Every Euro Counts ... and So Does Every Second

The EPPO and Cross-Border Cooperation in Relation to Seizure and Freezing in the 22 Participating Member States

Nicholas Franssen *

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Article

ABSTRACT

The European Public Prosecutor's Office (EPPO), operational since 1 June 2021, has not just been established to bring the perpetrators of EU fraud to justice but also to help recover the criminal profits they have acquired in the process. Thus, its raison d'être not only matches the traditional political axiom that crime does not pay but equally serves another goal formulated by European politicians across the board: money spent under the EU budget should not end up in the wrong hands. From a taxpayers' viewpoint, this understandable ambition has not proved to be self-fulfilling over time, and this is where the EPPO could well take up its role as the ultimate remedy in the EU's antifraud chain. The risk of major fraud involving EU money particularly came to the fore after adoption of the Recovery and Resilience Facility in 2021, as it encompasses a staggering €800 billion that will undoubtedly attract well-organised fraudsters. By definition, an effective recovery policy requires swift seizure of criminal proceeds at an early stage of the criminal investigation in order for there to be any realistic chance of returning them to the EU budget following a final conviction, which may take time. Swift seizure is particularly challenging in a situation involving several countries, as is usually the case with VAT fraud or other complex fraud schemes. This article examines the possibilities that the EPPO has under Regulation 2017/1939 to undertake cross-border measures relating to seizure and freezing. It concludes that, in the absence of a specific mechanism in the Regulation, some of the issues that may arise in practice could be solved by resorting to existing EU cooperation instruments on seizure and confiscation. However, questions, in particular as to the legal relationship or hierarchy between the Regulation and these other EU instruments will need to be addressed, ideally in the not too distant future and in the context of a fresh look at Art. 31 of the Regulation.

AUTHOR

Nicholas Franssen

Counsellor
Ministry of Justice and Security in The Netherlands

CITATION SUGGESTION

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I. Introduction

The European Public Prosecutor's Office (EPPO), a relatively new European body that started its operational activities on 1 June 2021, has mainly been set up to address a law enforcement gap, certainly one perceived strongly by the European Commission and OLAF,[1] in relation to the protection of the financial interests of the EU. Members of the current European Commission, such as Vice-President for Values and Transparency, *Věra Jourová*,[2] and Commissioner for Justice, *Didier Reynders*,[3] as well as former Vice-President *Viviane Reding* of the previous Commission,[4] have, on various occasions, highlighted the need for perpetrators of EU fraud to be brought to justice. Moreover, and equally importantly, the principle that every single euro in the EU budget be well spent and respectively received as a contribution to that budget in the first place, is paramount. Its importance was again recently emphasized by Commissioner for Budget and Administration *Johannes Hahn*.[5] The same principle is also supported by the European Parliament.[6] Furthermore, the Commissioners have underlined that if, for some reason, perhaps inherent to the criminogenic nature of the system of EU subsidies,[7] perpetrators were to use these funds for less legitimate purposes, the money involved should then somehow be fully recovered, if need be with the assistance of the EPPO. It goes without saying that this principle equally applies to fraud cases related to other financial interests of the Union, for instance relating to its traditional own resources.[8] Particularly where recovery through administrative means may have proven impossible to achieve, the EPPO could act as an instance of last resort. *Laura Codruţa Kövesi*, the European Chief Prosecutor, highlighted the important role the EPPO fulfills in this respect in a recent interview with *Die Presse*.[9] As a matter of fact, the EPPO College has recently adopted a decision to establish the Asset Recovery and Money Laundering Advisory Board in order to underline that an effective and harmonised asset recovery approach is of critical importance to the EPPO.[10] The acute awareness of the need to effectively tackle EU fraud has increased strongly following approval of the new multi-annual financial framework (MFF) 2021-2027 and of the Recovery and Resilience Facility by the European Council in July 2021.[11] The staggering amounts[12] involved would make it naïve if not foolish to do anything other than step up the efforts in this field. Europol,[13] OLAF,[14] and the European Court of Auditors[15] have all publicly drawn attention to the considerable risks of fraud at stake.

According to the EPPO's first annual report covering the first seven months of its operation:[16]

> "81 recovery actions took place in 12 of the participating Member States (Italy, Belgium, Germany, Romania, Czechia, Croatia, Finland, Latvia, Luxembourg, Spain, Lithuania, Portugal). In total, the EPPO requested more than €154 million to be seized, and the seizure of more than €147 million was granted. This represents over three times the budget of the EPPO in 2021."

