

# Fighting Terrorism through the European Public Prosecutor's Office (EPPO)?

What future for the EPPO in the EU's Criminal Policy?



## Article

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### ABSTRACT

The EPPO was established by Regulation 2017/1939, which entered into force on 20 November 2017, under enhanced cooperation to fight crimes affecting the Union budget. The Office is currently in the set-up phase with the aim of becoming operational at the end of 2020. On 12 September 2018, the Commission published a Communication on the extension of the EPPO's competences to cross-border terrorist crimes and invited the European Council to take this initiative forward at the informal summit in Sibiu on 9 May 2019. As a single, decentralised European prosecution office, the EPPO could become an effective tool in investigating, prosecuting and bringing to judgement terrorist crimes and add a European dimension to the current efforts. Compared to the present horizontal, multinational approach, the EPPO would create a vertical, European relationship amongst the Member States and Union actors. This could be a decisive qualitative improvement, which would help overcoming the divergences of effective investigation and prosecution of terrorist crimes across the EU.

This article outlines the key aspects of the Communication, touches upon the procedural/legal steps needed for an extension of the EPPO's competences, and discusses the potential legal and practical implications of such an extension. It sets out which aspects demand particular attention prior to a decision on an extension of the competences of the EPPO, thereby stressing that justice and security are inextricably linked and have to be looked at together. The authors point out that a narrower and more targeted approach, such as a gradual extension of the EPPO's competences to financial crimes, organised crime or cybercrime could also be envisaged, while at a later stage other types of crimes, such as trafficking in human beings, trafficking in arms and eventually cross-border terrorist crimes, could be included.

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# I. Introduction

On 9 May 2019, the European Council met in Sibiu, Romania, to discuss the future of Europe. This informal summit was the culmination of the process launched by President Juncker in his 2017 State of the Union address<sup>1</sup>, which included a roadmap<sup>2</sup> detailing the main steps towards a more united, stronger and more democratic EU. A fundamental role in this respect concerns the EU's next strategic agenda for 2019 to 2024. One of the key aspects in this context relates to ensuring the security of EU citizens and in particular the fight against terrorism.<sup>3</sup> For the purpose of this summit, the Commission put forward an initiative<sup>4</sup> on an extension of the competence of the newly established European Public Prosecutor's Office<sup>5</sup> (hereinafter "Communication").

While the Commission's White Paper on the future of Europe<sup>6</sup> reflects about the challenges that the Union is facing and in that context about an EU-wide prosecution office to become competent for a range of crimes in general terms, the initiative on the extension of the competences of the European Public Prosecutor's Office (hereinafter "EPPO") has its origins primarily in President Juncker's 2017 State of the Union address, where the EPPO is seen as a potentially effective tool to fight cross-border terrorist crimes.

Although it is not the first time that the idea to empower the future EPPO to fight terrorist crimes was voiced,<sup>7</sup> President Juncker's remark came rather unexpectedly, given that at that time the Council was still due to adopt the Regulation on the establishment of the EPPO (hereinafter "EPPO Regulation"), which gives the EPPO competence over crimes affecting the financial interests of the Union. Moreover, not all Member States wished to participate, which is why the EPPO Regulation was adopted under enhanced cooperation on 12 October 2017, after more than four years of complex negotiations. The EPPO Regulation also foresees a set-up phase of at least three years, meaning that the EPPO is currently in the midst of its build-up process and cannot take up its functions before the end of 2020.<sup>8</sup>

The Communication forms part of a broader package of ambitious measures complementing the Security Union and thus enhancing the security of the European citizens. It explores the idea of tasking the EPPO with investigating, prosecuting and bringing to judgement terrorist crimes – with a 2025 perspective.<sup>9</sup> These reflections aim at launching a discussion on a range of questions that need to be addressed prior to taking a decision on the extension of the EPPO's competence to terrorist crimes.

The reactions to the Communication from the side of national parliaments or national governments<sup>10</sup> were rather mixed, some welcoming the initiative, others expressing their concerns. In general, it was stated that this initiative came too early and further analysis on this equally complex and sensitive matter was required.

This article will outline the key aspects of the Communication (III.), touch upon the procedural/legal steps needed for an extension of the EPPO's competences (IV.), discuss potential legal and practical implications of such an extension (V.), and conclude with a number of observations (VI.). Beforehand, this article will recall the main features of the EPPO in its current design<sup>11</sup> and provide a brief state of play of its set-up process (II.).

