

# History Repeats Itself: Resolving Conflicts of Competence in EPPO Cases

Reflections on the Beroš and Ayuso Cases

Balázs Márton



Article

## ABSTRACT

A corruption case in Croatia (the Beroš case) recently reached the political level, leading to a positive conflict of competence between the Croatian prosecutorial authorities and the European Public Prosecutor's Office (EPPO). The circumstances surrounding the debate bear a striking resemblance to the conflict that emerged in 2022 regarding the so-called Ayuso case in Spain. Both cases underpin the shortcomings in the regulatory framework of the EPPO's competences, which have already been highlighted in legal literature. The prompt resolution of these shortcomings is crucial, as the current legal framework may have serious rule-of-law implications, potentially leading to harmful consequences for the defendant's rights. With its analysis of both the Croatian Beroš case and the Spanish Ayuso case, this article aims to demonstrate the regulatory challenges related to the conflict of jurisdiction within the EPPO's legal framework.

## AUTHOR

Balázs Márton

PhD Student

National University of Public Service,  
Budapest, Hungary

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# I. Background of the *Beroš* and *Ayuso* Cases

On 15 November 2024, the European Public Prosecutor's Office (EPPO) issued a statement announcing that its office in Zagreb (Croatia) had initiated an investigation against eight individuals, including the Minister of Health, directors of two hospitals in Zagreb, and two companies. The suspects allegedly committed various economic crimes as members of a criminal organisation between June 2022 and November 2024: accepting and giving bribes, abuse of position and authority, and money laundering.<sup>1</sup> For the purpose of this article, it is important to note that some of the alleged offences relate to contracts under projects funded by the European Union (EU) as part of Croatia's National Recovery and Resilience Plan 2021–2026. The media referred to the Croatian case as the *Beroš* case, named after the Minister of Health involved.<sup>2</sup> For the sake of clarity, I will also use this term, nevertheless respecting the presumption of innocence.

On the same day that the EPPO issued its statement, the Office of the Prosecutor General of Croatia (*Državno odvjetništvo Republike Hrvatske, DOHR*) also released a statement confirming that its anti-corruption unit (*Ured za suzbijanje korupcije i organiziranog kriminaliteta, USKOK*), which operates independently within the Croatian prosecutorial system, was also investigating the same facts and individuals. The DOHR claimed that the EPPO had not been notified, indicating that it should exercise competence over the case. Therefore, the DOHR requested the EPPO to transfer the entire case file to the USKOK. It referred to Art. 5 of Regulation (EU) 2017/1939,<sup>3</sup> which mandates sincere cooperation between national authorities and the EPPO. This provision requires national authorities to actively assist and support the EPPO in its investigations and prosecutions and emphasizes that any action, policy, or procedure under Regulation (EU) 2017/1939 shall be guided by the principle of sincere cooperation.<sup>4</sup>

These circumstances resulted in a positive conflict of competence between the EPPO and the DOHR – the basis of the legal dispute.

The *Beroš* case resembles the events in another case of a positive conflict of competence that arose between the EPPO and Spanish authorities in 2022: the *Ayuso* case. The *Ayuso* case, which I presented in a previous eucrim article,<sup>5</sup> involved an alleged corruption crime regarding the purchase of medical masks financed by EU funds during the COVID-19 pandemic. Spain's **Special Anti-Corruption Prosecutor's Office** (*Fiscalía Especial contra la Corrupción, FEC*) initiated an investigation into the payment of €55,000 allegedly made to the brother of the regional president, Isabel Díaz Ayuso. The EPPO sought to exercise its right of evocation, however, arguing that the suspected offence involved EU financial resources. The **Prosecutor General** of Spain, who is the authority in Spain to decide on positive conflicts of jurisdiction in EPPO cases, decided to separate the case involving the mask deal. Thus, the FEC could continue to investigate the mask contract.<sup>6</sup>

Against the background of these two cases, this article aims to demonstrate the regulatory challenges related to resolving (positive) conflicts of competence within the EPPO's legal framework. Section II briefly recapitulates this legal framework; section III presents the lines of argument in the Croatian and Spanish cases. This is followed by my own analysis of the cases (section IV) and, ultimately, conclusions are drawn (section V).