The annual report does not specify quite how much of the aforementioned amounts were actually related to cross-border investigations but, given the nature of complex EU fraud schemes, particularly VAT fraud, one may very well assume that a considerable percentage is concerned. Again, quoting from the EPPO's annual report on 2021:[17]

> "[T]he first seven months of operations also amply demonstrated that the EPPO brings a decisive advantage to law enforcement in cross-border investigations. Without cumbersome mutual legal assistance formalities, organising coordinated searches or arrests across borders has been a matter of weeks, instead of months. Unprecedented access to operational information through its Case Management System allowed the EPPO to establish connections between different investigations (and subsequently merge them), to identify more evidence to be secured and assets to be seized. In the first seven months, European Delegated Prosecutors assigned altogether 290 assisting measures to each other."

Evidently, the idea behind the ambition to ensure that every euro counts closely follows the old adage that crime does not pay,[18] or, perhaps better put from a policy perspective: crime should not pay, which is particularly appropriate in this context, given the fact that the average taxpayer would indeed expect that all money from the EU budget is in fact correctly spent. Whether criminals are actually deterred by an active confiscation and asset recovery policy has yet to be empirically established, though.[19] For many years now, OLAF has been unable to indicate to what extent its financial recommendations to Directorates-General in the Commission, to national authorities, and to other stakeholders have actually led to the money involved being fully recovered. OLAF is still trying to gain a better picture, which begs the question of how effective the recovery efforts are, a concern also expressed by the European Court of Auditors back in 2019.[20] Assuming, though, for the sake of argument, that an effective recovery policy does actually deter criminals, conventional wisdom in the law enforcement community[21] tends to be: the sooner the goods or property of suspects are seized, the more likely that (following their final conviction) the authorities can actually recover the perpetrators' illicit gains.[22] This approach is considered to be preferable to, for example, starting a potentially fruitless post-conviction search, using lengthy and cumbersome mutual legal assistance procedures, in order to locate proceeds of crime in an exotic location perhaps best known for its facilities to launder money or to locate them online in the impenetrable domain of servers in obscure locations. Worse still, all the proceeds of crime may already have been spent by that point in time. In her critical analysis of EU cross-border financial asset recovery policy, *Ariadna Helena Ochnio* therefore rightly points to the importance of securing continuity throughout the entire process preceding actual recovery, which necessarily starts with the timely identification of assets and freezing them so as to avoid their concealment.[23] After all, if carried out properly as part of the investigation before trial and conviction, this will make the actual execution much easier and ultimately more effective.

In this article, I will explore the legal framework for cross-border cooperation in relation to freezing and seizing under the auspices of the EPPO. I will argue that a number of lacunae may give rise to problems in practice and could perhaps best be solved by applying relevant existing EU instruments on cross-border seizure and freezing by analogy. In so doing, I will also list several issues that need to be addressed by the EU legislator following the evaluation of Regulation 2017/1939 as foreseen under Art. 119 of said Regulation. Although it is slightly tempting to do so, this article will neither endeavour to discuss cross-border cooperation in this field between the EPPO and non-participating Member States or between the EPPO and third countries[24] nor will it deal with confiscation following a conviction, this being a task that lies outside the mandate of the EPPO and is thus left to national authorities.[25]

II. Legal Framework for Cross-Border Investigations in the EPPO Regulation

Regulation 2017/1939 does not contain a specific provision on the mechanism for cross-border seizing or freezing within the realm of the 22 Member States participating in the EPPO. It does have a more general provision on cross-border cooperation within the EPPO, be it that this provision is closely linked to the previous article in the Regulation on investigation and other measures. That general provision is Art. 31, the first two paragraphs of which read as follows:

> *Article 31 Cross-border investigations*
>
> 1. The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary

> measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.
>
> 2. The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor assigns an investigation measure to one or several European Delegated Prosecutors from another Member State, he/she shall at the same time inform his supervising European Prosecutor.

The first sentence of Art. 31(2) refers to Art. 30 of Regulation 2017/1939 and thus creates a point of entry to bring freezing measures under the arrangement of cross-border cooperation within Art. 31 of the Regulation:

> *Article 30 Investigation measures and other measures*
>
> 1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures: (….)
>
> (d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.

