

Compliance with the EPPO Regulation

Study Results on the “Implementation” of Council Regulation (EU) 2017/1939 in the Member States

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Article

ABSTRACT

The European Public Prosecutor’s Office, being the largest project in the history of European Criminal Law, is based on Council Regulation (EU) 2017/1939 (“the EPPO Regulation”) but has nevertheless required substantial adjustments to national criminal law in order to function. This article presents the results of a compliance study commissioned by the European Commission to assess whether the national legislation of the 22 Member States participating in the EPPO is in conformity with the EPPO Regulation.

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I. Introduction

The establishment of the European Public Prosecutor's Office (EPPO) by Council Regulation (EU) 2017/1939 of 12 October 2017 (hereinafter: "EPPO Regulation")¹ was a major step in European integration and in the field of European criminal law. This historic project posed unprecedented challenges, not only for the newly established body of the Union but also for the Member States. The problems for the Member States stem to a large extent from the complex structure of the EPPO, which, after a rocky and controversial debate on the nature and structure of the possible body, resulted in a compromise that was not acceptable for all Member States: The EPPO was constructed between the borderlines of recognising national sovereignty (given that criminal law is a particularly important and sensitive issue in the national legal systems) and finding an effective approach to transnational criminal investigations (that should go far beyond the existing legal instruments of European cooperation in criminal matters).²

Because of the complexity of the structure and hybrid nature of the EPPO, which requires an interplay between national law and EU law, on the one hand, and national authorities and the EPPO, on the other, the EPPO does not operate simply based on the – in principle, directly applicable – EU Regulation. Although the EPPO Regulation takes precedence in the case of conflicting national law, it could by no means solve all legal problems and aspects of national law. Hence it required implementing national legislation – quite unusual for a Regulation.

Against this background, the regular conformity assessment of national measures, which the European Commission regularly carries out as a follow-up to European legislation, was not only of particular interest but also a challenging undertaking in this case. The Commission's Directorate-General for Justice and Consumers (hereinafter: "DG JUST") therefore tasked external experts with a study preparing the assessment.³ The study culminated in a final report (hereinafter: "Final Report") with two Annexes (Annex 1 and Annex 2)⁴ as well as a report replying on specific aspects after an extension of the study (hereinafter: "Extension Report").⁵

II. Overview

The study examined the compliance of the legal systems of the 22 participating Member States (at the time of the study) with the EPPO Regulation. It covered the articles of the Regulation that are relevant to the Member States and thus might require "implementation" in their legal systems, in particular those dealing with the setting-up of a structure for the European Delegated Prosecutors (hereinafter: the "EDPs") and with the relevant rules of procedure governing the work of the EDPs. An assessment of the articles dealing directly with the exclusively European part of the EPPO, such as the provisions relating to the European Chief Prosecutor (hereinafter: the "ECP"), the Permanent Chambers, the College, and (in so far as they do not concern national matters) the European Prosecutors (hereinafter: the "EPs") was not part of the study.⁶

1. Structure of the study reports

The Final Report presents the main findings of the study in the form of a comparative legal analysis. It starts by addressing an overarching issue that has an impact on several compliance issues: the role of national authorities in the EPPO's criminal proceedings, which may affect the overall tasks and independence of the EPPO.⁷ It then deals with the issues regulated by the EPPO Regulation: establishment, tasks, and basic principles;⁸ structure, status, and organization;⁹ competences;¹⁰ and relevant rules of procedure.¹¹ A brief section of the report is devoted to procedural safeguards,¹² information processing,¹³ financial and staff provi-

sions,¹⁴ and general provisions.¹⁵ Annex I provides an analysis of the situation in each participating Member State, giving an illustrative overview on full compliance, partial compliance, and non-compliance with the EPPO Regulation. Annex 2 provides an equally descriptive article-by-article summary table, which provides a good depiction of which articles are causing problems for national jurisdictions.

