

Herrnfeld/Brodowski/Burchard

European Public Prosecutor's Office

Article-by-Article Commentary



Herrnfeld / Brodowski / Burchard
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Regulation (EU) 2017/1939
implementing enhanced cooperation
on the establishment of the
European Public Prosecutor's Office ('the EPPO')

Article-by-Article Commentary

by

Hans-Holger Herrnfeld
Dominik Brodowski
Christoph Burchard

2021



Published by

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by

Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
email: orders@isbs.com

Published in North America by Hart Publishing,

An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA

ISBN 978-3-8487-4884-6 (NOMOS Print)

ISBN 978-3-8452-9076-8 (NOMOS ePDF)

ISBN 978-3-406-74388-7 (C.H.BECK)

ISBN 978-1-5099-4715-7 (Hart)

First Edition 2021

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Foreword

The creation of the European Public Prosecutor's Office is an important step the European Union takes towards preserving the rule of law and holding responsible those who abuse the confidence of the European citizens.

The EPPO can provide a template for further developments in creating a true common European criminal justice area, and represents a long waited response to the limitations of a national judicial response to a European sized problem of modern criminality.

As the first European Chief Prosecutor and the former Chief Prosecutor of the Romanian National Anticorruption Directorate, I am also fully aware of the challenges we are facing in setting up for the first time a supranational judicial body. Each of these challenges, if inadequately addressed, has the potential of turning the EPPO into a largely ceremonial institution, which would represent a serious letdown of the expectations that led to its creation.

If this exciting project is to be deemed a success, the EPPO has to become an institution whose effectiveness in prosecuting complex fraud offences will be accompanied by strict compliance with the procedural safeguards.

The proper interpretation of the EPPO Regulation in the context of 22 legal systems with different procedural rules and criminal law provisions is a difficult task for any legal practitioner, including the European Prosecutors and the European Delegated Prosecutors.

That is why I salute the work done by Hans-Holger Herrnfeld, Dominik Brodowski and Christoph Burchard as extremely relevant for all those interested in the EPPO. The authors bring an ideal mix of practical experience in judicial matters and academic background, which ensures that all possible approaches are covered.

As it combines an intimate knowledge of the EPPO's genesis with a sophisticated and detailed legal analysis, the commentary is an excellent tool for practitioners and I easily see it becoming the reference used for solving related legal disputes.

Moreover, the passion of the authors for the subject of their work comes across the pages and makes it one of the most enjoyable legal readings I have encountered in a significant time.

I was impressed with the mastery the authors prove in addressing a multitude of apparently non-related areas concerning EU administrative law, criminal procedural law, judicial cooperation and exchange of law enforcement intelligence or data protection. As a career prosecutor, I especially appreciated the in depth understanding of criminal investigations and of the delicate interplay between the national and European provisions in this area.

The structure of the book makes it easy to navigate through the significant volume of information it contains for both the readers interested in a comprehensive understanding of the EPPO and for those looking for an answer to a specific question. This will become ever more important once the EPPO will become operational, as its innovative framework and approach towards investigations will inevitably give birth to a long list of legal questions.

Foreword

In an area of free movement of people, goods and capital, one cannot efficiently fight crime when the law enforcements' powers stop at the national borders, that is why the adequate instrument to combat a European problem is a European institution.

Nevertheless, as in the case of any prosecutor's office, our efficiency will eventually be measured by the courts, which will have to reflect for the first time on the legal issues raised by the EPPO's appearance on the judicial arena.

I am confident that this book will represent an invaluable support for these reflections and there will be many readers who will have gained a broader perspective thanks to it.

August 2020

Laura Kövesi
European Chief Prosecutor

Preface and Acknowledgements

The establishment of the European Public Prosecutor's Office ('the EPPO') is a bold, long-awaited step towards further integration of European criminal justice systems. The competence to investigate and prosecute criminal offences will no longer be only in the hands of national authorities but will also be exercised by prosecutors acting on behalf of this new Union body. This will underline that crimes against the financial interests of the European Union affect the European Union as a whole and not only individual Member States, and that such crimes thus warrant a truly European response.

On the basis of a proposal submitted by the European Commission, and after four years of intensive negotiations in the relevant Council bodies, the Council adopted, with the consent of the European Parliament, the landmark Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO Regulation'). As of today, 22 Member States take part in this enhanced cooperation. The rules on the establishment of the EPPO, its structure and competences as well as the procedural provisions for the criminal investigations and prosecutions conducted by the EPPO are laid out in the EPPO Regulation. Notwithstanding its independence from the Member States and its establishment as a 'body' of the Union, the EPPO is – in terms of structures, competences and procedures regulating its operations – a new hybrid entity in the area of European criminal justice, as the EPPO relies both on European Union law and on the national law of the participating Member States.