Interestingly, Art. 30(1)(d) does not explicitly mention seizure as one of the measures European Delegated Prosecutors are authorised to order or request, but the author assumes that, because seizure is a measure very similar in nature to freezing, this would imply that it falls equally, albeit implicitly, under the scope of this article. To illustrate this point, reference may be made here to Art. 2(f) of the 2000 UN Palermo Convention Against Transnational Organized Crime, which states:

> "'Freezing'" or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority[.]"[26]

Similarly, and slightly closer to home, Art. 2(5) of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, stipulates:

> "'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposal of movement of property or temporarily assuming custody or control of property[.]"[27]

Still, even if a very strict reading of Art. 30(1)(d) of Regulation 2017/1939 were to imply that seizure measures do not technically fall within the scope of this provision, there would be a safety net under Art. 30(4), according to which European Delegated Prosecutors shall be entitled to request or order any other measures in their Member State that are available to prosecutors under national law in similar cases. Even though the meaning of the phrase "in their Member State" in Art. 30(4) is a bit ambivalent, I would argue that the aforementioned link to Art. 31 nevertheless allows a handling European Delegated Prosecutor to assign a seizure measure to an assisting European Delegated Prosecutor in another Member State if he/she is allowed to do so in his/her own Member State. This assumption is underpinned by the fact that Art. 13(1) equates European Delegated Prosecutors to national prosecutors in the sense that they have the same

powers and he/she could do so as a national prosecutor anyway. In any event, Art. 31(2) encompasses all measures in Art. 30, including those in paragraph 4.

Art. 31(3) of Regulation 2017/1939 lays down the principle that, as a rule, the assisting European Delegated Prosecutor shall obtain judicial authorisation for a measure assigned to him/her if it is required under the law of the Member State of the assisting European Delegated Prosecutor and in accordance with that law. The pertinent question as to quite how wide, or alternatively, marginal the role of the judge in the Member State of the assisting European Delegated Prosecutor should actually be in this situation is the subject of the very first preliminary ruling question referred to the European Court of Justice on an EPPO matter in an Austrian case.[28] If the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation but the law of the Member State of the handling European Delegated Prosecutor does, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment. Significantly, in this respect, recital 72 of Regulation 2017/1939 states that where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained; in any case, there should be only one authorisation.

Art. 31(4) of Regulation 2017/1939 stipulates that the assisting European Delegated Prosecutor shall undertake the measure assigned to him by the handling European Delegated Prosecutor unless he/she considers one of the situations mentioned in Art. 31(5) to apply:

> (a) the assignment is incomplete or contains a manifest relevant error;
>
> (b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;
>
> (c) an alternative but less intrusive measure would achieve the same results as the measure assigned;
>
> (d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State.

In these situations, the assisting European Delegated Prosecutor shall inform his/her supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally.

Art. 31(7) and Art. 31(8) foresee a role for the Permanent Chamber if the European Delegated Prosecutors involved cannot resolve the matter within seven working days and the handling European Delegated Prosecutor maintains the assignment. The same applies if the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time.

Lastly, mention must be made of the Guidelines on the application of Art. 31 of Regulation 2017/1939 adopted by the EPPO College on 26 January 2022.[29] The College notes, first of all, that freezing instrumentalities and proceeds of crime is not an investigation measure and is not aimed at gathering evidence. Instead, it is a tool to recover ill-gotten assets or their equivalent value and has nothing to do with an "investigation measure". According to the College, it consequently falls under the notion of "other measures" from the title of Art. 30.[30] The Guidelines of the College further state:

> "In any case, de *lege lata*, the EPPO Regulation includes the order for freezing proceeds of crime in Article 31. Therefore, as a rule, the handling EDP should assign the measure of obtaining a freezing order to the assisting EDP in the participating Member State where the

> asset is located, and the latter should request the competent authority of his/her Member State to issue the order."[31]

Whether the latter excludes the possibility for the assisting European Delegated Prosecutor (or perhaps even the handling European Delegated Prosecutor) to issue the freezing order himself/herself, which would seem far more efficient, and, if so, to what extent relevant EU law on freezing orders outside the EPPO Regulation will subsequently come into play if the competent authority issues it instead, is not immediately clear in the said Guidelines. The term "competent authority" in this context would *prima facie* appear to refer to the judicial authority in the Member State of the assisting European Delegated Prosecutor competent to either order or judicially authorise the freezing order, depending on the applicable national legislation.

As an interim conclusion, it follows from the above analysis of Arts. 30 and 31 of Regulation 2017/1939 that the EPPO's legal framework itself does not contain very specific provisions on seizing and freezing assets in the situation of cross-border cooperation. The EPPO College's Guidelines on the application of Art. 31 do offer some guidance but leave equally as many practical aspects untouched. This raises the question as to whether inspiration may perhaps be drawn from existing EU legislation, including that in the field of mutual recognition, in dealing with these specific issues.