## II. The EPPO *de lege lata* and State of Play of the Set-Up Process

### 1. The EPPO in a nutshell

The EPPO is an independent European prosecution office created to fight crimes affecting the financial interests of the Union, as defined in Directive 2017/1371 (“PIF Directive”).<sup>12</sup> This includes crimes, such as fraud, corruption, money laundering or complex VAT carousels, as well as crimes related to the participation in a criminal organisation,<sup>13</sup> if the focus is to commit crimes that affect the financial interests of the Union, and, eventually, any other criminal offence that is inextricably linked to a crime affecting the financial interests of the Union.<sup>14</sup>

The EPPO was established under enhanced cooperation in accordance with the procedure provided in Art. 86 of the Treaty on the Functioning of the European Union (TFEU), with currently 22 participating<sup>15</sup> Member States.<sup>16</sup> On 3 April 2019, Sweden’s Prime Minister, *Stefan Löfven*, announced in the European Parliament that the Swedish Government will propose to the Swedish Parliament that Sweden joins the EPPO, although there is no indication when this would happen.<sup>17</sup>

The EPPO’s structure consists of two levels. The central level is located at the EPPO’s seat in Luxembourg, where the European Chief Prosecutor and European Prosecutors from each participating Member State – organised in Permanent Chambers – monitor and supervise the investigations and prosecutions carried out by European Delegated Prosecutors located in the Member States.

In this way, the EPPO will operate directly across all participating Member States, allowing for direct action and immediate information exchange, coordinated police investigations, fast freezing and seizure of assets and ordering of arrests across the EU. Moreover, the EPPO will operate on the basis of a permanent structure, i.e. there will be no need for *ad hoc* Joint Investigation Teams (JITs) or mutual legal assistance requests.

The EPPO will also possess a unique overview over cross-border criminal activity in the Union and beyond falling within the remit of its material, territorial and personal<sup>18</sup> competence. This will also enable the EPPO to develop a common investigation and prosecution strategy.

The Office will work hand in hand with national law enforcement authorities and exercise the function of prosecutor in the competent courts of the participating Member States. In carrying out its mandate, the EPPO will also closely cooperate with EU agencies and bodies, such as Eurojust, Europol, and the European Anti-Fraud Office (OLAF).

As the only prosecution body at Union level, the EPPO seems also ideally placed to cooperate with third countries, thereby building on the provisions of the EPPO Regulation related to international cooperation as well as the legal framework that will be created on that basis.<sup>19</sup>

Once operational, the EPPO will become an integral part of the Union’s security architecture and draw upon the existing experience and best practices at national and EU level.

## 2. State of play of the set-up process

Art. 20 of the EPPO Regulation provides that the Commission is responsible for the establishment and initial administrative operation of the EPPO, until the latter has the capacity to implement its own budget. To that end, the Commission has taken a wide range of preparatory steps towards setting up the EPPO, in close consultation with a group of experts composed of representatives of the participating Member States (EPPO Expert Group).<sup>20</sup>

This preparatory work relates to the recruitment of the key EPPO staff, in particular the European Chief Prosecutor and the European Prosecutors,<sup>21</sup> the development of the EPPO Case Management System, the premises for the seat of the future EPPO in Luxembourg, the preparation of the 2019 and 2020 budgets, and many other logistical, administrative, financial and legal matters. The Commission has consulted the EPPO Expert Group on these matters and in this context also discussed the necessary adaptations to be made in national law following the adoption of the EPPO Regulation.<sup>22</sup>

Currently the Council and the Parliament are in the process of agreeing on a common candidate for the post of European Chief Prosecutor. As regards the selection procedure of the European Prosecutors, the Commission invited the Member States to start their national selection procedure and nominate three candidates per Member State by the end of March 2019. The selection procedure of the European Prosecutors is currently also ongoing and the selection panel referred to in Article 14(3) of the EPPO Regulation<sup>23</sup> will hear the nominees and provide reasoned opinions on the 66 candidates,<sup>24</sup> in order for the Council to appoint the European Prosecutors from the 22 participating Member States by the end of 2019. According to the Commission's timelines, the EPPO shall become functional at the end of 2020.

## III. Extension of the EPPO Competence: Key Aspects of the Commission Communication

The Commission presented the above-mentioned initiative to extend the competences of the EPPO as its vision of establishing a comprehensive and structured Union response to the threat of terrorism. This should include the investigation and prosecution of terrorist offences across the Union.

While acknowledging that decisive action and measures have already been taken in the fight against terrorism,<sup>25</sup> the Communication sets out a number of gaps in the investigation and prosecution of cross-border terrorist crime in the EU, which, in the Commission's view, have not yet been addressed within the existing framework. The Communication subsequently outlines how the EPPO, as a novel EU approach, could address these gaps. The identified gaps relate to the following aspects:

- Fragmentation of terrorist crime investigations at the national level (below 1.);
- Deficient sharing of information (below 2.);
- Disintegrated approach in the investigation and prosecution phases (below 3.);
- Potential conflicts of jurisdiction (below 4.).

### 1. Fragmentation of terrorist crime investigations at the national level

The first gap identified by the Commission relates to the fact that national authorities are exclusively responsible for investigating, prosecuting and bringing to judgement terrorist crimes, although these crimes

very often have a cross-border nature. The result is a variety of different national approaches in the investigation and prosecution of terrorist crimes, accompanied by a deficient exchange of case-related information and lack of coordination/cooperation between the authorities of different Member States.