This commentary takes a systematic approach to comprehensively describe, analyse and assess the legal basis for the EPPO and its operation: the EPPO Regulation. To shed light on it as a whole, this commentary follows its structure. For each Article, it examines its respective legislative history – with a specific focus on key changes to the original Commission proposal – and the individual elements of each provision. Specific focus is spent on the interplay between the various provisions of the Regulation, the relation to constitutional, human rights, and criminal law as well as criminal procedure on both the European and national level, and on the practical consequences for the day-to-day work of the EPPO. As far as required for the interpretation of the EPPO Regulation and in particular its material competence, this commentary also analyses the provisions of the Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('PIF-Directive'). The work on the commentary was concluded before the EPPO's College took up its duties and thus before important internal documents such as the EPPO's internal rules of procedure had been adopted, which will further guide the work of the EPPO.

We are very grateful for the support we received from our research assistants, especially Aysel Akhundzada, Philipp Blume, Maria Gahn, Lena Maj, Julia Reichmann, Helena Schnur, Elsa Wainer and Christoph Zoller (from the team of Dominik Brodowski) as well as Dr. Nicola Recchia and the 'Frankfurt' team of student assistants (from the chair of Christoph Burchard). Moreover, we thank the team of Nomos, in particular Dr. Matthias Knopik and Anke Troeltzsch, for their steady, substantial support in bringing the work on this commentary to a good end.

We hope that this commentary may guide practitioners – within the EPPO, in the national prosecution services, judges, and lawyers – in the interpretation of the landmark EPPO Regulation. By providing an in-depth analysis of the intricate interplay of the provisions and their constitutional, political, and practical context, we trust that this commentary will also provide a starting point for further research on the EPPO and individual aspects of the EPPO Regulation. Finally, we aim to assist political decision-makers

Preface and Acknowledgements

(on the level of the EU and in the Member States) in assessing the practical implementation of the EPPO Regulation by contextualizing the Regulation's references to national law and the EPPO's relations to national prosecution services.

August 2020

Hans-Holger Herrnfeld

Dominik Brodowski

Christoph Burchard

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List of Authors

Dominik Brodowski Junior Professor of Criminal Law and Criminal Procedure at Saarland University, Saarbrücken, Germany; Dr. iur. (Tübingen University); LL.M. (University of Pennsylvania)

Articles 7, 21, 22, 29, 30, 38 to 41, 99 to 118, 120

Christoph Burchard Professor of German, European and International Criminal Justice, Comparative Law and Legal Theory, Goethe University Frankfurt am Main, Germany; Dr. jur. (Passau University); LL.M. (NYU)

Articles 1 to 6, 8 to 19, 32, 33, 37, 119

Hans-Holger Herrnfeld Senior Federal Public Prosecutor; Head of Division at the Federal Ministry of Justice and Consumer Protection, Berlin, Germany, Dr. jur. (University of Hamburg)

*Introduction, Articles 20, 23 to 28, 31, 34 to 36, 42 to 46, Introduction to Chapter VIII, Articles 47 to 98**

* The contributions to the commentary express solely the personal view of the author.

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Abbreviations

AD	Administrative Director of the EPPO
Am. J. Comp. L.	American Journal of Comparative Law
CEOS	Conditions of Employment of Other Servants of the European Union
cf.	confer
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
CISA	Convention Implementing the Schengen Agreement
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
CMS	Case Management System
COM	Commission
cont.	continued / continuator
COPEN	Council Working Party on Cooperation in Criminal Matters
CUP	Cambridge University Press
DÖV	<i>Die Öffentliche Verwaltung</i>
DPD	Directive (EU) 2016/680 [...] on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [...]
e.g.	<i>exempli gratia</i> (for example)
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECP	European Chief Prosecutor
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
edn.	edition
EDP(s)	European Delegated Prosecutor(s)
EEC	European Economic Community
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
ELJ	European Law Journal
ELR	European Law Reporter
EP(s)	European Prosecutor(s)
EPL	European Public Law
EPPO	European Public Prosecutor's Office
esp.	especially
et al.	<i>et alia/et altri</i> (and others)
etc.	<i>et cetera</i> (and so on)
ETS	European Treaties Series
EU	European Union
EuCLR	European Criminal Law Review
eu crim	eu crim – The European Criminal Law Associations' Forum
EUR	Euro
EUSR	Staff Regulations of Officials of the European Union
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
f./ff.	<i>folio</i> (following)
FD	Framework Decision
fdr./fdrs.	founder(s)
FRA	European Union Agency for Fundamental Rights
GA	<i>Goltdammer's Archiv für Strafrecht</i>
GC	General Court
GDPR	Regulation (EU) 2016/679 [...] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
GVG	<i>Gerichtsverfassungsgesetz</i> (Courts Constitution Act of Germany)
HRRS	<i>HRRS – Onlinezeitschrift für Höchststrichterliche Rechtsprechung zum Strafrecht</i>
i.a.	<i>inter alia</i> (among others)
i.e.	<i>id est</i> (that is)