III. EU Legal Framework on Investigation Measures and Confiscation

Before embarking on the thinking exercise announced in the previous paragraph, we should tackle the preliminary question of whether Regulation 2017/1939 would allow the use of existing EU legal cooperation instruments, including those based on the principle of mutual recognition, in the first place. The affirmative answer may be found in Art. 31(6) of the Regulation. It permits the use of such measures, be it as an exception to the general arrangement for cross-border cooperation in Art. 31(1)-(5) and especially so given their inherently cross-border nature:

> If the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments.

The exceptional nature of the use of instruments on mutual recognition or cross-border cooperation is underlined by recital 73 as follows:

> The possibility foreseen in this Regulation to have recourse to legal instruments on mutual recognition or cross-border cooperation should not replace the specific rules on cross-border investigations under this Regulation. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with national law implementing the relevant instrument, when conducting the investigation or prosecution.

The existing EU legal instruments that are most relevant to further exploring the argument in relation to freezing and seizing under the auspices of the EPPO would be the following:

- Directive 2014/42 of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union;[32]

- Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.[33]

In the next section, I will look into a number of legal and practical challenges in conjunction with cross-border cooperation in relation to seizure and freezing within the EPPO, which are not specifically covered by Regulation 2017/1939 but which may be resolved by resorting to the existing, aforementioned EU legal instruments. I have interpreted the term "measure" in Art. 31(6) in a broad sense, i.e., not just the measure as such but also the relevant aspects of the legal instrument it is based on.

IV. Challenges to Cross-Border Cooperation in Relation to Seizure and Freezing in the EPPO

1. Practical challenges

In the following, I list several practical points where the EU legal cooperation instruments on freezing and confiscation mentioned in the previous section could, within the framework of Art. 31(6) of Regulation 2017/1939 (as set out above), complement the EPPO Regulation in order to optimize the seizure and freezing of illicit proceeds resulting from EU fraud.

- Directive 2014/42 foresees pre-trial freezing of property with a view to possible subsequent confiscation, including through urgent action when necessary to preserve property;[34]

- Directive 2014/42 also contains a provision to ensure adequate management of frozen property with a view to possible subsequent confiscation,[35] including the possibility to sell or transfer property where necessary.[36] In addition, Regulation 2018/1805 contains a provision on management of frozen property laying down that this shall be governed by the law of the executing state.[37] Furthermore, it contains an obligation to prevent depreciation in value of the frozen property and determines that frozen property and money obtained after being sold shall remain in the executing Member State until a confiscation certificate has been transmitted and the confiscation order has been executed.[38] On a side note, for the purpose of the EPPO Regulation, the term "executing state" should then, by analogy, be interpreted as the Member State of the assisting European Delegated Prosecutor.

- Regulation 2018/1805 contains an important provision on the costs involved.[39] One has to bear in mind that the costs of managing, maintaining, and protecting frozen property over a longer period of time can become very high. The main principle laid down in this provision is that each Member State shall bear its own costs resulting from the application of the Regulation (without prejudice to the provisions on the disposal of confiscated property in Art. 28). The provision foresees a possibility to share the costs if these are large or exceptional.[40]

  If these cost rules in Regulation 2018/1805 were to be applied in line with Art. 31(6) of the EPPO Regulation, an interesting question would then concern the tension associated with the provisions on the costs of operational expenditure in the EPPO Regulation itself.[41] Intriguingly, in its Guidelines of 26 January 2022,[42] the College seems to have ruled that, as a general principle, the costs in relation to the mechanism under Art. 31 will be covered by the EPPO anyway. Point 28 of the Guidelines states: "As the system established by Art. 31 of the EPPO Regulation is entirely new, those expenditures directly linked to the application of the assignment mechanism, although essentially of operational nature, should, in light of recital 113, be borne by the EPPO because they are caused only due to the EPPO having assumed responsibilities for investigation and prosecution." At the same time, however, Point 30 of the Guidelines lays down that, in accordance with Art. 91(5) of the EPPO Regulation and

without prejudice to Art. 91(6), the Member States shall remain responsible for the costs they would have incurred anyway if the measure were to have been executed under the mutual recognition or mutual legal assistance regime, such as costs incurred by any national authority during the execution of a measure on the territory of that Member State. How Points 28 and 30 are to be reconciled in practice may therefore require further clarification.

