Judicial Cooperation Between the EPPO and Third Countries

Chances and Challenges

Nicholas Franssen *

eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

The article deals with the European Public Prosecutor's Office's (EPPO's) specific role in the fight against EU fraud in relation to third countries, i.e. countries outside the EU. It contains an overview of the various legal avenues in the EPPO Regulation that the EPPO may explore for engaging in judicial cooperation with such third countries. It then describes the legal parameters that will mostly affect the application of these various modalities in practice. In its conclusion, the article assumes that it may well prove to be rather challenging for the EPPO to develop its external role and that it is likely to have to deal with a patchwork of forms of judicial cooperation as a result, as this will depend on factors like the nature of the case and the third country involved. Equally, once the EPPO is up and running and in a position to start defining its external policy priorities it will need to identify the third countries most relevant to its operational activities, assess the possibilities for judicial cooperation with them and, if need be, propose solutions to Member States or the Commission, as the case may be, in order to address any legal voids encountered in the process.

AUTHOR

Nicholas Franssen

Counsellor
Ministry of Justice and Security in The Netherlands

CITE THIS ARTICLE

Franssen, N. (2019). Judicial Cooperation Between the EPPO and Third Countries : Chances and Challenges. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2019-015

Published in eucrim 2019, Vol. 14(3) pp 198 – 205

https://eucrim.eu

ISSN:

I. Introduction

The protection of the financial interests of the European Union (EU) encompasses a significant external dimension in the sense that money originating from the EU's financial instruments is not just spent within the territory of its Member States or perhaps their overseas territories but equally in countries outside the EU (third countries).[1] As a consequence, investigations concerning fraud, corruption, and any other illegal activity affecting the financial interests of the Union (EU fraud) should not stop at its external borders. In fact, even PIF offences committed within the EU itself may bring the need to undertake investigatory acts outside the EU. This external dimension of the fight against EU fraud will equally affect the European Public Prosecutor's Office (EPPO). This new EU body was set up by Council Regulation 2017/1939 of 12 October 2017.[2] The Regulation entered into force on 20 November 2017. So far, 22 Member States have chosen to participate in the project.[3] The EPPO is expected to be up and running by the end of 2020.

Forms of EU fraud that have a link to third countries are plentiful. The 2018 OLAF report is a case in point.[4] Of 84 investigations concluded in 2018, no less than 37 concerned a country outside the Union.[5] In addition, as regards ongoing investigations at the end of 2018, divided by sector, there were 44 ongoing investigations in relation to external aid and 43 customs and trade cases out of a total of 414.[6] Furthermore, Eurojust, the Union's Agency for Criminal Justice Cooperation, has also dealt with a number of cases of value added tax (VAT) fraud involving third countries.[7]

It goes without saying that effective cooperation with third countries will thus be essential in order for the EPPO to achieve concrete results in cases related to such countries whenever it performs its tasks under Art. 4 of the EPPO Regulation.

II. The EPPO's Extraterritorial Competence and its Framework for Judicial Cooperation

So, has the EPPO been legally equipped to investigate and, if need be, prosecute fraud cases having a link to third countries? Art. 23 of the Regulation (Territorial and personal competence of the EPPO) offers a positive reply to this question. It defines the extent of the EPPO's extraterritorial jurisdiction, be it only in relation to its mandate regarding PIF offences as defined in Art.s 22 and 25 of the Regulation. The EPPO can evidently exercise its competence if these offences were committed in the territory of one or several Member States[8] but also with respect to offences committed:

- By a national of a Member State, provided that the Member State has jurisdiction for such offences when committed outside its territory;[9]
- Outside the territories [of one or several of the Member States] by a person who was subject to the Staff Regulations or to the Conditions of Employment at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.[10]

In other words, the EPPO has competence in this situation in relation to EU nationals and EU officials. In order to be able to effectively exercise that competence in relation to third countries, the EPPO will need to resort to the use of mutual legal assistance (MLA). Some examples of international agreements on MLA (MLATs) that might prove relevant to the EPPO for this purpose are (in no particular order):