Abbreviations

iAD	interim Administrative Director of the EPPO
IBOA(s)	institution(s), body/-ies, office(s) or/and agency/-ies
IGO	intergovernmental organisation
JEECL	Journal of Eastern-European Criminal Law
JZ	<i>JuristenZeitung</i>
KriPoZ	<i>Kriminalpolitische Zeitschrift</i>
KritV (= CritQ, RCrit)	<i>Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation</i>
MJECL	Maastricht Journal of European and Comparative Law
mn.	margin number(s)
NJECL	New Journal of European Criminal Law
NJW	<i>Neue Juristische Wochenschrift</i>
n.	footnote
no.	numero (number)
NSZ	<i>Neue Zeitschrift für Strafrecht</i>
NZWSt	<i>Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht</i>
OJ	Official Journal of the European Union
OLAF	Office Européen de Lutte Anti-Fraude (European Anti-Fraud Office)
OUP	Oxford University Press
para.	paragraph/paragraphs
PC	Permanent Chamber of the EPPO
PIF	<i>Protection des Intérêts Financiers</i> (Protection of the Financial Interests)
POTS	plain old telephone service
resp.	respectively
RIDP	<i>Revue internationale de droit pénal</i>
SNE(s)	seconded national experts
StraFo	<i>Strafverteidiger Forum</i>
StV	<i>Strafverteidiger</i>
suppl.	supplement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TLR	Tulsa Law Review
UR	<i>Umsatzsteuer-Rundschau</i>
VAT	value-added tax
VerfBlog	<i>Verfassungsblog</i>
Vol	volume
wistra	<i>Zeitschrift für Wirtschafts- und Steuerstrafrecht</i>
ZEuS	<i>Zeitschrift für europarechtliche Studien</i>
ZRP	<i>Zeitschrift für Rechtspolitik</i>
ZStW	<i>Zeitschrift für die gesamte Strafrechtswissenschaft</i>

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A. Genesis of the EPPO Regulation

The Council Regulation (EU) 2017/1939 on the establishment of the European Public Prosecutor's Office ("the EPPO") was adopted on 12 October 2017¹ and entered into force on 20 November of that year. In accordance with Article 120 of the Regulation, the EPPO shall assume its operational work on a date to be determined by a decision of the Commission, which shall not be earlier than three years after the date of entry into force of the Regulation. The **legislative history** of the EPPO Regulation began on 17 July 2013 when the European Commission published its Communication "Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust"², presenting a package of measures addressing institutional aspects of protecting the Union's financial interests. This package consisted of two legislative proposals: a "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office"³ as well as a "Proposal for a Regulation on the establishment of the European Agency for Criminal Justice Cooperation ('Eurojust')"⁴. The package also included a Communication on "Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office"⁵. The presentation of the 2013 package followed up to an earlier Commission communication on the subject matter of protection of the Union's financial interest,⁶ as well as the Commission's proposal for the so-called "PIF-Directive", harmonizing, to some extent, the relevant criminal law provisions on the protection of the Union's financial interests⁷.

The proposal to establish the EPPO as a new Union body with an exclusive competence for the investigation and prosecution of crimes committed against the financial interest of the Union was the core element of the package proposed by the Commission in July 2013. The Commission's intention behind the proposal to replace the Council Decision on Eurojust⁸ by a new Eurojust Regulation was to create synergies between the

¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, 1.

² COM (2013) 532 final, 17.7.2013.

³ COM (2013) 534 final, 17.7.2013.

⁴ COM (2013) 535 final, 17.7.2013.

⁵ COM (2013) 533 final, 17.7.2013.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293 final, 16.5.2011.

⁷ Commission proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11.7.2012.

⁸ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, 14.

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EPPO and Eurojust,⁹ as well as to overcome deficiencies in the existing legal framework for Eurojust¹⁰. The Communication on OLAF sketched out further legislative measures which the Commission considered necessary to further amend the OLAF Regulation, which had already been under revision at that time¹¹, with a view to adjusting the legislative framework on OLAF in light of the future competences of the EPPO and the needs for an effective cooperation between OLAF and the EPPO.¹² Following the adoption of the PIF Directive in July 2017¹³ and the EPPO Regulation in October 2017¹⁴, negotiations on the proposal for a new Eurojust Regulation were concluded in 2018,¹⁵ whereas negotiations on the Commission's proposal for an amendment of the OLAF Regulation¹⁶ were still ongoing as of early 2020.

