

Cooperation between the European Commission and the European Public Prosecutor's Office

An Insider's Perspective



Article

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ABSTRACT

The European Commission and the European Public Prosecutor's Office (EPPO) have a joint interest in effectively fighting, and mitigating the effects of, crimes against the EU's financial interests. In 2021, they concluded an agreement to translate this mutual interest into concrete cooperation measures. Their cooperation is unique in the EU's anti-fraud architecture, having regard to the Commission's specific responsibility for managing and protecting the EU budget and the EPPO's novel nature as the first EU body with criminal prosecution tasks. This article sets off the Commission's initial negotiation objectives against the results and future outlook of their mutual cooperation.

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I. Introduction

Article 103(1) of Regulation (EU) No 2017/1939¹ establishing the European Public Prosecutor's Office (hereinafter "the EPPO Regulation") provides that the EPPO "shall establish and maintain a cooperative relationship with the European Commission for the purpose of protecting the financial interests of the Union and shall conclude to that end an agreement setting out the modalities for their cooperation." It is no coincidence that the EPPO Regulation includes a specific provision dedicated solely to Commission-EPPO cooperation. It is equally telling that the EPPO Regulation envisages the conclusion of an "agreement" to this effect, rather than a mere "arrangement", as is the case for the other EU institutions, bodies, offices, and agencies.² These two aspects – at first sight formal, but also important – reflect the relevance of the Commission-EPPO partnership for fighting, and mitigating the effects of, financial crimes detrimental to the EU's financial interests. They spring from a recognition of the Commission's unique and specific responsibility for managing and protecting the EU budget, as reflected in Article 317 TFEU.

The technical negotiations on the envisaged agreement between the services of the Commission and those of the EPPO kicked off in December 2020. On the Commission side, a group made up of representatives from horizontal Commission services and chaired by the Secretariat-General led the working-level negotiations. An intense meeting schedule, both internally³ and with the EPPO services, eventually resulted in the endorsement of a balanced text by the College of Commissioners and the EPPO. The Agreement⁴ entered into force on 18 June 2021 upon signature by the European Chief Prosecutor and the Secretary-General of the Commission on behalf of the Commission.

II. The Commission's Objectives during the Negotiations

The Commission's objectives were twofold:

- firstly, to **render its support to the EPPO** in its endeavours to investigate and prosecute crimes affecting the EU budget **as effective as possible**. This requires the prompt and systematic notification to the EPPO of instances of suspected fraud and other types of illicit behaviour falling under the EPPO's competence, which Commission services may come across in the course of their activities;
- secondly, and conversely, to **ensure that the Commission receives prompt information from the EPPO** on the (preliminary) results of its investigations, without prejudice to their confidentiality, in view of the following:
 - the adoption of appropriate administrative, financial, and disciplinary follow-up measures by the Commission, including the recovery of defrauded EU funds;
 - the adoption of precautionary measures to avoid further financial or reputational damage to the Commission, and the EU as a whole, pending the outcome of EPPO's proceedings. This includes the initiation of an "Early Detection and Exclusion System" (EDES) procedure, where appropriate, to ensure that possible fraudulent entities cannot continue accessing or applying for EU funds. It also covers managerial measures, in case of possible implication of a Commission staff member, such as temporarily relieving the staff member of certain tasks that present a potential risk;

- the establishment of possible “rule-of-law” breaches and corresponding budgetary measures pursuant to the “conditionality mechanism”;⁵
- the Commission’s participation as a civil party in judicial proceedings resulting from the EPPO’s investigations and prosecutions, where necessary.

Underlying the negotiations was a strong awareness of mutual dependency in both bodies’ efforts to protect the EU’s financial interests. It would indeed be difficult to convince the general public that the EU institutions take the fight against fraud seriously if they were to fail to notify instances of fraud to the EPPO. This also holds true for cases in which the Commission continued insouciantly paying EU funds or sending sensitive information to organisations or individuals under serious suspicion of fraud or other illegal activities affecting the EU budget, even though precautionary measures could have been taken. The common interest in establishing prompt and useful information flows to operationalise the cooperation envisaged in Article 103(1) of the EPPO Regulation was therefore at the heart of the negotiations.

III. The Commission-EPPO Agreement

The Agreement that the Secretary-General of the Commission and the European Chief Prosecutor signed on 18 June 2021 fulfils the above-mentioned objectives. It specifies the following:

- the specific types of information to be transmitted in each case;
- the relevant contact points;
- the applicable procedures, communication tools, templates, and deadlines;
- the conditions under which the EPPO can, under certain conditions, access specific relevant databases managed by the Commission;
- training measures and awareness-raising actions.