- The 1959 Council of Europe (CoE) Convention on Mutual Assistance in Criminal Matters and its second Additional Protocol of 2001;[11]

https://doi.org/10.30709/eucrim-2019-015

- The United Nations (UN) Convention against Corruption of 2003 (UNCAC);[12]
- The UN Convention against Transnational Organized Crime of 2000 (UNTOC);[13]
- The 2000 EU MLA Convention[14] and its Protocol of 2001[15], some provisions of which may be applied to Iceland and Norway.[16]

1. The Road from the 2013 European Commission Proposal to Regulation 2017/1939

This section describes which provisions Regulation 2017/1939 contains on judicial cooperation between the EPPO and third countries and how they came about. When the European Commission (the Commission) published its original proposal for a Council Regulation on the establishment of the EPPO on 17 July 2013,[17] that proposal contained provisions on cooperation between the EPPO and Eurojust, Europol, and third countries.[18] Art. 59 of the proposal (Relations with third countries and international organisations) reads as follows:

"[…] 3. In accordance with Article 218 TFEU, the European Commission may submit to the Council proposals for the negotiation of agreements with one or more third countries regarding the cooperation between the [EPPO] and the competent authorities of these third countries with regard to [MLA/extradition] in cases falling under the competence of the [EPPO].

4. Concerning the criminal offences within its material competence, the Member States shall either recognise the [EPPO] as a competent authority for the purpose of the implementation of their international agreements on [MLA]/extradition, or, where necessary, alter those international agreements to ensure that the [EPPO] can exercise its functions on the basis of such agreements when it assumes its tasks in accordance with Article 75(2)."

In hindsight, the intriguing assumption in paragraph 4 of this Article seems to have been that unilateral notifications by Member States would always trigger a positive reaction from third states. However, looking at the most relevant rule of general international law laid down in Art. 34 of the Vienna Convention on the law of treaties of 23 May 1969,[19] one might be forgiven for thinking that such a third state would actually need to agree to cooperate with the EPPO one way or the other. Against this backdrop, it is not surprising to note that Regulation 2017/1939 now contains a number of provisions on judicial cooperation between the EPPO and third countries that are fully compatible with public international law.

Chapter X of the Regulation (Provisions on the relations of the EPPO with its partners) contains a number of relevant provisions, of both a more general and a specific nature. As a starting point, Art. 99 (Common provisions) sets out the basic principle in paragraph 1 that the EPPO may establish and maintain cooperative relations with its partners, insofar as is necessary for the performance of its tasks. These main partners are the institutions, bodies, offices or agencies of the Union, non-participating Member States (NPMS), the authorities of third countries, and international organisations. Insofar as relevant to the performance of its tasks, paragraph 2 of Art. 99 states that the EPPO may, in accordance with Art. 111, directly exchange all information with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in the Regulation. Lastly, for the purposes set out in paragraphs 1 and 2, paragraph 3 of the same Article allows the EPPO to conclude working arrangements with the entities referred to in paragraph 1. These working arrangements are to be of a technical and/or operational nature and must aim, in particular, at facilitating cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States. The next section will explain and analyse the central provision on judicial cooperation with third countries, i.e. Art. 104 of the Regulation, in greater detail.

2. Cooperation with Third Countries under Article 104 of Regulation 2019/1939

Art. 104 (Relations with third countries and international organisations) starts by specifying that the working arrangements referred to in Art. 99(3) with the authorities of third countries may in particular concern the exchange of strategic information and the secondment of liaison officers to the EPPO.[20] The EPPO may designate, in agreement with the competent authorities concerned, contact points in third countries in order to facilitate cooperation in line with its operational needs.[21] Before describing the three main possibilities for judicial cooperation between the EPPO and third countries – which may be briefly summarised as conclusion of/accession to an international agreement, succession of national judicial authorities, and applying the 'double hat' by a European delegated prosecutor (EDP) –, it is important to note recital 109 of the Regulation, which reads as follows:

"Pending the conclusion of new international agreements by the Union or the accession by the Union to multilateral agreements already concluded by the Member States on [MLA], the Member States should facilitate the exercise by the EPPO of its functions pursuant to the principle of sincere cooperation enshrined in Article 4(3) TEU. If permitted under a relevant multilateral agreement and subject to the third country's acceptance, the Member States should recognise and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of those multilateral agreements (…)."