- 3 The **idea of establishing a European Public Prosecutor's Office** has a **long history**. The needs for a better protection of the Union's financial interests, but also concerns, as well as various proposals have been well documented.¹⁷ The Commission already issued a Green Paper on the EPPO in 2001¹⁸ and a follow-up report thereto in 2003.¹⁹ The Lisbon Treaty, which entered into force in December 2009, laid the ground for establishing the EPPO by inserting the present Article 86 into the Treaty on the Functioning of the European Union, providing a legal basis for establishing the EPPO "from Eurojust". Following further consultations, the Commission then presented its proposal for the EPPO Regulation in July 2013.
- 4 Even prior to the presentation of the proposal by the Commission, discussions had started at the EU level as well as between Member States, in particular on the appropriate design of the EPPO as a new European judicial body, which evidently would assume competences previously exercised by national authorities. Against this background, the idea of establishing the EPPO met different degrees of enthusiasm when the Commission presented its proposal for the EPPO Regulation. Under the so-called "**yellow card procedure**" in accordance with Protocol (No 2) "on the Application of the Principles of Subsidiarity and Proportionality", 14 parliaments of 12 Member State voiced their opin-

⁹ Cf. COM (2013) 532 final, 17.7.2013, 8.

¹⁰ Cf. COM (2013) 532 final, 17.7.2013, 4.

¹¹ Regulation (EU, EURATOM) 883/2013 of the European of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, 1.

¹² Cf. COM (2013) 532 final, 17.7.2013, 9.

¹³ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, 29; cf. for the genesis and an analysis of this directive → Article 22 mn. 8 ff.

¹⁴ Council regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, 1.

¹⁵ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, 138. On this regulation, → Article 100 mn. 3 ff.

¹⁶ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM (2018) 338 final, 23.5.2018. On OLAF and its legal framework, → Article 101 mn. 3 ff.

¹⁷ Cf., i.a., Mireille Delmas-Marty and John Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, Vol. 1 (2000); Katalin Ligeti, 'The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?' (2011) 1 EuCLR, 123; Marianne L. Wade, 'A European public prosecutor: potential and pitfalls' (2013) 59 Crime, Law and Social Change, 439.

¹⁸ Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, 11.12.2001.

¹⁹ Follow-Up Report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, 19.3.2003.

ion on the proposal and questioned the proper observance of the subsidiarity principle. The Commission, in accordance with Article 7(2) of that Protocol, provided its reply to the parliaments on 2 December 2013, essentially stating that in its view, the “proposal complies with the principle of subsidiarity enshrined in Article 5(3) TEU, and that a withdrawal or an amendment of that proposal is not required”²⁰ and thus maintained its proposal.

Formal **negotiations in the Council Working Group COPEN** started in October 2013 and were largely concluded in that format by October 2016. During that period, the Justice and Home Affairs Council regularly received reports from the Presidency with a view to a possible “partial general approach” on certain sections or articles of the draft regulation, and eventually obtained at least a “broad conceptual approach” on the text presented. Several controversial issues that were still unresolved in October 2016 were then further discussed in other formats. A consolidated version of the full draft text was presented to the December 2016 Justice and Home Affairs Council for agreement. While the majority of Member States expressed at least “general support” for the draft text and commitment to participate in the establishment of the EPPO, some Member States still had certain concerns with the proposal. In line with its intervention at the Council meeting in December, Sweden formally stated in January 2017 that it would, at the present time, refrain from participating in the establishment of the EPPO. This announcement provided the basis for the Council to formally register the absence of unanimity, required under Article 86(1) TFEU for the adoption of the EPPO Regulation. This was subsequently confirmed by the meeting of the European Council on 9 March 2017 – thus giving way to the possibility for establishing the EPPO under the enhanced cooperation procedures (*infra* → mn. 8).

In parallel to this process, the Slovak and the Maltese Council Presidencies continued efforts to reach agreement (between the “willing” Member States) on the full text of the EPPO Regulation. By letter of 3 April 2017, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission that they wished to participate in an **enhanced cooperation** on the establishment of the EPPO. In accordance with the third subparagraph of Article 86(1) TFEU, the authorisation to proceed with enhanced cooperation thus was “deemed to be granted”. Subsequently, also Latvia, Estonia, Austria and Italy indicated their wish to participate in the enhanced cooperation to establish the EPPO. The fact that the Regulation would thus be binding only for the “participating Member States” required some further amendments to the draft Regulation. Also, a few of the Member States that eventually expressed their willingness to participate in the enhanced cooperation had requested some further amendments to the draft text. Negotiations were finally concluded in May 2017. Following the **European Parliament’s approval** given on 5 October 2017²¹, the

²⁰ Communication from the Commission to the European Parliament, the Council and the national Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2013) 851 final, 27.11.2013, 13.