As the study identified a number of issues causing “implementation” problems in national law, DG Just requested an extension of the study with regard to the following topics, which are dealt with separately in more detail in the Extension Report: the question of the independence of the EPPO;¹⁶ material competence of the EPPO;¹⁷ operations of the EPPO, especially the right of evocation and the access to information;¹⁸ cross-border-investigations, especially in regard to judicial authorization, the admissibility of evidence, and translations.¹⁹ While the Final Report assesses the compliance of the national legislation of the Member States with the EPPO Regulation, the Extension Report looks at certain aspects of the EPPO Regulation that may impact the effectiveness of the EPPO and its working practices, which do not necessarily stem from the lack of compliance of Member States’ national legislation with the EPPO Regulation but extend to other issues that may arise, for example, from the unclear wording of the Regulation itself.

2. Methodology of the study

The study is based on sound comparative research.²⁰ The country rapporteurs of the participating countries completed a correlation table on the relevant articles of the EPPO Regulation, taking into account the respective national measures of implementation (either already existing measures or measures being drafted specifically for the implementation of the EPPO Regulation into national law). In addition, the country rapporteurs interviewed either an EDP or an EP from the respective jurisdiction. After a review process by the core project team, each country rapporteur drafted a national summary report published in Annex I.²¹ The national reports/correlation tables formed the basis for the comparative analysis presented in the Final Report written by the core project team.

For the extension study, an in-depth analysis was carried out of articles that were either problematic because of the wording of the Regulation itself, or because non-compliance has a clear impact on the functioning of the EPPO, or because a significant number of Member States did not fully comply with the EPPO Regulation.²² The study team conducted structured interviews with EDPs/EPs as well as with representatives of the Operations and College Support Unit at the EPPO’s central level. The findings of the interviews are presented in the Extension Report.

III. Results in Detail

The study shows that the vast majority of Member States fully or almost fully comply with the EPPO Regulation.²³ The following presentation is therefore limited to those aspects where no (full) implementation of the requirements was found or to those which impact the effectiveness of the EPPO’s functioning.

1. Independence and tasks of the EPPO

The independence of the EPPO is a key concept of the EPPO Regulation, as set out in its Art. 6(1). Independence is, in principle, not a problem in systems that mainly follow an adversarial system (such as AT, BG, CZ, DE, EE, HR, IT, LT, LV, NL, PT, RO, and SK). In these countries, criminal investigations and prosecutions are led by national public prosecutors and the investigative judge rarely intervenes, e.g., only to ensure the protection of fundamental rights during the investigation. However, in legal systems with a more inquisitorial approach (such as BE, EL, ES, FR, LU, and SI), in which an investigative judge traditionally not only exercises judicial control over the investigations but also actively directs the investigative work and/or decides on the

prosecution, problems arise on several fronts. These systems still confer some residual powers upon the investigative judge, which hampers the investigative powers of the EPPO as exercised by EDPs/EPs.²⁴ One example is Belgium, where, pursuant to Art. 79 of the Judicial Code, a dual system of criminal investigations either led by prosecutors or the investigative judge is also applicable to EPPO cases; if the investigations of PIF offences require intrusive investigative measures (as per Arts. 55 and 56 of the Belgian Code of Criminal Procedure), the investigation is led by the investigative judge and not by the Belgian EDPs/EP.²⁵ Generally speaking, the investigation tasks and the basic principles of the activities of the EPPO under Arts. 4, 5(4), 28, and 30 EPPO Regulation are not fully implemented in all Member States.²⁶

However, it is not only the system of investigative judges that causes problems but also the fact that other national authorities (often specialised agencies, such as customs authorities or “higher” prosecution authorities, such as the Attorney General, or national judicial authorities, such as a Judicial Council) retain their investigative and/or prosecutorial powers. The result is that the EDPs/EPs are unable to exercise the investigation²⁷ and prosecutorial powers²⁸ they are required to perform according to the Regulation.²⁹ In addition to these problematic powers, situations in which reporting obligations to and agreements of national authorities are required before the EPPO can carry out and perform its duties also affect the independence of the EPPO (although to a lesser extent). For example, Dutch law requires the Board of Prosecutors General to check the decision of the EPPO to use certain investigative techniques.³⁰ This is in conflict with Art. 12(4) EPPO Regulation, which states that in cases in which national law provides for the internal review of certain acts within the structure of a national prosecutor’s office, the acts of the EDPs shall be reviewed exclusively by the EPs, on the basis of the internal rules of procedure of the EPPO.