The Agreement does not in any way modify or interfere with the existing legal frameworks governing the Parties and their independence. It renders the cooperation required under this framework operational and identifies practical ways for its day-to-day implementation. A specific section provides the necessary data protection safeguards by complementing the extensive protection provided under each Party’s own legal framework.

As specified in the Agreement, the cooperation is without prejudice to the operational cooperation between the EPPO and the European Anti-Fraud Office (OLAF) when the latter exercises its independent investigative function⁶ pursuant to “OLAF Regulation” (EU, Euratom) No 883/2013.⁷

IV. Implementation and Future Challenges

As with any negotiated solution, the real challenge, once the dust has settled, lies in rendering the Agreement operational on a daily basis. In other words, the provisions have to be efficiently translated into concrete actions.

A specific challenge in this respect is the novel and unique nature of the EPPO – the first-ever EU body with criminal prosecution tasks – in the EU’s anti-fraud architecture. On the one hand, the Commission has to adapt itself to the EPPO’s specific needs, working methods, and procedural requirements. On the other hand, the EPPO’s set-up is, to a large extent, decentralised, with an important role falling to the European Delegated

Prosecutors in the Member States who come from the national prosecution systems. The newly established and unique cooperation between both bodies therefore requires targeted awareness-raising and training efforts, geared towards all those involved in processing the following types of information:

- information from the EPPO allowing the Commission to adopt (precautionary or final) administrative, financial, budgetary, or disciplinary follow-up measures resulting from the EPPO's investigations and prosecutions;
- information from the Commission obtained while (co-)managing EU-funded programmes, actions, or contracts, warranting a transmission to the EPPO, as it points to potentially criminal behaviour falling under the EPPO's competence.

At an even more practical level, the cooperation necessitates the adaptation of relevant IT systems, databases, and tools, to ensure that each Party's information needs are taken into account at the appropriate level and moment.

Annual high-level reviews, complemented by regular working-level consultations, will serve to further fine-tune the cooperation mechanisms and tools, where needed. The adequacy of the Agreement will eventually find its reflection in the number of cases successfully concluded by the EPPO, with the help of information from the Commission, but it will also be reflected in the effectiveness with which the Commission is subsequently able to safeguard the EU budget, its administration, and its values from financial or reputational damage thanks to timely information received from the EPPO. In other words, the **common interest** in safeguarding taxpayers' money and the EU's reputation will now have to be translated into **common successes**. The first signs are encouraging in this respect.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter "the EPPO"), O.J. L283, 31.10.2017, 1. ↵
2. Under Article 99(3) of the EPPO Regulation. ↵
3. Including meetings with the various services managing the – over 30 – databases listed in Annex VIII to the Commission-EPPO Agreement, to which the EPPO can, under certain conditions, have direct or indirect reading access. ↵
4. Agreement establishing the modalities of cooperation between the European Commission and the European Public Prosecutor's Office (the EPPO), available at: <https://www.eppo.europa.eu/sites/default/files/2021-09/2021.073_Agreement_EPPO_European_Commission_Final_signed_version.pdf> accessed 27 September 2022. See also the summary in eucrim 3/2021, 145. ↵
5. Article 4(2)(g) of Regulation (EU, Euratom) No 2020/2092 (the "Rule of Law Conditionality Regulation") lists a participating Member State's cooperation with the EPPO among the relevant factors for establishing possible rule-of-law breaches. Recital 16 of the same Regulation lists the EPPO's reports among the sources that the Commission should take into account in its assessment of whether breaches of the principles of the rule of law have occurred. Accordingly, the Commission-EPPO Agreement of 18 June 2021 specifies that the EPPO "may send" to the Commission information on individual or systemic issues that are relevant for the Rule of Law Conditionality Regulation. For examples of such information, see eucrim 1/2022, 16-17 and eucrim 1/2022, 22. ↵
6. The latter is the subject of a separate "Working Arrangement between the European Anti-Fraud Office" ('OLAF') and the European Public Prosecutor's Office ('EPPO') signed on 5 July 2021 pursuant to Article 101 of the EPPO Regulation and Articles 1(4)(a) and 12(g) of the OLAF Regulation. ↵
7. Regulation (EU, Euratom) No 883/2013 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, O.J. L 248, 18.9.2013, 1–22, as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020, O.J. L 437, 28.12.2020, 49–73. ↵

* Author statement

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