²¹ P8_TA(2017)0384 = OJ C 346, 27.9.2018, 246; cf. for earlier critical positions of the European Parliament on the Commission proposal: Resolution of 12 March 2014 (P7_TA(2014)0234 = OJ C 378, 9.11.2017, 151) and on the draft EPPO Regulation, as it evolved in the course of the negotiations in the Council : Resolution of 29 April 2015 (P8_TA(2015)0173 = OJ C 346, 21.9.2016, 27); cf. for further analysis: Wouter van Ballegoij, ‘European Public Prosecutor’s Office – A View on the State of Play and Perspectives from the European Parliament’ in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor’s Office* (2018), 27; Anne Weyemberg and Chloé Brière, *Towards a European Public Prosecutor’s Office (EPPO). Study for the LIBE Committee* (2016).

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EPPO Regulation was adopted by the Justice and Home Affairs Council (the 20 participating Member States²²) at its meeting on 12 October 2017.

B. Article 86 TFEU – legal basis – enhanced cooperation

- 7 The **legal basis for the EPPO Regulation**, Article 86 TFEU, was inserted by the Lisbon Treaty. It allows (“may”) the establishment of a European Public Prosecutor’s Office, by way of regulations, “from Eurojust”. The purpose and meaning of the latter phrase has been subject to different considerations.²³ In practice, it remained a rather empty promise and merely gave reason to confirm the EPPO’s special relationship with Eurojust in Article 3(3) of the EPPO Regulation. In accordance with Article 86(1) TFEU, the task of the EPPO, as a minimum, is to “combat crimes affecting the financial interests of the Union”; its specific competences in this respect are to be determined by the regulation(s) establishing the EPPO (cf. Article 86(3) TFEU). An extension of competences to other types of crime would be possible, subject to a decision of the European Council (cf. Article 86(4) TFEU; *infra* → mn. 11). In accordance with paragraph 2 of Article 86 TFEU, the EPPO shall be responsible for “investigating, prosecuting and bringing to judgement the perpetrators of and accomplices” in the offences determined in the regulations(s) establishing the EPPO and it “shall exercise the functions of prosecutor in the competent courts of the Member States”. The essence of this provision is reflected in Article 4 of the EPPO Regulation, clarifying that the EPPO’s task, contrary to the prosecutor’s tasks in some Member States, is not only to prosecute the case once an investigation conducted by another authority has been completed, but that the EPPO’s European Delegated Prosecutors (“EDP”) have full responsibility already for leading the investigations (→ Article 28 mn. 2). Article 86 TFEU does not address the enforcement of judgments, which in some Member States is also a responsibility of or carried out under supervision of the prosecution service. Article 4 of the EPPO Regulation is more specific in this respect, clarifying that the EPPO’s tasks end once the case “has been finally disposed of”, thus not including the enforcement phase. Finally, paragraph 2 of Article 86 TFEU specifically provides that the EPPO shall prosecute the cases in the national courts (→ Article 36 mn. 3) – and thus not at the CJEU, which has not been designed to function as such a criminal court anyhow.
- 8 Article 86(1) TFEU provides for a “**special legislative procedure**” (cf. Article 289(2) TFEU), under which the regulation(s) is/are to be adopted by the Council, acting unanimously after obtaining the consent of the European Parliament. In order to ensure that the establishment of the EPPO would not be blocked by just a few Member States, subparagraphs two and three of Article 86(1) TFEU provide for a special mechanism to establish the EPPO by way of **enhanced cooperation**²⁴, which has been applied in the present case. Contrary to the normal procedure for a Council Decision to authorize a

²² That group was subsequently joined by Malta and the Netherlands – cf. *infra* → mn. 9.

²³ Cf. i.a. Markus Kotzur, in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds.), *European Union Treaties* (2015), Article 86 TFEU mn. 1; Katalin Ligeti and Anne Weyembergh, ‘The European Public Prosecutor’s Office: Certain Constitutional Issues’ in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 53 (69 ff.); José Lopes da Mota, ‘Eurojust – The Heart of the Future European Public Prosecutor’s Office’ [2008] eucrim, 62; Jorge A. Espina Ramos, ‘The Relationship Between Eurojust and the European Public Prosecutor’s Office’ in Lorena Bachmaier Winter (ed.), *The European Public Prosecutor’s Office* (2018), 87.