The Communication supports this view by making reference to the growing caseload of Eurojust in the area of terrorist crimes, stressing that cases are being investigated and prosecuted in parallel and in isolation in several Member States. In addition, the Communication underlines that both Eurojust<sup>26</sup> and Europol<sup>27</sup> primarily support the national authorities and are also not equipped with the required powers to proactively carry out coordinated prosecutions at the EU level. The Commission then outlines how the EPPO could provide a comprehensive Union response to enhance the fight against cross-border terrorist crimes. Particularly, the EPPO as a single office acting through the European Delegated Prosecutors, who are embedded in the national legal systems, could bridge the gaps in the national systems and provide better cooperation within and between the Member States at the EU level.

## 2. Deficient sharing of information

The timely sharing of information is important in any criminal investigation, yet crucial in terrorist crimes, which require immediate and targeted action by all law enforcement and judicial authorities. By obtaining information directly and through ordering or requesting the collection of relevant evidence, the EPPO may be in a central position to react to terrorist offences across the EU, as well as to cooperate with third countries or international organisations as the entity in charge.

## 3. Disintegrated approach in the investigation and prosecution phases

The Communication further points to the lack of a central authority at Union level, with the ability to direct both the investigation and prosecution phases of cross-border terrorist cases. Such a central authority would provide a smooth cooperation mechanism between all national and Union authorities involved and would operate in a far more efficient and effective manner than is the case today.

According to the Communication, the EPPO would be such a central authority allowing for a more connected and coordinated investigation and prosecution approach. In this way, the EPPO could also tackle existing shortcomings following from parallel and fragmented investigations/prosecutions in terrorist cases.

## 4. Potential conflicts of jurisdiction

Lastly, the Communication refers to potential risks of conflicts of jurisdiction, which may occur in situations where several affected Member States want to exercise jurisdiction in relation to the same terrorist offence on different grounds, for example the victim's or offender's nationality or territorial competence. The Communication underlines that in cross-border terrorist cases, there is a specific need for an adequate Union mechanism, also in view of avoiding problems related to the *ne bis in idem* principle.

Against this background, the Commission argues that the EPPO would be able to ensure a coherent and effective approach in the prosecution of terrorist crimes. Given its nature as the only Union-level actor to decide on the basis of objective criteria where to bring a case to court, the EPPO could prevent or reduce possible conflicts of jurisdiction and thus avoid unnecessary litigation.

## IV. Procedural and Legal Steps for an Extension of the Competences

The Communication only briefly touches upon the legal and procedural requirements for an extension of the EPPO's competences to cross-border terrorist crimes. The central provision is Art. 86(4) TFEU, which foresees a simplified Treaty amending procedure. An envisaged extension of the competences of the EPPO would need to take place in two steps.

As a first step, the European Council would need to adopt a decision amending paragraphs 1 and 2 of Art. 86 TFEU in order to extend the powers of the EPPO to include "serious crimes having a cross-border dimension" and as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. For that purpose the European Council would need to "act unanimously after obtaining the consent of the European Parliament and after consulting the Commission", whereby the term "unanimously" in Art. 86(4) TFEU refers to all EU Member States, and not only to those participating in the enhanced cooperation of the EPPO. This even includes the Member States, which do not, by virtue of Protocols 21 and 22, take part in the adoption of measures by the Council under Title V of Part Three of the TFEU, i.e. Denmark, Ireland, and – unless Brexit happens – also the UK.

The European Council may amend Art. 86(1) TFEU to extend the material competence of the EPPO to all, some or only one of the "serious crimes having a cross-border dimension". This notion includes the "particularly serious crime[s] with a cross-border dimension" referred to in Art. 83(1) TFEU and listed in the second subparagraph of this provision. It is hence legally possible to extend the competence only to one of those crimes, e.g. terrorism. Further to that, the amendments to Art. 86(1) and (2) TFEU would also need to reflect the additional requirement laid down in Art. 86(4) TFEU, according to which the EPPO's competence may only be extended in relation to serious crimes affecting "more than one Member State".