From this recital, an obligation on (participating) Member States appears to follow, pending action undertaken by the Union and based on Art. 4(3) TEU, to actively promote the conditions for the EPPO to enable it to fulfil a certain role in the field of judicial cooperation. A closer look at recital 109 also reveals an order or – as some might put it – a hierarchy among the three possibilities. Moreover, the recital reflects the pragmatic notion that, if the first possibility mentioned fails to materialize, one or more alternative options will need to be explored.

The first possibility in Art. 104 is based on the *principle of conclusion of or accession to* international agreements by the Union. Art. 104(3) states that international agreements with one or more third countries concluded by the Union or to which the Union has acceded in accordance with Art. 218 TFEU in areas that fall under the EPPO's competence, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO. In other words, there is no obligation on the Union to conclude new agreements or to accede to any existing ones. Nevertheless, the EPPO should be able to suggest that the Council draw the Commission's attention to the need for an adequacy decision or for a recommendation on the opening of negotiations over an international agreement if the College identifies an operational need for cooperation with a third country.[22] The only aforementioned conventions to which the Union is a party at the moment are UNTOC, which it approved on 21 May 2004, and UNCAC, which it approved on 12 November 2008.[23] At present, and in addition to the Agreement with Norway and Iceland mentioned above,[24] the EU also has two bilateral agreements on MLA of its own, one with the United States[25] and the other with Japan.[26] The EU-Japan agreement is self-standing; the agreement with the United States is complementary to bilateral agreements between the Member States and the United States.

The second possibility in Art. 104 is based on what one might refer to as the *succession principle*, according to which the EPPO is considered the competent (judicial) authority that will replace the national judicial authorities competent for PIF crimes within the EPPO's competence. Unlike the previous principle, the focus here is on the Member States. In line with this second principle, the Regulation states the following in Art. 104(4):

"In the absence of an agreement pursuant to paragraph 3, the Member States shall, if permitted under the relevant multilateral international agreement and subject to the third country's acceptance, recognise and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of multilateral international agreements on [MLA] concluded by them, including, where necessary and possible, by way of an amendment to those agreements."

The essence of this provision is that Member States have an obligation to recognise and, if possible, notify the authorities of a third state that the EPPO is a "competent authority" for the purpose of the implementation of a multilateral MLAT concluded between them. According to recital 109, "this may entail, in certain cases, an amendment to those agreements" but it immediately acknowledges [that] "the renegotiation of such agreements should not be regarded as a mandatory step, since it may not always be possible." Indeed, this adds a touch of realism to the text. The assumption is that the actual purpose of the notification is limited to officially confirming that the EPPO has been recognised by the Member State concerned as competent for PIF crimes and competent to issue MLA requests; it does not imply something more far-reaching like allowing the new body to have direct contact with judicial authorities in third countries, unless explicitly foreseen in that agreement. In addition, Member States may also notify the EPPO as a competent authority for the purpose of the implementation of other MLATs concluded by them, in particular bilateral ones, including, by way of an amendment to those agreements

The third and final possibility in Art. 104 is based on the so-called *double hat principle*, which is inspired by the role of the EDP described in Art. 13(1) of the Regulation.

Recital 109 explains the *rationale* behind this principle as follows:

"Where the notification of the EPPO as a competent authority for the purposes of multilateral agreements already concluded by the Member States with third countries is not possible or is not accepted by the third countries and pending the Union accession to such international agreements, [EDPs] may use their status as national prosecutor toward such third countries."

The Regulation accordingly states in Art. 104(5) that:

"In the absence of an agreement pursuant to paragraph 3 or a recognition pursuant to paragraph 4 of this Article, the handling [EDP], in accordance with Article 13(1), may have recourse to the powers of a national prosecutor of his/her Member State to request [MLA] from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities. In that case, the [EDP] shall inform and where appropriate shall endeavour to obtain consent from the authorities of third countries that the evidence collected on that basis will be used by the EPPO for the purposes of this Regulation. In any case, the third country shall be duly informed that the final recipient of the reply to the request is the EPPO."

In other words, if it were to prove impossible for the EPPO to rely on an international agreement to which the Union is a party or on an agreement to which a Member State is a party, the handling EDP is allowed to resort to whichever legal possibilities he might use in his capacity as a national prosecutor for the purpose of MLA under national or international law. However, this should be seen as an ad hoc solution that can only be applied under the strict condition that the other two possibilities are unavailable, that the EDP acts in full transparency towards both the suspect and the authorities in the third country and, last but not least, that the latter obviously agree to the use of the "double hat".