²⁴ Cf. for an analysis: Julian J. E. Schutte, ‘Establishing Enhanced Cooperation Under Article 86 TFEU’, in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 196.

group of Member States to establish enhanced cooperation in a particular area covered by the EU Treaties (cf. Article 329 TFEU), no such specific Council Decision is necessary in the case of Article 86(1) TFEU. As the European Council on 9 March 2017 did not reach consensus, it was sufficient for a group of “at least nine Member States” to formally express their “wish to establish enhanced cooperation”. In accordance with the third subparagraph of Article 86(2) TFEU, the authorization to proceed with enhanced cooperation referred to in Article 20(2) TEU and Article 329(1) TFEU then was “deemed to be granted and the provisions of enhanced cooperation shall apply” (i.e. Article 20 TEU and Articles 326 to 334 TFEU).

As a consequence, not only the adoption of the EPPO Regulation, but also all further decisions by the Council in the implementation of the EPPO Regulation or its future amendment are taken with only the **participating Member States** enjoying a right to vote (cf. Article 330 TFEU). Any other Member State may at any point in time express its wish to participate in the enhanced cooperation (cf. Article 331 TFEU). Subsequent to the adoption of the EPPO Regulation by 20 Member States in October 2017, the Netherlands and Malta have joined the group (→ Article 120 mn. 17), following the necessary approval by the Commission (Article 331 TFEU)²⁵. Establishing the EPPO by way of enhanced cooperation means that **non-participating Member States** are not bound by the EPPO Regulation (cf. Article 20(4) TEU),²⁶ and the participating Member States – as well as the EPPO created by their decision – “shall respect the competences, rights and obligations” of the non-participating Member States while, in turn, the latter are obliged not to impede the enhanced cooperation (cf. Article 327 TFEU). As the EPPO was to be established by enhanced cooperation, the Council considered it appropriate to specifically clarify by way of a definition (cf. Article 2 No. (1) of the EPPO Regulation) that the term “Member State” used in the Regulation normally only refers to the participating Member States with some exceptions in particular in Chapter VIII, where certain provisions on data protection also refer to (but not impose obligations on) non-participating Member States (→ Introduction to Chapter VIII mn. 10). The definition of the term “Member State” as applying only to participating Member States is particularly relevant for the scope of the EPPO’s territorial and personal competence (→ Article 23 mn. 3). The fact that the EPPO was to be established by way of enhanced cooperation also required the insertion of specific provisions on the cooperation between the EPPO and non-participating Member States (cf. Article 105) as well as on the financing of the EPPO by the participating Member States (cf. Article 91(7) and (8)).

C. Material competence of the EPPO

As provided for in Article 86(2) TFEU, the EPPO Regulation, aside from a general description of the EPPO’s tasks (cf. Article 4, *supra* → mn. 7), determines its “**material competence**” in Article 22. It does so not by way of independent and complete substantive criminal law provisions on offences within the competence of the EPPO. Instead, it

²⁵ Commission Decision (EU) 2018/1094 of 1 August 2018 confirming the participation of the Netherlands in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 196, 2.8.2018, 1; Commission Decision (EU) 2018/1103 of 7 August 2018 confirming the participation of Malta in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 201, 8.8.2018, 2.

²⁶ Also specifically acknowledged in Recital 9: “This Regulation should be binding in its entirety and directly applicable only in the Member States which participate in enhanced cooperation on the establishment of the EPPO, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU.”

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refers primarily to the PIF-Directive²⁷ “as implemented by national law” (cf. Article 22(1)). In addition, the Regulation provides the EPPO with competence regarding the offence of participation in a criminal organization if – and only if – the focus of the criminal activity is to commit PIF offences (→ Article 22 mn. 94 ff). Also, the Regulation allows the EPPO to extend its investigations and prosecutions in a particular case to other types of criminal conduct that is “inextricably linked” to a PIF offence under investigation/prosecution (→ Article 22 mn. 99 ff). The EPPO Regulation determines the “**territorial and material competence**” of the EPPO, which builds on but does not affect the jurisdictional principles of the Member State’s criminal law (→ Article 22 mn. 1; → Article 23 mn. 4). The competences of the EPPO are in principal **shared with national authorities**; different from the Commission proposal²⁸, the Regulation does not award the EPPO with an exclusive competence. Thus, the national authorities are not excluded from the possibility to initiate an own investigation in respect of offences for which the EPPO is (also) competent. The EPPO’s competence, however, has priority whenever it decides to exercise its competence (cf. Article 25(1); → Article 25 mn. 2). In addition to the definition of the EPPO’s competences in Articles 22 and 23, the Regulation provides in Article 25 paragraphs 2 and 3, rules obliging the EPPO to **refrain from exercising its competence** i.a. in respect of minor cases involving only a limited damage to the Union’s financial interests.