In addition, other factors were identified as potentially affecting the independence of the EPPO: the lack of transparency in the appointment procedure of the EPs; the lack of national career guarantees after the end of the mandate of the EPs (or ECP); the control by national authorities over the “necessary” resources and equipment of the EDPs; and the national authorities’ provision of “adequate arrangements” for social security, pension, and insurance coverage.³¹

In contrast to the problems with national authorities, the study did not identify any problems involving the influence of European Union institutions, bodies, offices, or agencies (IBOAs) on the EPPO.³² The only noteworthy aspect was the access of the EPPO to certain databases. Art. 43(2) EPPO Regulation provides that the EPPO shall have access to information stored in Union databases. Access to databases with a purely/ mainly administrative purpose, however, such as ARACHNE (supporting administrative controls in the field of European investment and structural funds), is problematic, as some Member States (AT, DE, DK, FI, and SE) have not agreed to the use of the system for criminal investigations.³³ In this regard, the (general and largely unresolved) question of the use in criminal proceedings of data stored for administrative/preventive purposes also applies to the EPPO.³⁴

2. EPPO’s competence and its exercise

Concerning the material competence of the EPPO according to Art. 22 EPPO Regulation, the study showed that there are almost no compliance problems.³⁵ However, this positive assessment cannot conceal the fact that linking the material competence of the EPPO to the offences defined in Directive (EU) 2017/1371³⁶ (the “PIF Directive”) makes the EPPO dependent on the Member States’ understanding of these offences. The relevant provisions defining the offences for which the EPPO is competent are not found in the PIF Directive itself but rather in the transposition of its provisions into national law. The way in which the Directive has been transposed varies widely among Member States, so that the offences can only be considered partially harmonised.³⁷ This lack of harmonisation between the legal systems of the Member States hinders the effective work of the EPPO and may lead to non-aligned practices in the handling of PIF offences in the

Member States.³⁸ In the same vein, Art. 25(3) EPPO Regulation, which elaborates on the exercise of the EPPO's competence in case of non-PIF offences inextricably linked to PIF offences, also raises many legal and practical questions and requires further clarification or harmonisation.³⁹

The study also revealed some other problems concerning the exercise of the competence of the EPPO under Arts. 24 and 25 EPPO Regulation. In many Member States, the timely and direct information of the EPPO, the transfer of proceedings to the EPPO, and the attribution of competence between the national prosecution service and the EPPO have not been resolved in a compliant manner.⁴⁰ Art. 24(1) EPPO Regulation, for example, stipulates the reporting of possible EPPO cases without undue delay; however, several Member States (BE, CY, CZ, ES, FI, HR, MT, and PT) provide in their legislation that the national authorities should report to a national authority before reporting to the EPPO.⁴¹

Another example where a large number of Member States do not comply with the EPPO Regulation concerns Art. 25(6), which provides that, in the event of disagreement between the EPPO and the national authorities, the national authorities competent to decide on the attribution of competence for prosecution at the national level, shall decide who is to be competent for the investigation of the case. Member States must therefore designate the national authority that will decide on the attribution of competence. In this context, Art. 25(6) must be read in conjunction with Art. 42(2)(c) EPPO Regulation, which provides that the ECJ shall have jurisdiction to give preliminary rulings on the interpretation of Arts. 22 and 25 EPPO Regulation in the event of a conflict of competence between the EPPO and the competent national authorities. However, many Member States have not designated a national authority as a "court" or "tribunal", which precludes that a request for a preliminary ruling be submitted to the CJEU (which has jurisdiction under Art. 267 TFEU in regard to questions raised before a "court or tribunal").⁴²