Now, what if all three possibilities described above fail? The second paragraph of Art. 104(5) of the Regulation contains a safety net in the form of relying on reciprocity or international comity,[27] based on the notions of courtesy and mutual recognition in international relations. It states:

"Where the EPPO cannot exercise its functions on the basis of a relevant international agreement as referred to in paragraph 3 or 4, the EPPO may also request [MLA] from authorities of third countries in a particular case and within the limits of its material competence. The EPPO shall comply with the conditions which may be set by those authorities concerning the use of the information that they provided on that basis."

This safety net may be used by the EPPO in individual cases, ad hoc, and subject to any conditions the authorities in the third country might stipulate.

Referring to recital 109 yet again, this should, however be carried out on a case-by-case basis, within the limits of the material competence of the EPPO and subject to possible conditions set by the authorities of the third countries, all of which is self-evident.

As regards the scope and content of Art. 104, two remarks are warranted. The first one concerns the possibility for the EPPO to provide information or evidence, upon request, to the competent authorities of third countries, for the purpose of investigations or use as evidence in criminal investigations. It is important to understand that this possibility only covers information or evidence in the EPPO's possession.[28] The implication of this limitation is that judicial authorities in third countries, who are seeking to find other evidence than the EPPO itself has, will need to contact the competent national authorities. The second remark is that Art. 104 does not cover extradition.[29] This matter has wisely been left to the Member States, this being a sensitive area where national authorities tend to prefer to be in charge of the decision-making themselves, given the implications on their bilateral relations with third countries. Very often they are also legally barred from extraditing their own citizens anyway. The handling EDP may therefore request the competent authority of his/her Member State to issue an extradition request in accordance with applicable treaties and/or national law.

The following section of this article will deal with a number of legal issues concerning the modalities for judicial cooperation in Art. 104 in light of, *inter alia*, applicable public international law and its relation to European and national law and, moreover, various other factors that are likely to be crucial for their practical application.

III. Legal Issues Related to Article 104 of the EPPO Regulation

The first observation is that, whichever legal avenue the EPPO would like to embark on, the bottom line is that it will ultimately be dependent on the consent of the authorities of the third countries involved. This clearly follows from the maxim *pacta tertiis nec nocent nec prosunt* embodied in Art. 34 of the Vienna Convention mentioned in section II.1 above. The notion of acceding to or amending an existing treaty to allow for a role for the EPPO will be a daunting task, particularly in the case of a multilateral treaty. The question is which treaties would lend themselves to incorporating the EPPO with its current narrow mandate or, conversely, how to prevent it from going down the road of "mission creep" if the treaty has a much wider scope than only for PIF crimes. A new treaty between the EU and a third country on the basis of Art. 218 TFEU may be a more attractive and feasible option, but the first issue to be solved before adopting the negotiating mandate for the Commission is what precise role for the EPPO such a new Treaty should actually allow for (competent judicial authority or even Central Authority, see below) and which forms of MLA it should cover. A second but nonetheless important procedural point is how best to take account of the fact that not all Member States of the Union are participating in the EPPO. At first glance, it would appear that, if a new treaty between the EU and a third country is concluded on the basis of Art. 218 TFEU in combination with Art. 86 TFEU, a Council decision approving the conclusion of such a treaty will have to be adopted unanimously by

the participating Member States after consent by the European Parliament. Therefore, the NPMS would not need to agree to such a treaty in the Council. However, if it is a multilateral international treaty to which NPMS are also parties, they will have to agree to the amendment.

The idea of a notification to the depositary of a multilateral treaty or the other party to a bilateral agreement to the effect that the EPPO is a competent authority must obviously be possible under an existing international agreement and ideally indicate the purpose thereof. Even if this is the case, the notification may still be met with a certain scepticism in third countries and lead to counter-declarations in order to avoid the EPPO – as an EU body rather than a state – fulfilling such a role. Third states may simply refuse to cooperate. It is impossible to predict how third countries will react to such notifications. On this point, too, what use would a notification by a single EU Member State or only a handful of Member States be? It would probably lead to confusion in the outside world if this were not done in a coordinated way. If the case should ever arise, the most practical way to resolve it would seem to be that the EU and the 22 Member States announce the notification of the multilateral agreements affected *en bloc* at the Conference of States Parties. Many questions therefore remain unanswered. To end on a positive note, however, at least one third country – Switzerland – is actually preparing itself to deal with the EPPO in the future.[30]