- Regulation 2018/1805 also contains a provision on reimbursement that covers the situation when the executing Member State is liable under its law for damage to an affected person resulting from the execution of a freezing order. The issuing Member State shall reimburse the executing Member State for any damages paid to the affected person unless they agree between themselves on the amount to be reimbursed if (part of) the damage was exclusively due to the conduct of the executing Member State.[43] As we have seen in the previous section in relation to costs, the EPPO Regulation itself has a specific provision on compensation for damage as a result of non-contractual liability.[44] Leaving aside the need to equate the assisting European Delegated Prosecutor with an executing Member State and the handling one with an issuing Member State as a condition for applying Regulation 2018/1805 in the first place, I tend to think that the specific provision on non-contractual liability in the EPPO Regulation should overrule the arrangement in Regulation 2018/1805, as all European Delegated Prosecutors involved are employed by one and the same organisation in the end, namely the EPPO. Be that as it may, the potential tension between the two provisions might need to be clarified. This will need to be done at the very latest once the evaluation foreseen in Art. 119 of the Regulation is underway or as a follow-up to it.

2. Legal challenges

In addition to the aforementioned overview of mostly practical issues, I would like to raise two other points of a more legal nature that affect the legal relationship or hierarchy between the EPPO Regulation and the two EU legal cooperation instruments discussed here:

The first point concerns the application of grounds for non-recognition and non-execution of freezing orders. Regulation 2018/1805 has specific provisions on grounds for refusal.[45] As mentioned in section II above, Art. 31(5) mentions a limited number of situations in which the assisting European Delegated Prosecutor can inform the supervising European Prosecutor that it is not possible to undertake the assigned measure, which could eventually lead to involvement of the Permanent Chamber in order to find a solution. Here again, this potentially creates a tension between, the relevant provisions in the EPPO Regulation on the one hand, and the ones in the Regulation on freezing and confiscation orders on the other hand. This tension may well be used by criminal lawyers seeking to exploit unclarity caused by the wording of the EPPO Regulation. Given the fact that the mechanism for cross-border cooperation in the EPPO Regulation seeks to further develop the EU instruments on mutual cooperation, it would be beneficial to the efficiency of the mechanism if only the situations mentioned in Art. 31(5) pose an obstacle in practice. Nevertheless, without an explicit provision saying so, it may not be quite that simple to avoid the refusal grounds in Regulation 2018/1805 being invoked in court, particularly by lawyers representing the persons concerned.

The second point concerns the issue of judicial control and review. The two EU legal cooperation instruments on freezing and confiscation mentioned above contain provisions on (effective) legal remedies.[46] However, so does the EPPO Regulation. One can assume that the EPPO Regulation sets aside the provisions on legal remedies in the said instruments, since it can be considered as a *lex posterior* or *lex specialis*, respectively. Nonetheless, the EPPO Regulation remains silent on this relationship. The specific mechanism for judicial authorisation in the context of cross-border investigations in Art. 31 of the EPPO Regulation has already been described in section II. The more general provision on judicial review for EPPO cases in the

Member State of the handling European Delegated Prosecutor can be found in Art. 42 of Regulation 2017/1939. It stipulates that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts that are intended to produce legal effects vis-à-vis third parties and that it was legally required to adopt under this Regulation.[47] National courts therefore have a primary role during criminal proceedings at the national level, while the European Court of Justice has a more limited one.[48] That said, the European Court of Justice, in turn, evidently does have a vital role to play in ensuring a uniform interpretation of the applicable rules in the EPPO Regulation.

Against this backdrop, the person subject to a measure assigned in relation to seizure and freezing, or indeed any other measure under Art. 31 of the EPPO Regulation, is evidently entitled to exercise all the rights he/she has under the national law of the Member State(s) concerned. In my view, however, the court in the Member State of the assisting European Delegated Prosecutor should not (again) examine the substantive aspects of the assigned measure if judicial authorisation is obliged under the law of that Member State. The judicial control in the Member State of the assisting European Delegated Prosecutor should therefore ideally be limited to checking whether the formal requirements of its national law regarding execution of the measure are met. In so doing, the court in the Member State of the assisting European Delegated Prosecutor must rely on the admissibility of the measure and may rely on the adoption of such a measure in the Member State of the handling European Delegated Prosecutor to comply with the requirements laid down in Union law, in particular Art. 47 of the Charter. After all, Art. 31(2) of the EPPO Regulation specifically states: "The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor." The judgment of the European Court of Justice in Case C-281/22[49] will eventually be an indication as to whether that view is legally tenable or not. If the Court were to decide otherwise, cross-border cooperation under Art. 31 runs the risk of becoming much less efficient and much slower, and that may make quick cross-border seizure and freezing of illicit gains resulting from EU fraud far more difficult in practice – and the EPPO's task of recovering that money quite daunting. To be very clear, the risk of less effective cross-border cooperation will arise, even if the preliminary assumption that Art. 31(6) would allow for the use of existing EU instruments on seizure and freezing is ultimately upheld. However, if the application of these existing EU instruments were in itself considered to be impossible under Art. 31(6) from the very outset, the challenges for the EPPO in this field would likely become even greater. This direct consequence of the absence of a specific mechanism for cross-border seizure and freezing in the EPPO Regulation would then become very tangible. Even so, such an interpretation of Art. 31(6) would arguably also go against the trend in the development of judicial cooperation based on mutual recognition, whereby direct acceptance of a decision issued by a judicial authority by the executing authority has become the standard rule.