3. Rules of procedure

The majority of Member States fully comply with the procedural rules (which are rudimentary, as they are largely supplemented by national law) on investigation, investigative measures, prosecution, and alternatives to prosecution, as set out in Arts. 26 to 39 EPPO Regulation.⁴³ The main problems arise in systems with investigative judges.⁴⁴ For example, Art. 33(1) EPPO Regulation allows the handling EDP to order or request the arrest or pre-trial detention of the suspect or accused person in accordance with national law. Under Belgian national law, however, an arrest warrant or pre-trial detention requires a "judicial inquiry" and thus falls within the category of measures that are entirely under the control of the investigative judge; in such cases, the EDPs/EP cannot even request that the measures be carried out.⁴⁵

A specific issue that was addressed in the extension study concerned the question of judicial authorisation in the context of cross-border investigations.⁴⁶ Art. 31(3) EPPO Regulation requires the assisting EDP to obtain authorisation in accordance with national law if judicial authorisation is required under the law of the assisting EDP. At first sight, the question of compliance with the regulation does not pose a problem, as almost all Member States comply with this requirement.⁴⁷ However, the provision is not sufficiently clear if both Member States (of the handling and the assisting EDP) require judicial authorisation or if there are differing standards between them; also unclear is the extent of judicial review that can be carried out within the Member State of the assisting EDP, e.g., if a court in the Member State of the assisting EDP is required to approve an assigned measure already examined by a court in the Member State of the handling EDP. In this context, the question arises as to whether review can be carried out only of enforcement issues or also of the justification and adoption of the measure assigned. This deliberation on the understanding of Art. 31(3) gave rise to the first preliminary ruling on the EPPO Regulation, decided by the ECJ in December 2023.⁴⁸ The Court ruled that the review conducted in the Member State of the assisting EDP may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning its justification and

adoption. It is highly debatable whether this interpretation is in line with the wording of Art. 31(3); in any case, Member States will have to review and possibly partially amend their legislation in order to ensure that it meets the requirements expressed by the ECJ.⁴⁹

IV. Conclusions

The study on the implementation of the EPPO Regulation provides a unique insight into the most ambitious initiative to date concerning its criminal law integration into the EU. It clearly shows the range of existing approaches in the Member States and thus also enables a rarely found comparison of criminal procedural standards. Above all, however, it shows that – despite the complex structure of the EPPO and the great differences between the individual criminal law systems – transposition throughout Europe has been successful overall. However, the problems identified, particularly in the systems with an inquisitorial approach, also make it clear that a supranational criminal law system requires a minimum degree of harmonisation, particularly of the procedural rules according to which it can function and of the structure of national criminal law systems.

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; available at <<https://eur-lex.europa.eu/eli/reg/2017/1939/oj>> accessed 30 April 2024.↵
2. On the long history of the Regulation, see H. Herrnfeld, in: H. Herrnfeld, D. Brodowski and C. Burchard, *European Public Prosecutor's Office: Article-by-Article Commentary*, 2021, Introduction paras. 1-6.↵
3. The project was led by Spark Legal and Policy Consulting (Patricia Ypma, Célia Drevon, Chloe Fulcher and Angelica Rasiewicz) and Tipik (Sylvie Giraudon) with the support of three key legal experts (John A.E. Vervaele, Katalin Ligeti, and Marc Engelhart) and a network of national legal experts (country rapporteurs).↵
4. European Commission, Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004), September 2023; the report is available on the European Parliament's website: <<https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142>> accessed 30 April 2024.↵
5. European Commission, Extension of the Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004), September 2023; the report is also available on the European Parliament's website: <<https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142>> accessed 30 April 2024.↵
6. In detail, Arts. 1, 2, 3, 7, 8-12(3), 14-16, 17(3), 18-21, 27(4), 28(3), 31(7)(8), 32, 34, 36(2)(4), 38, 41(1)(2), 42(5)-(7), 44, 46, 47-105, 106(2), 107, 108(1), and 109-120 apart from 113(6) were not included in the study.↵
7. Final Report, *op. cit.* (n. 4), pp. 29-37.↵
8. Final Report, *op. cit.* (n. 4), pp. 38-42.↵
9. Final Report, *op. cit.* (n. 4), pp. 43-45.↵
10. Final Report, *op. cit.* (n. 4), pp. 46-57.↵
11. Final Report, *op. cit.* (n. 4), pp. 58-77.↵
12. Final Report, *op. cit.* (n. 4), pp. 78-80.↵
13. Final Report, *op. cit.* (n. 4), p. 81.↵
14. Final Report, *op. cit.* (n. 4), pp. 82-83.↵
15. Final Report, *op. cit.* (n. 4), pp. 84-85.↵
16. Extension Report, *op. cit.* (n. 5), pp. 17-25.↵
17. Extension Report, *op. cit.* (n. 5), pp. 26-41.↵
18. Extension Report, *op. cit.* (n. 5), pp. 42-49.↵
19. Extension Report, *op. cit.* (n. 5), pp. 50-64.↵
20. For details see Final Report, *op. cit.* (n. 4), pp. 25-27.↵
21. The national correlation tables have not been published.↵
22. See Final Report, *op. cit.* (n. 4), pp. 27-28; Extension Report, pp. 14-16.↵
23. See especially the visualization in Annex II.↵
24. Final Report, *op. cit.* (n. 4), pp. 29-37; Extension Report, *op. cit.* (n. 5), pp. 17-25.↵
25. Final Report, *op. cit.* (n. 4), p. 32.↵
26. See Final Report, *op. cit.* (n. 4), pp. 38-39.↵
27. Arts 4, 28(1), and 30 EPPO Regulation.↵
28. I.e., the power to decide whether to prosecute before a national court or to consider a referral of the case, a dismissal, or a simplified prosecution procedure in accordance with Arts. 34, 35, 36, 39, and 40 EPPO Regulation.↵