The second observation is that, traditionally, judicial cooperation has mostly been a matter between states, which the EPPO is not. For the purpose of judicial cooperation, most states have designated a Central Authority with the power to receive and execute MLA requests or transmit them to the competent domestic authorities for execution. The judicial authorities of the requesting state can communicate with the Central Authority directly. Sometimes, though, national law allows for direct transmission. To illustrate: Art. 4 of the Second Additional Protocol to the 1959 CoE Convention amends Art. 15 of the Convention in order to allow for direct transmission of requests in most instances.[31]

As mentioned above, the EU currently has two bilateral MLATs, one with the United States and one with Japan. These too follow the concept of a Central Authority.[32] The EU is a party to UNCAC but, for obvious reasons, has not issued a notification in accordance with Art. 46(13) UNCAC designating a Central Authority it does not have.[33] The same logic applies to UNTOC.[34] Even if the Member States involved were to accept a role for the EPPO as a Central Authority in relation to certain criminal offences, which is anything but certain, it is not self-evident that the EU may now designate the EPPO without any boundaries after all, given the specific mandate of the EPPO versus the different scopes of UNTOC and UNCAC.[35] Finally, Central Authorities tend to be Ministries of Justice or offices of the Prosecutor General. This adds another complicating element in the sense that the EPPO's strict independence on paper[36] will, in practice, depend on the cooperation of an external, sometimes more political actor, who may claim a functional role in overseeing the execution of MLA requests, for instance. It would definitely be premature to conclude that the practical effect will *ipso facto* be to the detriment of the EPPO's independence, but it is safe to say that it may well have some impact on its functioning. This side note has even more relevance, if unexpectedly so, in light of recent decisions by the European Court of Justice concerning the issuing of European Arrest Warrants by public prosecutor's offices in Lithuania and Germany, which have shed light on the notion of "independence."[37]

The third observation may not be quite as potentially problematic as the previous two but has to be mentioned all the same. For the purpose of exercising any role in relation to judicial cooperation with third countries, the EPPO will have to rely on, and in fact will be bound by, the applicable national legislation and procedures as well as the international legal framework within which the Member State concerned and the handling EDP operate. This ground rule follows from Art. 5(3) of the Regulation:

"The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation."

And not only that, the EPPO Regulation itself contains an elaborate set of provisions on the exchange of personal data with third countries.[38] Art. 80 stipulates that the EPPO "may transfer operational personal data to a third country […], subject to compliance with the other provisions of this Regulation, in particular Art. 53, only where the conditions laid down in the Articles 80 to 83 are met." In other words, on top of applicable national legislation, the EPPO will also be bound by strict rules on the exchange of personal data with third countries as laid down in the Regulation.

The fourth observation is about the use of the "double hat" principle, in combination with the concept that the EPPO is somehow considered a "legal successor" to the national judicial authorities competent for PIF crimes. Here, one has to bear in mind that the EPPO no longer has exclusive competence for PIF crimes, as was envisaged in the original Commission proposal.[39] By contrast, the EPPO shares its competence concerning PIF crimes with national authorities. The implication of this construct is that the EPPO may only be viewed to be acting as a "legal successor" in the sense mentioned earlier, to the extent that it has actually and effectively exercised its competence for PIF crimes in a given case, thus taking priority over a competent national authority. It may not necessarily always be evident that it is competent, particularly in the early stages of an investigation. This may also turn out to be very confusing for the authorities in third countries, who are likely to encounter some difficulty in identifying who to contact in the EU in such a situation. That said, even if the third country were to accept that an EDP may act on behalf of the EPPO in his role as national prosecutor, it will be very interesting to see the trial court's reaction to this. Will the evidence thus gathered be accepted as an integral part of the file or will it instead give rise to the court expressing doubts as to its legitimacy? Only time will tell.