- 11 In line with Article 86(1) TFEU, Article 22 of the Regulation only provides the EPPO with a competence to investigate and prosecute offences affecting the financial interest of the Union.²⁹ While paragraph 1 of Article 22 contains a “dynamic reference” to the PIF Directive, the wording used here (“competent in respect of criminal offences affecting the financial interest of the Union”) as well as in Article 4 would ensure that the scope of the legal basis of Article 86(1) TFEU is observed even if the legislator were to subsequently amend the PIF Directive to include also offences in respect of which it may be questionable whether they actually do affect the financial interests of the Union (→ Article 22 mn. 90). Any **extension of the EPPO’s material competence** beyond the scope of Article 86(1) TFEU would require an amendment of this Treaty provision. Article 86(4) TFEU does allow for such an amendment by way of a simplified procedure, authorizing the European Council to amend paragraph 1 of Article 86 TFEU. In order to do so, the European Council would have to decide unanimously, including the Member States not participating in the EPPO.³⁰ On the basis of such an amended provision of Article 86(1) TFEU, the Council – acting in the format of the Member States participating in the enhanced cooperation – could then, again by unanimous decision, amend the EPPO Regulation in order to extend its material competences accordingly. Already on

²⁷ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, OJ L 198, 28.7.2017, 29; for an analysis cf. → Article 22 mn. 8 ff.

²⁸ On the Commission proposal and the negotiations in the Council, cf. Petter Asp, ‘Jeopardy on European Level – What is the Question to which the Answer is the EPPO?’ in Petter Asp (ed.), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (2014), 51; see also Giovanni Grasso, Rosaria Sicurella and Fabio Giuffrida, ‘EPPO Material Competence: Analysis of the PIF Directive and Regulation’ in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 23 (32).

²⁹ For an analysis of this phrase, cf. Giovanni Grasso, Rosaria Sicurella and Fabio Giuffrida, ‘EPPO Material Competence: Analysis of the PIF Directive and Regulation’ in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 23 (27 ff).

³⁰ Cf. page 4 of the Commission’s Communication referred to below (n 31).

12 September 2018, the Commission presented a communication³¹, “inviting” the European Council to take such a decision on the amendment of Article 86(1) TFEU with a view to extending the EPPO’s competence to terrorist offences affecting more than one Member State. While, under the Treaty provisions, the Commission does not have a formal “right of initiative” for making such amendments, the Commission considered that this does not prevent it from presenting an initiative.³² So far, the European Council has refrained from taking up this Commission initiative. Apparently, there is a wide-spread understanding that the EPPO, as a new Union body, should first become fully functional and provide proof of its effectiveness, before an extension of competences to such a vital matter as the fight against terrorism could be considered.

D. Structure of the EPPO and cooperation with national authorities

The Regulation provides the EPPO with a rather complex structure in its Central Office in Luxemburg as well as a “decentral level” composed of European Delegated Prosecutors (“EDPs”) in the Member States (cf. Articles 8 to 13)³³. In line with Article 86(1) TFEU, the EPPO Regulation prescribes a role for the EDPs to lead the investigations to be undertaken by the EPPO (*supra* → mn. 7). While the EPPO is a Union body operating as one single office (cf. Article 8(1)), the EPPO will, nevertheless, to a large extent need to rely on **national authorities for carrying out investigation measures**. As provided for in Article 28(1), the EDPs may either undertake the investigation measures and other measures on their own or instruct the competent authorities in their respective Member State to do so. In addition, the EPPO may invite and/or request Eurojust (cf. Article 100(2), → Article 100 mn. 15 ff.), OLAF (cf. Article 101(3), → Article 101 mn. 25 ff.) and Europol (cf. Article 102(2), → Article 102 mn. 15 ff.) to provide certain types of assistance within their respective mandates, which, however, does not include the taking of criminal investigation measures on behalf of the EPPO. Also, and different from the original Commission proposal³⁴, the members of the EPPO’s Central Office are not intended to undertake investigation measures in the Member States – aside from a limited possibility for the supervising European Prosecutor (cf. Article 12) to assume the role of an EDP of his/her Member States in exceptional circumstances by deciding to conduct the investigations personally (cf. Article 28(4)). Thus, even though the Central Office may have certain staff members who can, on request in an individual case, support the investigations conducted by the EDPs, the success of the EPPO will to a large extent depend on the competent national authorities, their availability, their resources³⁵ and their commitment, all of which are necessary to actively assist and support the investigations conducted by the EPPO (→ Article 28 mn. 4). And while the EPPO Regulation “is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organized” (cf. Recital 15), it nevertheless may require

³¹ Communication from the Commission to the European Parliament and the European Council “A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to cross-border terrorist crimes”, COM(2018) 641 final, 12.9.2018; for further details: Adam Juszcak and Elisa Sason, ‘Fighting Terrorism through the European Public Prosecutor’s Office (EPPO)?’ [2019] *eu crim*, 66.