29. Final Report, *op. cit.* (n. 4), pp. 35-36; Extension Report, *op. cit.* (n. 5), p. 18.↵
30. Final Report, *op. cit.* (n. 4), pp. 42, 44.↵
31. Extension Report, *op. cit.* (n. 5), pp. 19-22.↵
32. Extension Report, *op. cit.* (n. 5), pp. 22-23.↵
33. Extension Report, *op. cit.* (n. 5), pp. 45-48.↵
34. See on the general problem, e.g., Silvia Allegranza, "Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies", (2020) *eucrim*, 302-309.↵
35. Final Report, *op. cit.* (n. 4), pp. 46-47.↵
36. 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.↵
37. See, for the differences European Commission, the Second report on the implementation of 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, COM(2022) 466, available at <[https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0466/COM_COM\(2022\)0466_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0466/COM_COM(2022)0466_EN.pdf)> accessed 30 April 2024.↵
38. For more details, see Extension Report, *op. cit.* (n. 5), pp. 26-38, which assesses whether the wording of Arts. 22 and 25 EPPO Regulation can hinder the practical work of the EPPO.↵
39. For details see Extension Report, *op. cit.* (n. 5), pp. 31-39.↵
40. See the Final Report, *op. cit.* (n. 4), p. 48 (overview), pp. 51-58 (details).↵
41. Final Report, *op. cit.* (n. 4), pp. 51-54.↵
42. Final Report, *op. cit.* (n. 4), pp. 55-58.↵
43. Final Report, *op. cit.* (n. 4), pp. 64-70.↵
44. For more details, see Section III.1 of this Article.↵
45. Final Report, *op. cit.* (n. 4), p. 69.↵
46. Extension Report, *op. cit.* (n. 5), pp. 50-55.↵
47. The only exception is Slovenia, as the EDP cannot execute investigations. He/She can, however, propose that the investigating judge execute investigative measures within the judge's competence, thus hindering the assisting EDP from obtaining such authorisation. See Final Report, *op. cit.* (n. 4), p. 69.↵
48. ECJ (Grand Chamber), 21 December 2023, Case C-281/22, *G.K. and Others (Parquet européen)*, ECLI EU:C:2023:1018.↵
49. See, e.g., H. Herrnfeld, "Yes Indeed, Efficiency Prevails - A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 *G.K. and Others (Parquet européen)*", (2023) *eucrim*, 370-380.↵

* Author statement

The author contributed to the study as a key legal expert.

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