The fifth and final observation worth mentioning here concerns the element of reciprocity when dealing with third countries. Arguably, any legal arrangement for judicial cooperation between the EPPO and a third state will need to be of a reciprocal nature and not just operate to the benefit of the EPPO. However, to whom will the judicial authorities in third states have to turn if they themselves need legal assistance in a PIF case? Most probably to the Central Authority in the Member State involved, unless the EPPO can be contacted directly in the future following a notification to that effect. Even so, will the EPPO automatically become a kind of "one-stop-shop" for all incoming requests for assistance from third states in PIF cases, even if it is not immediately clear whether the EPPO is competent, whether it has exercised its competence, or whether it has instead chosen to let the national authorities deal with the case? The EPPO has a limited, non-exclusive mandate, thus making it impossible to guarantee that is has all the evidence the third country is looking for. Moreover, the EPPO can only provide evidence already in its possession, as was noted in the previous section. It is, therefore, effectively impossible that the EPPO could act as an executing authority for the purpose of gathering evidence other than that which it already has. The practical question to be assessed by a third country will therefore be whether or not the EPPO is a sufficiently interesting or attractive partner to engage with and to invest effort in.

IV. Conclusion

The EPPO will not be operational before the end of 2020. Bearing in mind that the EPPO will have to deal with a rather full agenda in other areas in order to become operational and commence its core business, its external policy is not likely to be a top priority from Day One. That said, the various options for future judicial cooperation between the EPPO and third countries in Art. 104 of Regulation 2017/1939 may be complex and still untested, but, at the same time, they are definitely more in line with public international law and realistic on paper than the relevant provisions in the original Commission proposal were.

The question now is how much help the possibilities in Art. 104 will actually be to the EPPO in practice, as it will surely have to engage in cooperation with third countries in PIF cases sooner rather than later. After all,

https://doi.org/10.30709/eucrim-2019-015

the EPPO will, by definition, remain dependent on third states being willing to come to a form of structural or *ad hoc* judicial cooperation. The forms of judicial cooperation more likely to lend themselves to this purpose would seem to be either cooperation on the basis of the comity principle or application of the "double hat" principle by EDPs acting as national prosecutors. Resorting to the latter possibility may, however, raise legitimate questions in courts as to the acceptability of any evidence thus obtained. The avenue to designate the EPPO as a competent (judicial) authority in the context of an existing bilateral or multilateral agreement does not look like a very realistic prospect for the time being. The role foreseen for a Central Authority within the framework of such an agreement may further complicate things, particularly in the context of the possible implications of recent decisions by the European Court of Justice on the European Arrest Warrant with respect to the notion of independent judicial authorities. In the longer term, if "direct transmission" as provided for in Art. 4 of the Second Additional Protocol to the 1959 CoE Convention of 8 November 2001 were to become possible or, alternatively, if a future agreement between the Union and a third country were to allow the EPPO to act as a competent judicial authority in direct contact with the judicial authorities of a third state, further possibilities might emerge for the EPPO accordingly.

Consequently, the EPPO will most likely have to deal with a patchwork of forms of judicial cooperation with third countries in its early days, this presumably on an *ad hoc* basis, depending on the nature of a particular investigation and the third country involved. This risks rendering the EPPO's operability cumbersome and less effective in cases that have third country-related aspects at the initial stage of the EPPO's existence. This would indeed be somewhat unsatisfactory from the perspective of the optimal protection of the Union's financial interests. Once the EPPO is in a better position to define its external strategy, it will certainly need to identify the third countries most relevant to its operational activities and assess how to enable judicial cooperation with them in a more solid manner. At the same time, it should equally explore solutions to any legal voids encountered in the process. This exercise could very well include appealing to national authorities or, as the case may be, to the Commission, to undertake any appropriate measures required to fill the gaps thus identified.