Although Art. 86(4) TFEU does not foresee that the European Council acts on a proposal from the Commission, this does not prevent the Commission from taking an initiative under Art. 17(1) of the Treaty on European Union (TEU). And indeed, the Commission put forward a draft European Council Decision, proposing the necessary amendments to paragraphs 1 and 2 of Art. 86 TFEU.<sup>28</sup>

As a second step, separate from the European Council's decision to amend Art. 86 TFEU, the EPPO Regulation would need to be modified accordingly so as to include the competence over cross-border terrorist crimes. Such amendment must, *inter alia*, take into account the requirement that more than one Member State needs to be affected, and introduce the possible adaptations that might be required for the EPPO's activities concerning terrorism being effective. In that legislative procedure, the principles of subsidiarity and proportionality will be examined.<sup>29</sup>

The circumstance that the current EPPO Regulation was adopted under enhanced cooperation raises a number of legal questions. The Communication outlines, for instance, that it would not be possible to have a "variable geometry" within the EPPO in a way that Member States would participate in different parts of its competence. According to Art. 86(4) TFEU, the decision of the European Council "to extend the powers of the European Public Prosecutor's Office" does not amount to the establishment of a new or second EPPO but to a modification of the competences of the existing EU body. Given that the EPPO was established by enhanced cooperation, the EPPO Regulation would have to be amended by all and for all the participating Member States. In addition, non-participating Member States that would join the EPPO at a later stage would have to participate in it as a whole, and could not limit their participation to a particular area of the EPPO's competence.

## V. Implications of an Extension

Extending the EPPO's competence to cross-border terrorist crimes would demand an in-depth analysis of how and to which extent the current framework of the EPPO – which is tailor-made to combat crimes affecting the Union budget – would need to be adapted in order for the EPPO to fight these crimes as a single investigatory and prosecutorial office. Terrorism cases differ from other types of criminal cases due to their inherent degree of complexity and the need for quick and efficient multilateral action. Swift exchange of information and evidence, accelerated execution of mutual legal assistance and extradition requests, European Arrest Warrants (EAWs) and European Investigation Orders (EIOs), as well as setting up Joint Investigation Teams (JITs) are crucial aspects for a successful operation of the EPPO in the field of terrorism. Investigations in terrorist crimes generally involve significant human, technical and logistical resources. Furthermore, it should be recalled that a European criminal procedure code does not exist and that the EPPO will need to rely to a great extent on national law in order to carry out its investigations and prosecutions.<sup>30</sup> The following remarks highlight the relevant areas, which would require a careful assessment in the event that the EPPO's mandate would be extended to include cross-border terrorist crimes. It is obvious that this list is not exhaustive.

### 1. Competence

With regard to the material competence of the EPPO, the Communication suggests a targeted extension by simply adding a new paragraph in Art. 22 of the EPPO Regulation, which would make reference to Artt. 3 to 13 and 14 of Directive 2017/541 on combatting terrorism.<sup>31</sup> The EPPO Regulation follows this approach for the PIF crimes currently falling within the EPPO's material competence.<sup>32</sup> The Communication further clarifies that the requirement from Art. 86(4) TFEU, namely that the crimes need to affect more than one Member State, could be accommodated under the definitions in the EPPO Regulation.

Whether such quick solution would indeed suffice or whether there would be a need for greater precision in formulating the competences in the area of cross-border terrorist crimes in the EPPO Regulation, so as to avoid potential conflicts of competences, legal uncertainties and frictions in the investigation and prosecution of these crimes, will require careful analysis.

This includes the question of the scope and limits of the elements of crime, including the cross-border element, e.g. whether this would include preparatory acts to have taken place in another EU Member State and if so which; whether accomplices need to be located and act in another country; or whether transnational money transfers need to have been made in support of or related to the terrorist act in order to constitute a cross-border terrorist crime; and eventually whether, by way of a broader approach, e.g. the nationality of victims should also become a constitutive element, etc. In the same direction, a terrorist act solely based on the motivation to replicate similar terrorist crimes that have taken place in another country could, as such, possibly fall outside the scope of cross-border terrorist crime.<sup>33</sup>

### 2. Structure and decision-making procedures

Similar considerations as above apply to the present structure of the EPPO. The involvement and the roles of the various actors of the EPPO, such as the European Chief Prosecutor, the European Prosecutors, the Permanent Chambers and the European Delegated Prosecutors, in the investigations and prosecutions need to be carefully analysed with a view to assess whether this structure would fit the purpose of investigating and prosecuting cross-border terrorist crimes. A greater empowerment of the European Chief Prosecutor and/or the European Prosecutors or a greater specialisation of the Permanent Chambers should be con-

sidered.<sup>34</sup> Moreover, the multi-layered structure of the EPPO, as foreseen in the EPPO Regulation, may also need to be revisited from the perspective of the decision-making procedures. This relates in particular to the division of decision-making powers between the Permanent Chambers and the European Delegated Prosecutors, and the role of the European Prosecutors in between these two.

### 3. Investigation measures

While the EPPO Regulation includes a comprehensive set of investigation measures, allowing the EPPO to efficiently tackle crimes affecting the Union budget, it will be necessary to assess whether the tools at the EPPO's disposal will suffice to fight terrorist crimes or whether additional measures would be required. Due to the complex and specific nature of terrorist crimes, it may be required to broaden the scope of the investigation measures that the European Delegated Prosecutors have at their disposal in EPPO investigations.