It is likely that, as a consequence of the regulatory difficulties shown, legal disputes similar to those described in this article can presently only be resolved on an *ad hoc* basis. Such case-by-case resolution affects the principles of legal certainty and foreseeability, thereby undermining the predictability of legal outcomes. Addressing this risk effectively calls for a comprehensive and fundamental legislative response.

## II. EPPO's Legal Framework on Resolving Conflicts of Jurisdiction

Both substantive and procedural rules governing the EPPO's competence are defined in Regulation (EU) 2017/1939, which is directly applicable in all participating Member States. There are two primary ways in which the EPPO may initiate an investigation:

- Right of evocation: If a judicial or law enforcement authority of a Member State initiates an investigation into an offence for which the EPPO could exercise its competence or if at any time after the initiation of a national investigation it appears to that authority that the case concerns such an offence, that authority shall, without undue delay, inform the EPPO so that it can decide whether to exercise its right of evocation.<sup>7</sup>
- Autonomous initiation: The EPPO shall initiate an investigation if there is a suspicion that an offence within its competence has been committed. In such cases, the European Delegated Prosecutor (EDP) of the relevant Member State shall record the initiation of the investigation in the Case Management System.<sup>8</sup> The EPPO shall then notify the national authority of its decision to open the investigation without undue delay.<sup>9</sup>

Before making a decision about exercising its right of evocation, the EPPO may consult with the relevant national authorities.<sup>10</sup> If it comes to the EPPO's attention that an investigation into a criminal offence for which it could be competent has already been undertaken by the competent national authorities, it shall inform these authorities without delay. After being duly informed, the EPPO shall take a decision on whether to exercise its right of evocation.<sup>11</sup> It follows from this "priority competence" that, once the EPPO has exercised its competence over an investigation, the national authorities shall transfer the case to the EPPO and are no longer permitted to proceed with the investigation or prosecution of the same offence.

The EU legislator neither regulated the vertical relationship between the EPPO and the Member States on the basis of the principle of complementarity as laid down in the Corpus Juris<sup>12</sup>, nor did it apply the rule of exclusive competence proposed in the Model Rules<sup>13</sup> and the European Commission's 2013 proposal.<sup>14</sup> Although these concepts would have created a clearer legal framework for the EPPO's competence, they provoked opposition from the Member States during the legislative procedure. This ultimately led to the adoption of the current solution based on the **model of shared competence**.<sup>15</sup> While shared competence may appear to be a more balanced approach compared to exclusive competence at first glance, the balance actually shifts in favour of the EPPO rather than to the Member States. The reason for this is that, in the case of competing competences, the EPPO's jurisdiction ultimately takes precedence over that of the Member State if there is an offence within the scope of the EPPO Regulation. That is why it is more accurate to refer to this rule as priority competence.<sup>16</sup>

Thus, the current legal framework does not *de jure* preclude the emergence of a positive conflict of competence between the EPPO and the national authorities. In legal literature, procedural issues related to conflicts of competence are often discussed alongside the material law governing the competence.<sup>17</sup> The EU legislator did not provide detailed guidance on the procedure to be followed in case of such a conflict. Regulation (EU) 2017/1939 merely provides that, in case of disagreement between the EPPO and the national authorities regarding the scope of the EPPO's material competence, the national authorities responsible for attributing competences concerning prosecution at the national level shall determine which authority is competent to investigate the case.<sup>18</sup>

### III. Lines of Arguments in the *Ayuso* and *Beroš* Cases

In *Ayuso*, the EPPO recognized the complexity of the case and the complexity of the relationship between national law and EU law; it recommended that the **Prosecutor General – the competent authority in Spain to decide on this conflict of competence – consider a referral** to the European Court of Justice.<sup>19</sup> Spanish lawyers proposed separating the case into two investigations, one allowing the EPPO to handle matters involving EU financial interests and one in which the FEC would handle the investigation of inextricably linked offences (see below).<sup>20</sup> The **Prosecutor General** ultimately endorsed this split. The EPPO, however, argued that splitting competence over factually linked offences contravened EU law and decided to proceed with its investigation. Eventually, both the FEC and the EPPO terminated their parallel investigations for different reasons and at different times.<sup>21</sup>