V. Conclusion

The EPPO has not only been created to bring the perpetrators of EU fraud to justice but also, equally importantly, to help recover the criminal profits thus acquired. This will enable proper spending of money within the framework of the EU budget and ensure the availability of the Union's own resources respectively. Against this background, it is vital to seize and freeze the money or property involved as early as possible during a criminal investigation undertaken by the EPPO. This is absolutely crucial to achieve the second political ambition, which would otherwise remain mere rhetorical wishful thinking. Particularly in cross-border investigations, speed and efficient cooperation among European Delegated Prosecutors themselves as well as between European Delegated Prosecutors and competent national authorities in the Member States concerned are therefore of essence. The EPPO Regulation has conveniently brought freezing and, as

argued in section II, seizure measures under the new mechanism for cross-border cooperation in Art. 31 via its link with Art. 30. The wording of the Regulation itself as well as the College's Guidelines on Art. 31, however, leave various practical aspects of this aspect of the EPPO's work open.

The lacunae that result from this approach taken by the EU legislator may well be filled by resorting to (elements of) existing EU instruments, including one on mutual recognition, which specifically address some of the practical aspects related to seizing and freezing, such as the management of frozen property. This would be possible, in theory, based on a broad interpretation of Art. 31(6) of the EPPO Regulation: if generally condoned, this interpretation would allow for the use of said instruments as an exception to the main rule in Art. 31(1) to 31(5). In so doing, however, it would still be necessary to strike a fine balance between the general mechanism for cross-border cooperation foreseen in Art. 31 and the specific provisions in the said EU instruments. This particularly means that the latter should only be applied as measures to supplement the EPPO Regulation where this is deemed useful. Their use ideally should not generate additional obstacles for effective cross-border cooperation within the EPPO regime, e.g., by opening the door to additional refusal grounds or adding extra layers to the proceedings. Indeed, an entirely different reading of Regulation 2017/1939 in combination with these instruments would imply that cross-border cooperation within the EPPO would be rendered more difficult and more time-consuming rather than easier, which is difficult to defend in light of the EPPO's *raison d'être* and ambitions. For this very reason, however, the exact legal relationship between the EPPO Regulation and the existing EU instruments relevant to cross-border freezing and seizing ought to be urgently reviewed – at the very least as an aspect of the evaluation foreseen under Art. 119 of the EPPO Regulation. It may very well entail refinement of the EPPO Regulation here and there in the process.

By contrast, if, in the end, Art. 31(6) were to somehow prohibit the use of existing EU instruments in relation to cross-border freezing and seizure, there is a genuine risk that the EPPO would face more practical obstacles in its efforts to recover EU money in the 22 participating Member States than it would if it could resort to these existing instruments. It would then be ironic that it has that very possibility in relation to non-participating Member States, based on the notifications made by participating Member States under Art. 105(3) of the EPPO Regulation.[50] Such an outcome would be more than unsatisfactory and effectively hamper the objective of recovering EU money that has found a destination other than what it was originally destined for.