Art. 20 of Directive (EU) 2017/541 on combatting terrorism goes in this direction when it stipulates that Member States need "to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting" terrorist and terrorist-related offences. Accordingly, one could consider adding to or expanding the EPPO's powers to make use of certain investigation measures, such as interception of telecommunications, real-time surveillance measures, covert investigations, inspecting means of transport, identification measures and measures to track and control persons.

Enhancing the investigatory powers of the EPPO in order to include measures of specific relevance to carry out investigations and prosecutions into terrorist crimes would equally demand an assessment of the impact on the procedural rights of suspects and accused persons in such proceedings (see below under 5.).

### 4. Collection of evidence

Throughout the investigations and prosecutions carried out by the EPPO, the principle of free admissibility of evidence applies as an overarching element.<sup>35</sup> Evidence against the defendant presented by EPPO prosecutors to a national court cannot be denied admission on the ground that it was collected in another Member State. The trial court is, however, allowed to examine the admissibility of the evidence, so as to ensure that its admission is not incompatible with Member States' obligations to respect the fairness of the procedure, the rights of defence, or other rights of the defendants, as enshrined in the Charter of Fundamental Rights, in accordance with Art. 6 TEU. Whether and if so to which extent the principle of free admissibility of evidence should be further developed or strengthened in the event that the EPPO would investigate and prosecute terrorist crimes, requires further assessment. Should the free admissibility of evidence become the future principle of the EU's criminal policy? It is clear that the collection of evidence across borders within the EU is becoming more important and that prosecutors and judges are more and more relying on the evidence collected in other Member States. An EU instrument providing common standards on the collection, handling and transfer of evidence could be envisaged in the future. Such rules could be applied to certain procedures or certain types of evidence, for example e-evidence or forensic evidence.

### 5. Procedural rights in EPPO proceedings

The EPPO Regulation offers a wide protection for suspects and accused persons involved in EPPO investigations and prosecutions.<sup>36</sup> The EPPO's activities will be carried out in full compliance with the Charter of Fundamental Rights of the EU, including the right to a fair trial and the rights of defence.<sup>37</sup> Suspects and accused persons can rely, at a minimum, on the existing or new EU *acquis*, which includes the

Directives concerning the rights of suspects and accused persons in criminal investigations, ranging from the right to interpretation and translation in criminal proceedings, over the right to information and access to the case file, the right of access to a lawyer, the right to remain silent and the right to be presumed innocent to the right to legal aid.<sup>38</sup> Moreover, suspects and accused persons as well as other persons involved in EPPO proceedings, may seek recourse to all procedural rights available under national law. The EPPO Regulation also includes the possibility to present evidence, appoint experts, hear witnesses, or request the EPPO to obtain such measures on behalf of the defence. All these rights would also be applicable to suspects and accused persons in possible EPPO investigations into cross-border terrorist offences. Given the serious nature of these crimes and the impact on legal proceedings, it is indispensable to assess whether and to which extent an enhancement of the rights for suspects and accused persons in EPPO proceedings focused on terrorism is indicated irrespective of a potential widening of the investigatory powers of the EPPO as elaborated above.

## 6. Information flows

An extension of the EPPO's competence to cross-border terrorist crimes would have an impact on various other areas. Such an extension would, on its own, not solve shortcomings in information and intelligence sharing in the investigation of terrorist crimes. Throughout its operations, the EPPO will need to rely on information from all available sources, including intelligence. Allowing the EPPO to fight cross-border terrorist crimes hence requires a comprehensive approach, including the development of common rules on various security-related matters, such as, rules on the collection and sharing of information, access to databases, and use of special investigation measures. In addition questions related to rules on detention and penitentiary as well as juvenile justice must be addressed and resolved.

The EPPO would need to be granted access to the relevant information held by national authorities, including Financial Intelligence Units, which deal with suspicious transactions involving the financing of terrorism, as well as immigration offices, asylum offices, or border security offices. The EPPO would also need to be granted access to relevant information held by Eurojust and Europol, either through the exchange of liaison officers or by way of direct and secure access to databases and registers or through a pooling of the relevant expertise and information. To that end, the interconnectivity possibilities between the EPPO's Case Management System and other IT systems, would need to be explored and further developed.

## 7. Security aspects

An important aspect in the above-mentioned context concerns security. Consideration is to be given to security standards, including physical and perimeter security of the EPPO and its staff, as well as to the secure treatment of intelligence or soft information for the purpose of criminal investigation, which would be of far greater relevance in the context of investigating and prosecuting cross-border terrorist crimes compared to PIF crimes. Allowing the EPPO to work with a wide range of information coming from different sources, including intelligence and whistleblowers, would also require that the EPPO Case Management System is adapted to safely processing such information.