---

1. For a list of 17 spending programmes under (in-)direct management open to third countries, see Council, document 5146/19 of 9 January 2019, annex 5, pp. 9–10, approved by Coreper on 23 January 2019 (see Council document 5418/19 of 18 January 2019).↩
2. *O.J.* L 283, 31 October 2017, 1.↩
3. At present, Denmark, Hungary, Ireland, Poland, Sweden, and the United Kingdom are not participating in the EPPO.↩
4. The OLAF report 2018 – Nineteenth report of the European Anti-Fraud Office 1 January to 31 December 2018, Luxembourg 2019, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf> accessed 29 October 2019.↩
5. Figure 4 of the 2018 OLAF report, *op. cit.*, p. 13.↩
6. Figure 5 of the 2018 OLAF report, *op. cit.*, p. 13.↩
7. See joint Eurojust-Europol press release of 20 October 2016 "EUR 320 million VAT fraud: key targets arrested," available at: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2016/2016-10-20.aspx>; joint Eurojust-Europol press release of 14 July 2015 "EUR 300 million VAT fraud: key targets arrested," available at: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2015/2015-07-14.aspx>. See also Eurojust's April 2016 publication "Operation Vertigo – A closer look," available at: <http://eurojust.europa.eu/Practitioners/Documents/2015-Operation-Vertigo-REV.pdf>- all accessed 29 October 2019.↩
8. Art. 23(a).↩
9. Art. 23(b).↩
10. Art. 23(c).↩
11. The Convention and its Second Protocol are available at: <https://rm.coe.int/16800656ce> and <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081 55e>. Note: Art. 27 of the 1959 Convention does not foresee a possibility for the Union to accede to it, as it states: "This Convention shall be open to signature by the members of the Council of Europe".↩
12. The Convention is available at: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.↩
13. The Convention is available at: <https://treaties.un.org/pages/ViewDetails.aspx?src¼TREATY&mtdsg_no¼XVIII-12&chapter¼18&clang=_en>.↩
14. *O.J.*, C 197, 12 July 2000, 3.↩
15. *O.J.* C 326, 21 November 2001, 2.↩
16. See the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, *O.J.* L 26, 29 January 2004, 3.↩
17. COM(2013) 534 final.↩
18. See Chapter VIII, Section 2 (Relations with partners), Art.s 57 *et seq*.↩

19. The Article is available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, p. 341 and reads as follows: "A Treaty does not create either obligations or rights for a third State without its consent."↩
20. Art. 104(1).↩
21. Art. 104(2).↩
22. Recital 109, first paragraph.↩
23. For a list of parties to UNTOC, see <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> and to UNCAC, see <https://www.unodc.org/unodc/en/corruption/ratification-status.htm>.↩
24. Op. cit. n. 16.↩
25. Agreement on mutual legal assistance between the European Union and the United States of America of 25 June 2003, *O.J.* L 181, 19 July 2003, 34.↩
26. Agreement between the EU and Japan on mutual legal assistance in criminal matters of 30 November 2009, *O.J.* L 39, 12 February 2010, 20.↩
27. According to The Law.com Dictionary, comity is: "Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will."↩
28. Art. 104(6).↩
29. Art. 104(7).↩
30. For more details on the Swiss proposal to allow judicial cooperation with the EPPO, see the bill amending the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2019/2019-11-06/entw-f.pdf [accessed 6 November 2019]. See also the contribution of Maria Ludwiczak Glassey, https://doi.org/10.30709/eucrim-2019-016; U.I. Naves, *L'entraide pénale entre le Parquet européen et États* (Maîtrise Université de Genève, 2018, available at: <https://archive-ouverte.unige.ch/unige:114598> [accessed 29 October 2019]), p. 33.↩
31. For a list of countries that have ratified the Second Additional Protocol, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182/signatures?p_auth¼LK3Qvi1C> accessed 29 October 2019.↩
32. See Art. 3 of the EU-US MLA Agreement, *op cit.* (n. 25) and Art. 4 and Annex 1 thereto of the EU-Japan MLA Agreement, *op. cit.* (n. 26).↩
33. "The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose *at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to* this Convention" [emphasized by the author]; the assumption here being that the EU could still notify if it wished to do so.↩
34. See Art. 18(3) UNTOC.↩
35. See, e.g., Art. 3(1) of the UN Convention against Corruption: "This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention".↩
36. Art. 6(1).↩
37. Judgments of 27 May 2019 in Joined Cases C-508/18 *OG* and C-82/19 PPU *PI* and in Case C-509/18 *PF*.↩
38. Art.s 80 to 84.↩
39. Art. 11(4) of the original Commission proposal, *op. cit* (n. 17).↩

Author statement

The views expressed in this article are the author's only and do not as such represent an official statement by the Government of The Netherlands. The article is based on an earlier publication by the same author in the New Journal of European Criminal Law, June 2019.

future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

https://doi.org/10.30709/eucrim-2019-015