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1. See, *inter alia*, the Explanatory Memorandum to the 2013 Commission proposal for the EPPO, COM(2013) 534 final, p. 2 and p. 51.↩
2. See Commission press release IP/21/2591 of 26 May 2021 on the eve of the operational start of the EPPO in which *Věra Jourová* is quoted as having said "From 1 June onwards, European prosecutors, under the strong leadership of Laura Kövesi, will clamp down on criminals and make sure no euro is wasted on corruption or fraud".↩
3. In his speech in Luxembourg on the occasion of the first anniversary of the EPPO, Commissioner for Justice *Didier Reynders* put it like this: "You [the EPPO] are helping to get this money [an estimated damage to the EU budget in 2021 of 5.4 billion euro]" and "The work of the EPPO, to ensure no single euro is lost to fraud, is more crucial than we could have ever imagined"..↩
4. See Communication from the Commission, "Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust", COM (2013) 532 final, p. 3: "The Union and the Member States have a duty to 'counter fraud and any other illegal activities affecting the financial interests of the Union' and 'afford effective protection' to those interests. This duty is particularly relevant in times of fiscal consolidation where every euro counts". See also Commission press release IP/13/709 of 17 July 2013 in which former Vice-President *Viviane Reding* is quoted as saying "When it comes to taxpayers' money, every euro counts – even more so in today's economic climate".↩
5. See Commission press release 11/2022 on the 2021 PIF report: *reinforcing the protection of EU's finances:* "The amounts at stake and the different players involved require strong cooperation so that together we ensure that EU money reaches its intended beneficiaries."↩
6. See European Parliament resolution of 7 July 2022 on the protection of the European Union's financial interests – combating fraud – annual report 2020 (2021/2234(INI)), point 83: "[…] reminds the Commission and the Council that every euro spent on monitoring and investigation returns to the EU budget."↩
7. See Durdević, who is quoted in the impact assessment of the 2013 Commission proposal for the EPPO, SWD(2013) 274, p. 86: "The EU budget can be characterised as a subsidy budget, and according to criminological investigations, subsidies are a highly criminogenic financial instrument and very subject to criminal behaviour' and "apart from the criminogenicity of subsidies, the European system of managing and allocating subsidies has a criminogenic effect' due to the vast and complicated managing and control system of the EU funds that comprehends the EU level and authorities in the MSs at national, regional and local level and is complicated by numerous specific EU and national regulations".↩