## 8. Budgetary and staffing considerations

As outlined in the Communication, since the EPPO is currently competent for fighting crimes affecting the Union budget, any extension of the EPPO's mandate could have significant implications on the EPPO's budget and staffing. This does not only relate to an increased workload with the addition of a completely new area of competence but in particular also in relation to security, which may require additional (specialised) staff and technical solutions with a considerable financial impact. The extent of these implications depends

also on the adaptations that would have to be made to the EPPO, e.g. the creation of a separate department within the EPPO or the introduction of specialised Permanent Chambers focused on fighting terrorist crimes. Any possible synergy effects stemming from the extension of the EPPO's mandate would need to be assessed accordingly.

## 9. Impact on national authorities and EU bodies, in particular Eurojust and Europol

An extension of the EPPO's competence to terrorist crimes would have an impact on the current tasks and roles of Europol and Eurojust, as well as on relevant national authorities. Establishing a close relationship between the EPPO and the other relevant actors, and generating synergies, would be prerequisites for the EPPO to become an essential part of the EU-wide approach to fighting terrorist crimes. One of the key questions to consider with respect to national authorities is which powers the EPPO would need to have in order to direct the work of national authorities in the area of security. It is of note that Art. 4(2) TEU, which specifies that national security remains the sole responsibility of the Member States, would need to be taken into consideration in this context.

The EPPO, Eurojust and Europol have different tasks and different mandates. While the EPPO will be a European investigating and prosecuting body, Eurojust is an agency supporting and strengthening the co-ordination of investigations and prosecutions and cooperation between the competent national authorities in relation to serious crime, including terrorist offences, affecting two or more Member States. Europol is the Union agency which supports and strengthens action by competent national police authorities and their mutual cooperation in preventing and combatting serious crime affecting two or more Member States, including terrorism.

Given the current tasks and practical experience of Eurojust and Europol in the area of fighting terrorism,<sup>39</sup> an extension of the EPPO's competences to terrorist crimes would have to be carefully assessed in order to avoid duplication of work and to ensure that resources are used in the most efficient way. New cooperation models between the various EU bodies would need to be established in order to create the desired synergy effects. This could include e.g. developing an effective crime analysis capability at EU level, which could be a significant advantage in the context of sharing information. In the same vein, it should be considered that the EPPO is empowered to instruct Europol to perform crime analysis for it.<sup>40</sup>

From a practical point of view, the existing tools available at both Eurojust and Europol play a crucial role in investigating and prosecuting terrorist crimes. What may appear to be a purely national case, may turn out to be a large multi-national criminal offence from the perspectives of Eurojust and Europol, although the powers of these two bodies are entirely different in nature compared to EPPO. In any case, the special tools of Eurojust and Europol are of great use in making the fight against terrorist crimes more effective and this is something the EPPO would greatly profit from.

Further synergies may be created through a functional proximity between Eurojust, Europol and the EPPO as far as the fight against cross-border terrorist crimes is concerned. An option in this context could be to build the EPPO on the broad mandate and experience of Eurojust in the area of fighting terrorist crimes, by allowing these two EU bodies cooperate as closely as needed and possible.<sup>41</sup> In the long term, the option of bringing Eurojust and the EPPO under one roof could also be envisaged.

## VI. Conclusions

While the focus should ideally lie on preventing terrorist crimes, it is clear that terrorism cannot be addressed through prevention only – an absolute prevention of terrorism is not possible. Where prevention fails, an effective judicial response at prosecution level must be safeguarded. The Union needs to ensure an equal level of protection through preventive as well as prosecution measures.

The EPPO, as a single, decentralised European prosecution office, could become an effective tool in investigating, prosecuting and bringing to judgement terrorist crimes and add a European dimension to the current efforts. Compared to the present horizontal, multinational approach, the EPPO would create a vertical, European relationship amongst the Member States and Union actors. This could be a decisive qualitative improvement, which would help overcoming the divergences of effective investigation and prosecution of terrorist crimes across the EU.

The following features of the EPPO underpin that the Office would be well placed to effectively investigate and prosecute terrorist crimes:

- A decentralised structure, with the European Delegated Prosecutors embedded in the national systems of the Member States and working hand in hand with national law enforcement authorities;
- A central office able to develop a coherent prosecution policy to fight terrorist crimes and steer the investigations and prosecutions carried out by the European Delegated Prosecutors, while having a unique overview over the criminal activity across the Union;
- Close cooperation with EU actors, such as Eurojust and Europol.

Despite the added value the EPPO could bring, the Leaders at the summit in Sibiu on 9 May 2019 did not discuss this matter and did not decide in favour of an extension of the EPPO's competences to cross-border terrorist crimes.

There might be good reasons for allowing the EPPO, which is still in the process of being set up, to first settle into the existing judicial landscape and establish smooth cooperation with other EU actors, as well as with the national authorities, which will be vital for its functioning in practice, before taking a decision on extending its mandate. Any extension would require an in-depth analysis of the legal and practical requirements taking account of the political dimension. Lessons learned from the valuable work of Eurojust and Europol could feed into this.

