for that assistance. It is therefore argued that EPPO could utilize existing SAAs to make place for its extraterritorial jurisdiction on IPA abuses in the Western Balkans countries. However, even if SAAs were not in place, Art. 104 (5) of the Regulation allows that EPPO ‘have recourse to the powers of a national prosecutor of his/her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities.’ In those cases, bilateral criminal cooperation between the IPA countries and EU Member States would be used by EPPO to assert its extraterritorial jurisdiction on crimes relating to the abuse with IPA funds.

In addition to the extraterritorial jurisdiction on IPA funds, EPPO may also establish joint operations with Western Balkans to jointly prosecute crimes relating to abuses with IPA funds under a simple rule of dividing tasks: EPPO prosecutes persons who acted under the umbrella of the EU Delegation in that country, whereas the national prosecution prosecutes those persons who acted within the national government. In those scenarios, EPPO would still play an essential role in prosecuting crimes related to IPA funds in the Western Balkans, and filling the missing link between OLAF and prosecution of crimes identified by it before.

**Conclusions**

One may conclude that EPPO is a major step forward in the formation of a more unified criminal law and policy at the Union level. The legal implications that it may pose to the relationship between national courts and Union institutions on the one hand, and EU law and national law, on the other hand, remain quite extensive. In addition to that, EPPO may play an important role in the fight against financial crimes relating to IPA in the Western Balkans. It will feed further the process of investigation managed until now by OLAF alone with a prosecutorial layer. Therefore, it is briefly concluded that EPPO is a major institutional development in the process of fighting crimes affecting the financial interests of the Union in the Western Balkans as well. However, the scope of its practical impact in the future remains to be seen.
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CEPS launched the ENGAGE Fellowship Programme with the support of the Open Society Initiative for Europe (OSIFE). This tailor-made Programme connects academic, civil society and think tank actors from Central and Eastern European and Western Balkans countries with EU-level policy debates. It consists of a one-year programme providing a set of trainings, study visits, public events and a policy brief writing exercise. It culminated in the active participation of the selected fellows in the 2018 CEPS Ideas Lab.

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For the period 2017-2018, five highly-qualified Fellowship members were selected:

- Ms. Petra Bárd, Visiting Professor, Central European University / Senior Researcher, National Institute of Criminology / Professor, ELTE School of Law, Budapest, Hungary
- Mr. Fisnik Korenica, Senior Research Fellow, Group for Legal and Political Studies, Pristina, Kosovo
- Mr. Marjan Nikolov, President, Centre for Economic Analysis / Docent, International Slavic University, Skopje, Former Yugoslav Republic of Macedonia
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