8. See Arts. 3 and 4 of Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29.↩
9. "Wir holen das Geld zurück, das den EU-Finanzministern durch die Lappen Geht", Die Presse, 2 September 2022.↩
10. See College Decision 042/2022 of 28 September 2022.↩
11. See point 24 of the conclusions of the special meeting of the European Council on 17-21 July 2021 in Doc. EUCO 10/20: "The Commission is invited to present further measures to protect the EU budget and Next Generation EU against fraud and irregularities. This will include measures to ensure the collection and comparability of information on the final beneficiaries of EU funding for the purposes of control and audit to be included in the relevant basic acts. Combatting fraud requires a strong involvement of the European Court of Auditors, OLAF, Eurojust, Europol and, where relevant, EPPO, as well as of the Member States' competent authorities".↩
12. Together, the MFF 2021-2027 and EU NextGeneration add up to more than €1,800 billion (in 2018 prices).↩
13. See Europol, European Union Serious Organised Crime Threat Assessment (SOCTA) 2021, p. 96.↩
14. "Fraud chief warns of 'big risk' in policing 800bn EU recovery funds", Financial Times, 21 June 2021.↩
15. "European Auditors Warn of High Fraud Risk related to EU Recovery Fund", Novinite.com, 2 April 2021. See also ECA Special Report 21/2022 of 8 September 2022 *"The Commission's assessment of national recovery and resilience plans: overall appropriate but implementation risks remain",* available online at <https://www.eca.europa.eu/Lists/ECADocuments/SR22_21/SR_NRRPs_EN.pdf>, accessed 6 October 2022, p. 6.↩
16. See EPPO,_2021 Annual_Report, available online at: <https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO_Annual_Report_2021.pdf>, accessed 4 October 2022, p. 62.↩
17. Ibid., p. 10.↩
18. See, e.g., Report from the Commission to the European Parliament and the Council, "Asset recovery and confiscation: Ensuring that crime does not pay", COM(2020) 217 final and the recent Commission proposal for a directive on asset recovery and confiscation, COM(2022) 245 final. Art. 28 of that proposal specifically deals with cooperation between asset recovery offices and the EPPO.↩
19. See C. Atkinson, S. Mackenzie and N. Hamilton-Smith, *What works: crime reduction systematic review series – No 9. A systematic review of the effectiveness of asset-focussed intervention against organised crime*, University of Glasgow, April 2017, available online at: <https://dspace.stir.ac.uk/bitstream/1893/26091/1/Organised_crime_SR.pdf>, accessed 4 October 2022. See also the 2020 Europol report *Enterprising criminals Europe's fight against the global networks of financial and economic crime,* available online at: <https://www.europol.europa.eu/publications-events/publications/enterprising-criminals-%E2%80%93-europe%E2%80%99s-fight-against-global-networks-of-financial-and-economic-crime>, accessed 6 October 2022, p. 19: "Today, more than 98% of criminal assets are still not recovered."↩
20. See the OLAF report 2021, p. 45 and the ECA's Special Report 1/2019 entitled *Fighting fraud in EU spending*: *action needed*, pp. 42-49.↩
21. See, e.g., FATF, *International standards on combating money laundering and the financing of terrorism and proliferation*, recommendation 38: "Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; (…)" and the 2021 OECD publication *Fighting tax crime – The Ten Global Principles*, second edition, point 75: "Speed can be essential when it comes to freezing and seizing assets, as criminals can quickly transfer funds out of the agencies' reach or dispose of property if they become aware that the criminal investigation agencies are investigating them. The legal authority and operational capacity to freeze assets rapidly in urgent cases is relevant, for example, where the loss of property is imminent. Agencies should generally be able to execute rapid freezing orders within 24 and 48 hours."↩
22. See Art. 38 of Regulation 2017/1939, regarding the disposition of confiscated assets after involvement of the EPPO.↩
23. A.H. Ochnio, "The Tangled Path from Identifying Financial Assets to Cross-Border Confiscation. Deficiencies in EU Asset Recovery Policy", (2021) 29 *European Journal of Crime, Criminal Law and Criminal Justice* , pp. 218-240.↩
24. See, more generally, on this topic N. Franssen, "The Future Judicial Cooperation between the EPPO and Non-Participating Member States" (2018) 9 *NJECL*, 291; id, "Judicial Cooperation between the EPPO and Third Countries – Chances and Challenges", (2019) *eucrim,* 198-205.↩
25. See Art. 4 of Regulation 2017/1939 that defines the EPPO's tasks as being "responsible for investigating, prosecuting and bringing to judgment", in other words not for the execution of any sentence.↩
26. The 2021 OECD publication *Fighting tax crime – The Ten Global Principles*, second edition further explains in point 68 that "Freezing or seizing of assets involves "temporarily prohibiting the transfer, conversion, disposition or movement of assets or temporarily assuming custody or control of assets on the basis of an order issued by a court or other competent authority" (…). Freezing is an action that temporarily suspends rights over the asset and for example, may apply to bank accounts which are fungible. Seizure is an action to temporarily restrain an asset or put it into the custody of the government and may apply to physical assets such as a vehicle. Generally, these measures are used to temporarily prevent the movement of assets pending the outcome of a case."↩
27. In addition, Art. 2(1) of Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders defines a freezing order as "a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof." See also Ochnio, *op.cit* (n. 23), pp. 229-230.↩
28. Cf. Case C-281/22, brought forward by the Oberlandesgericht Wien. On this, see T. Wahl, "First EPPO Case before CJEU", (2022) *eucrim*, 96.↩
29. Available at: <https://www.eppo.europa.eu/sites/default/files/2022-02/2022.006_Decision_adopting_Guidelines_on_the_application_of_article_31_of_the_EPPO_Regulation.pdf> accessed 4 October 2022.↩
30. See point 24 of the Guidelines on the application of Art. 31.↩
31. See point 25 of the Guidelines on the application of Art. 31.↩
32. *O.J.* L 127, 29.4.2014, 39. Note: Regarding the scope of the Directive in the "PIF sector", its Art. 3(a) only mentions the EU Convention on the fight against corruption involving officials, but Art. 10 of the later Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law refers to Directive 2014/42.↩
33. *O.J.* L 303, 28.11.2018, 1.↩
34. See Art. 7 of Directive 2014/42.↩
35. On the importance of efficient management of frozen and seized goods, see the 2012 FATF publication, *Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery*, pp. 9-10.↩
36. See Art. 10 of Directive 2014/42.↩

37. See Art. 28(1) of Regulation 2018/1805.↩
38. See Art. 28(2) and (3) of Regulation 2018/1805.↩
39. See Art. 31(1) of Regulation 2018/1805. Cf. also Arts. 19 and 20 of the recent Commission proposal on asset recovery and confiscation, *op. cit.* (n. 19), which deal with the costs of management and maintenance of frozen property.↩
40. See Art. 31(2) of Regulation 2018/1805.↩
41. See Art. 91(5) in combination with recital 113 of Regulation 2017/1939.↩
42. *Op cit.* (n. 29).↩
43. See Art. 34 of Regulation 2018/1805.↩
44. See Art. 113(3) and (4) of Regulation 2017/139.↩
45. See Art. 8 of Regulation 2018/1805.↩
46. See Art. 8 of Directive 2014/42 and Art. 33 of Regulation 2018/1805.↩
47. See Art. 42(1).↩
48. See Art. 42(2)-(8).↩
49. *Op. cit.* (n. 28).↩
50. See, on this, Council document 10644/5/21 REV 5 EPPO 33 et al. of 10 October 2022.↩

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