The European Chief Prosecutor criticized the events leading up to the **Prosecutor General's** decision. She argued that the **Prosecutor General** of Spain, as the superior of the FEC, was inherently involved in the conflict. Moreover, the EPPO had not been given an opportunity to present its position either before the Prosecutor General or Spanish courts. The procedural rules in Spain, which pertain to the interpretation of EU law, did not provide for any right to judicial review. According to the European Chief Prosecutor, these procedural deficiencies hindered the CJEU from exercising its exclusive competence over the interpretation of EU law, thereby jeopardizing the **supremacy of EU law**.<sup>22</sup>

In the *Beroš* case, the Office of the **Prosecutor General of Croatia** – the national authority designated to resolve conflicts of competence – issued its decision on the conflict of competence on 19 November 2024, determining that the investigation should be continued by USKOK.<sup>23</sup> The Prosecutor General of Croatia cited Art. 22(2) of Regulation (EU) 2017/1939, which grants the EPPO competence over a case involving participation in a criminal organisation (as defined in Council Framework Decision 2008/841/JHA<sup>24</sup>) only if the focus of the criminal organisation's activity is to commit offences affecting the EU's financial interests (as defined in the PIF Directive). The **Prosecutor General of Croatia** concluded that the organisation's criminal activity in the *Beroš* case primarily targeted the Croatian state budget rather than EU funds.<sup>25</sup> Regarding the issue of inextricably linked offences, the **Prosecutor General of Croatia** cited the limitations in Art. 25(3) of Regulation (EU) 2017/1939 and determined that these also fell outside the EPPO's competence in the concrete case. The decision further noted that the EPPO did not act in accordance with the principle of **loyal cooperation**, as the Office itself caused the conflict of competence by failing to refrain from exercising its competence in compliance with the provisions of Regulation (EU) 2017/1939.<sup>26</sup>

It followed that the EPPO issued a statement expressing firm disagreement with the Prosecutor's General decision, but it finally transferred the *Beroš* case to the Croatian authorities. At the same time, the European Chief Prosecutor sent a formal letter to the European Commission, underlining systemic challenges in upholding the rule of law in Croatia, in line with Art. 4 of Regulation (EU) 2020/2092<sup>27</sup> (the so-called "**Rule of Law Conditionality Regulation**"), and raising three main concerns:

- The designation of the **Prosecutor General of Croatia** as the authority to resolve the conflict of competence violates EU law.
- The decision was based solely on USKOK's legal interpretation without allowing the EPPO to present its position, which undermines the principle of impartiality.
- USKOK had previously failed to notify the EPPO about its investigation involving EU financial resources, thereby breaching the provisions of Regulation (EU) 2017/1939.<sup>28</sup>

## IV. Analysis: The Deficient Regulatory Approach

The *Ayuso* and *Beroš* cases have highlighted conflicts of competence between the EPPO and national authorities, which stem from the regulatory approach taken: The Union legislator's decision to refer the dispute to the national level was likely guided by the same political considerations that led to the acceptance of shared competence.

The first problem here is the need for the application of national procedural rules in resolving such conflicts of competence. In the *Ayuso* case, *Lorena Bachmaier Winter* has identified a significant shortcoming regarding the reference of dispute resolution to the national authorities: there is no possibility of hearing the EPPO, as an involved party; moreover, the decision of the national authority is not subject to any judicial review.<sup>29</sup>

Second, the CJEU is only competent to interpret Arts. 22 and 25 of Regulation (EU) 2017/1939 within the framework of preliminary rulings.<sup>30</sup> In my view, however, the preliminary ruling procedure does not constitute an effective judicial remedy. The experiences in the *Ayuso* case confirm this, as the involvement of the CJEU was not mandatory and even inadmissible. I share *Hans-Holger Herrnfeld*'s view that "disturbances" occur when a national authority decides in cases of conflicts of competence;<sup>31</sup> I find it incomprehensible – from an EU law perspective – that a national decision can be binding on an EU body.