The EPPO Regulation foresees that five years after the start of its operations, the Commission is required to submit an evaluation report on the implementation and impact of the EPPO Regulation, as well as on the effectiveness and efficiency of the EPPO and its working practices.<sup>42</sup> Awaiting this evaluation prior to taking a decision on extending the EPPO's mandate could also be envisaged, although such approach could be considered as not flexible enough and not suitable to tackle the immediate problems in the fight against terrorism.

For sure the Commission Communication has triggered a debate on this important subject at the political level as well as amongst practitioners and academics. The Communication illustrates that security and justice aspects cannot be looked at separately. They must be looked at holistically. It is also clear that the fight against cross-border terrorist crimes is resource intensive and the EU would need to ensure that the EU bodies involved in the fight against cross-border terrorist crimes, such as Eurojust, Europol and – should such decision be taken in the future – the EPPO, receive all necessary resources to fulfil their mandates and

carry out their important tasks in protecting the European citizens. The same applies to the Member States in relation to their national authorities.

What may also be envisaged is a narrower and more targeted approach, e.g. a gradual extension of the EPPO's competences, starting with areas that show a strong connection with PIF crimes, such as financial crime in general, organised crime or cybercrime. At a later stage, other types of crime, such as trafficking in human beings, trafficking in arms, and ultimately cross-border terrorist crimes could be included.

1. Cf. the SOTEU 2017 package under [https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017\\_en](https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017_en) ↵
2. Cf. the Roadmap under [https://ec.europa.eu/commission/sites/beta-political/files/roadmap-factsheet-tallinn\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/roadmap-factsheet-tallinn_en.pdf) ↵
3. Cf. the Strategic Agenda 2019–2024 – outline under [https://www.consilium.europa.eu/media/39291/en\\_leaders-agenda-note-on-strategic-agenda-2019-2024-0519.pdf](https://www.consilium.europa.eu/media/39291/en_leaders-agenda-note-on-strategic-agenda-2019-2024-0519.pdf) ↵
4. 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 (hereinafter the "Communication"), 12 September 2018, COM(2018) 641 final. See also T. Wahl, *eucrim* 2/2018, 86–87. ↵
5. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the 'EPPO'), O.J. L 283, 31.10.2017, pp. 1–71. ↵
6. Cf. White Paper on the Future of Europe – Reflections and scenarios for the EU27 by 2025, p. 20 where scenario 3 mentions a "joint public prosecutor's office" to investigate fraud, money laundering and the trafficking of drugs and weapons. ↵
7. This idea was put forward e.g. by Italy's then Minister of Justice Orlando in a letter to Justice Commissioner Jourová and the Estonian Minister of Justice Reinsalu during the Estonian Presidency in the second half of 2017, as well as by French President Macron in his Sorbonne speech on 26 September 2017. ↵
8. Article 120 of the EPPO Regulation foresees that the EPPO assumes its investigative and prosecutorial tasks on a date to be determined by a decision of the Commission on a proposal of the European Chief Prosecutor once the EPPO is set up. As this date cannot be earlier than three years after the entry into force of the EPPO Regulation, the EPPO cannot take up its functions before the end of 2020. ↵
9. Cf. the Communication, *op. cit.* n. 7, p. 1. ↵
10. The following national Parliaments issued an opinion on the Communication: Czech Senate, German Bundestag and Bundesrat, Dutch Tweede Kamer, Romanian Camera dei deputati, and the Swedish Riksdag (to be found on the respective websites of the national Parliaments). ↵
11. Cf. on the EPPO also P. Csonka/A. JuszczaK/E. Sason, "The Establishment of the European Public Prosecutor's Office – The Road from Vision to Reality", (2017) *eucrim*, 125–135. ↵
12. The criminal offences falling within the material competence of the EPPO are defined in 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, O.J. L 198, 28.7.2017, p. 29. See for this Directive A. JuszczaK and E. Sason, "The Directive on the Fight to the Union's Financial Interests by Means of Criminal Law (PIF Directive)", (2017) *eucrim*, 80–87. ↵
13. Cf. Art. 22(2) of the EPPO Regulation and Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, O.J. L 300, 11.11.2008, p. 42. ↵
14. Art. 22(3) of the EPPO Regulation. ↵
15. At the time of adoption of the EPPO Regulation the following 20 Member States participated in the EPPO: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain. On 1 August 2018, the Commission confirmed the Netherlands as the 21st EU Member State (Commission Decision (EU) 2018/1094) and on 7 August 2018, the Commission confirmed Malta as the 22nd EU Member State in the enhanced cooperation (Commission Decision (EU) 2018/1103). ↵
16. EU Member States not participating at this stage are: Denmark, Hungary, Ireland, Poland, Sweden and the United Kingdom. Among those six Member States, Sweden, Poland and Hungary can notify any time their wish to join the EPPO, whereas Ireland and the UK have a special "opt-in" regime (Protocol 21), and Denmark has a special "opt-out" regime (Protocol 22). ↵
17. Cf. for further references [https://multimedia.europarl.europa.eu/en/visit-of-stefan-lofven-swedish-prime-minister-ep-plenary\\_2019043\\_EP-0878861A\\_WT5\\_009\\_p](https://multimedia.europarl.europa.eu/en/visit-of-stefan-lofven-swedish-prime-minister-ep-plenary_2019043_EP-0878861A_WT5_009_p) ↵ [https://multimedia.europarl.europa.eu/en/visit-of-stefan-lofven-swedish-prime-minister-ep-plenary\\_2019043\\_EP-0878861A\\_WT5\\_009\\_p](https://multimedia.europarl.europa.eu/en/visit-of-stefan-lofven-swedish-prime-minister-ep-plenary_2019043_EP-0878861A_WT5_009_p) ↵
18. Cf. Art. 23 of the EPPO Regulation. ↵
19. It is of note in this context that the EPPO was presented and discussed at the meeting of the Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters (PC-OC), Council of Europe on 29 May 2019. ↵
20. Register of Commission Expert Groups and Other Similar Entities, X03578 – EPPO Expert Group pursuant to Art. 20(4) of Council Regulation (EU) 2017/1939. ↵
21. Cf. also Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939, O.J. L 238, 21.9.2018, p. 92 and Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 282, 12.11.2018, p. 8. ↵
22. Cf. the articles on implementation of the EPPO Regulation in national law by Dubarry/Wachenheim, Herrnfeld, and Villas Alvarez in *eucrim* 2/2018. ↵
23. Cf. note 21. ↵
24. According to Art. 16 of the EPPO Regulation, the 22 participating Member States shall each nominate three candidates for the post of European Prosecutor. ↵