³² Cf. page 4 of the Communication (n 31).

³³ For a critical review, cf., e.g., Lothar Kuhl, ‘The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?’ [2017] *eu crim*, 135.

³⁴ Cf. Article 18(6) of the proposal (COM (2013) 534 final), which gave such a role to the European Chief Prosecutor.

³⁵ Cf. → Article 91 mn. 6, → Article 96 mn. 16.

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national legislative implementation measures³⁶ in this respect in particular, where the national prosecution service is not necessarily responsible for leading criminal investigations, but traditionally shares that role with other actors such as police or customs authorities or the *juge d'instruction*.

E. Procedural law framework for the EPPO

- 13 Article 86(3) TFEU provides that the regulation establishing the EPPO “shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”. Much consideration has been given to the needs and possible content of an own **code of criminal procedure for the EPPO**. The Commission had provided financial support to a project chaired by the University of Luxembourg to draft “European Model Rules for the Procedure of the future European Public Prosecutor's Office”³⁷. However, following in this respect the underlying concept of the Commission's proposal for the EPPO Regulation³⁸, the legislator decided to take a different path. The EPPO Regulation does contain procedural rules on initiating (Articles 26 and 27), conducting (Articles 28 to 33) and termination (Articles 34, 35 and 39) of investigations, on the prosecution before national courts (Articles 36 and 40), the admissibility of evidence (Article 37), procedural safeguards (Article 41) and judicial review (Article 42). Many of these provisions go into great detail in respect of internal responsibilities and decision-making competences – a result, perhaps, of the difficult negotiations in the Council Working Group on the question of a proper structure for the EPPO and the roles to be played by its different actors and organizational layers. However, on substance, many of these provisions are not “self-standing” as such, but refer to applicable national law in order to specify the conditions or procedures for their application. Furthermore, Article 5(3) clearly shows that the EPPO Regulation is not expected to provide final answers to all questions of criminal procedure law when it states that “national law shall apply to the extent that a matter is not regulated by this Regulation”.

³⁶ Cf., e.g., several contributions in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor's Office at Launch* (2020): Robert Kert, ‘Specific Aspects of the Implementation of the EPPO Regulation in Austria’, 137; Hans-Holger Herrnfeld, ‘Implementation of the EPPO Regulation: a perspective from Germany’, 149; Petri Freundlich, Dan Helenius and Samuli Miettinen, ‘The European Public Prosecutor's Office, enhanced cooperation and Finland’, 163; Gintaras Svedas and Ugnė Markevičiūtė, ‘The EPPO implementation: A perspective from the Republic of Lithuania’, 171; Angelo Marletta, ‘It takes two to tango. The relationship between the European Public Prosecutor and the *juge d'instruction* from the Luxembourg perspective’, 187; Nicholas Franssen, ‘Comments on the EPPO from a Dutch perspective’, 197; cf. also: Pauline Dubarry and Emmanuelle Wachenheim, ‘La naissance d'un Parquet européen – les enjeux de sa mise en œuvre en France’ [2018] *eu crim*, 121; Jocelyne Leblois-Happe and Florie Winckelmuller, ‘Impact of the Setting Up of a European Public Prosecutor's Office on National Judicial Systems – A French perspective’ in Petter Asp (ed.), *The European Public Prosecutor's Office, Legal and Criminal Policy Perspectives* (2014), 279; David Vilas Álvarez, ‘The EPPO Implementation – A Perspective from Spain’ [2018] *eu crim*, 124.

³⁷ Available at: http://www.eni.uni.lu/fdef/news/a_blueprint_for_the_european_public_prosecutor_s_office_eu_model_rules_of_criminal_procedure.

³⁸ Cf. in particular Articles 11(3) and 26(3) of the Commission proposal for the EPPO Regulation; for a critical review, see Katalin Ligeti and Anne Weyembergh, ‘The European Public Prosecutor's Office: Certain Constitutional Issues’ in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor's Office – An Extended Arm or a Two-Headed Dragon?* (2015), 53 (64 ff).