Several authors have criticized the current regulatory framework for resolving conflicts of competence, arguing that it undermines the EPPO's interests.<sup>32</sup> According to *Bachmaier Winter*, potential breaches of the right to a fair trial are apparent in the *Ayuso* case.<sup>33</sup> I firmly believe that the problem should instead be examined from the perspective of the defendant, as disputes of competence like those in *Ayuso* primarily affect the defendant's right to a fair trial. Parallel investigations conducted by different authorities involving the same offence – despite the pending resolution of a conflict of competence – undermine the principle of **equality of arms**: the defendant is forced to respond to multiple authorities, participate in multiple interrogations, and prepare for each proceeding, which complicates the exercise of the right to effective defense. One need only think of the associated costs of legal representation and related expenses. In addition, serious rule-of-law concerns arise regarding the legal validity of procedural acts conducted during parallel investigations if competence is ultimately granted to a different authority with a different regime of criminal procedure.<sup>34</sup>

## V. Lessons to Learn

The *Ayuso* and *Beroš* cases exemplify a conceptual anomaly in current EU law: Member States are obliged to interpret EU law and issue binding decisions on an EU body, specifically the EPPO, if conflicts of competence arise. Even though the Union legislator may have had a different intention, the currently applicable attempt to resolve such disputes by opening up the possibility of preliminary references to the CJEU, is unsuitable: national authorities are not in a position to provide authentic interpretations of EU law, particularly if the national authority or its subordinate body is a party to the dispute. The shortcomings are also exacerbated if the national authority competent to decide the conflict is not a court or tribunal, as it is not entitled to submit a request for preliminary ruling to the CJEU.<sup>35</sup>

The lack of clear procedural provisions in EU law for resolving a conflict of competence undermines **legal certainty**. As seen in the *Ayuso* and *Beroš* cases, the parties involved in the conflict (the Prosecutor Generals, on the one hand, and the EPPO, on the other) can only argue on the basis of broadly formulated principles or norms beyond the scope of Regulation (EU) 2017/1939, such as the Charter of Fundamental Rights of the European Union, general principles of EU law (e.g., loyal cooperation), or the Rule of Law Conditionality Regulation. This *ad hoc* approach is neither coherent nor comprehensive.

An effective judicial review is essential to ensuring a rule-of-law-compliant resolution of conflicts of competence between the EPPO and national authorities. Since these vertical conflicts inherently involve clashes between EU law and national laws, only a supranational body would be qualified to adequately review them. The Charter (Art. 47) has also emphasized the importance of ensuring effective judicial review, which is a fundamental requirement for the lawful resolution of such conflicts.

It could be argued in favour of the current solution that in cases where the investigation remains purely within a national jurisdiction, similar conflicts of competence can arise between different national law enforcement and/or judicial authorities with similar negative consequences, particularly for the defendant, including the prolongation of the procedure. However, purely national, horizontal disputes have a much less significant impact on the defendant's legal position compared to a vertical conflict, such as one between the EPPO and the national authority of a Member State. The resolution decision in the vertical situation determines the choice between different legal orders – and thus different procedures with different procedural rules. Furthermore, it must be borne in mind that, in horizontal disputes, the investigation – regardless of the final outcome of the competence dispute – remains within the national legal order at all times, the "master" of the case being a national authority under the jurisdiction and control of the given state. Conversely, if the conflict of competence is embodied in a vertical choice between EU and national laws, the decision may also have the consequence that the investigation is removed from state control.

In conclusion, I agree with *Enrico Traversa*'s opinion that the renunciation of exclusive competence and the transition to shared competence should have been accompanied by a complete revision of the procedure for conflicts of competence during the legislative procedure leading to the EPPO Regulation.<sup>36</sup>

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