25. Cf. the Progress Reports towards an effective and genuine Security Union, the most recent of 20.3.2019, COM(2019) 145 final. ↪
26. 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, PE/37/2018/REV/1, O.J. L 295, 21.11.2018, p. 138–183. ↪
27. Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, O.J. L 135, 24.5.2016, p. 53–114. ↪
28. This draft European Council decision has only two articles. The first article provides for the substantial amendments, while the second merely governs the entry into force. Article 1 of the draft European Council decision reads as follows:
- Article 1
- Article 86 of the Treaty on the Functioning of the European Union (TFEU) is amended as follows:
- “1) In paragraph 1, the first subparagraph is replaced by the following:
- ‘1. In order to combat terrorism and crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.’
- 2) Paragraph 2 is replaced by the following:
- ‘2. The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences of terrorism affecting more than one Member State and offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.’” ↪
29. According to the Commission’s proposal for the Regulation on the establishment of the EPPO, COM(2013) 534 final of 17.7.2013, the EPPO was already subject to the review under Protocol No 2. Cf. in this regard the 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 of 27.11.2013. ↪
30. Cf. Art. 5(3) of the EPPO Regulation. ↪
31. Directive (EU) 2017/541 of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. In accordance with Art. 28(1) of Directive (EU) 2017/541 Member States were to transpose Directive (EU) 2017/541 by 8 September 2018. ↪
32. Cf. above part II.1. ↪
33. The same applies also to formulating the territorial and personal competence of the EPPO. The Communication acknowledges that these aspects need to be carefully looked into in order to establish the competence of the EPPO for cross-border terrorist crimes. ↪
34. At the same time, in some areas there is a demonstrated need for specialisation through the creation of specialised units within the prosecution office, e.g. in the area of core international crimes. ↪
35. Cf. Art. 37 and the accompanying recital 80 of the EPPO Regulation. ↪
36. Cf. Art. 41 of the EPPO Regulation. ↪
37. Ibid. ↪
38. For overviews of these Directives, see the following articles in eucrim: S. Cras and L. De Matteis, *eucrim* 4/2010, 153; S. Cras and L. De Matteis, *eucrim* 1/2013, 22; S. Cras, *eucrim* 1/2014, 32; S. Cras and A. Erbežnik, *eucrim* 1/2016, 25; S. Cras, *eucrim* 2/2016, 109; and S. Cras, *eucrim* 1/2017, 35. ↪
39. Cf. in this context also Eurojust Press Release of 21 June 2018 with further references: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2018/2018-06-21.aspx>. In this Joint Statement a number of Member States call for the creation of a European Judicial Counter-Terrorism Register to be kept at Eurojust. ↪
40. Art. 102 of the EPPO Regulation already provides that the EPPO “may also ask Europol to provide analytical support to a specific investigation conducted by the EPPO”, but the instruction power envisaged here would require amending the Europol Regulation as well. ↪
41. Recalling Art. 86 TFEU, which states that the EPPO may be established “from Eurojust”. ↪
42. Art. 119(1) of the EPPO Regulation. ↪

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## \* Authors statement

The views set out in this article are those of the authors and do not necessarily reflect the official opinion of the European Commission.

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