

Repercussions of the Establishment of the EPPO via Enhanced Cooperation

EPPO's Added Value and the Possibility to Extend its Competence



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Article

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ABSTRACT

This article addresses several issues on the added value of the recently established European Public Prosecutor's Office (EPPO). One section of the article explores whether the establishment of the EPPO via enhanced cooperation undermines the added value of the EPPO in combating crimes affecting the financial interests of the Union. Another section offers an evaluation of whether the establishment of the EPPO via enhanced cooperation makes it more difficult or even impossible to further extend the competence of the EPPO over terrorism-related crimes.

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I. Introduction

The establishment of the European Public Prosecutor's Office (hereinafter: the EPPO) is envisaged by Art. 86 TFEU in order to ensure the effective investigation and prosecution of the perpetrators of crimes affecting the financial interests of the Union (Art. 86(1) TFEU). According to Art. 86 TFEU, the competence of the EPPO may further be extended to serious crime having a cross-border dimension if a unanimous decision within the European Council is reached after obtaining the consent of the European Parliament (Art. 86(4) TFEU). A special legislative procedure is required even if an EPPO with a limited competence over crimes affecting the financial interests of the Union is established. The EPPO must be set up by means of a regulation approved unanimously within the Council¹ after having obtained the consent of the European Parliament. However, if a unanimous agreement on the proposal establishing the EPPO is not reached, Art. 86(1) subpara. 3 TFEU – as a means of breaking deadlock – envisages the possibility of establishing the EPPO by means of a procedure of enhanced cooperation by a group of at least nine Member States.

Thus, following the registered lack of unanimity in support of the proposal, those Member States participating in the EPPO enhanced cooperation finally adopted the regulation establishing the EPPO on 12 October 2017.²

The establishment of the EPPO through enhanced cooperation raises concerns about the added value of creating such a supranational prosecutorial authority. In particular, the question is whether an EPPO configured in this way will be able to achieve the objectives assigned to it. It must investigate and prosecute effectively, while respecting the fundamental rights of suspects and other persons involved in the proceedings initiated by it, offences against the financial interests of the Union, and the perpetrators of serious crime affecting more than one Member State (should its competence be ever extended to such crime).

Theoretically, the EPPO offers added value because, due to its direct power of investigation and prosecution, it will likely increase the number of prosecutions of crimes affecting the financial interests of the Union, increase the deterrent effect for potential criminals, and solve the "problems related to different applicable legal systems."³ The achievement of these objectives is nevertheless being questioned by those authors who highlight that "taking recourse to enhanced cooperation, however, would at any rate result in an unsatisfactory solution right from the start." In their view, "such an approach would – by definition – abandon the main advantage of creating an EPPO in the first place which is to investigate and prosecute throughout one single European legal area irrespective of any state borders."⁴

In order to address these issues, section II of the article explores whether the establishment of the EPPO via enhanced cooperation undermines the added value of the EPPO in combating crimes affecting the financial interests of the Union. Section III offers an evaluation of whether the establishment of the EPPO via enhanced cooperation makes it more difficult or even impossible to further extend the competence of the EPPO over terrorism-related crimes. Finally, some concluding remarks are made in the last section.

II. Relationship Between the EPPO and Non-Participating Member States – the "Added Value" Problem

A serious risk resulting from establishment of the EPPO through enhanced cooperation is that non-participating Member States (hereinafter: MS) unable or unwilling to cooperate with the EPPO's requests for judicial

cooperation could become a “safe haven” for the perpetrators of the offences falling within the competence of the EPPO.⁵ This could occur in the following situations:

- a) when offences falling within the EPPO’s mandate
 - i) are committed on the territory of non-participating MS or
 - ii) have a cross-border dimension and therefore have effect on the territory of both participating and non-participating MS;⁶ or
- b) when ancillary offences “inextricably linked” to criminal conduct falling within the material scope of competence of the EPPO are committed on the territory of a non-participating MS.⁷

In all these scenarios, precise rules for the relationships between the EPPO and the non-participating MS, as well as of the role of Eurojust and OLAF, are crucial in order to ensure the effectiveness of the EPPO’s investigations and prosecutions and, at the same time, respect for the fundamental rights of suspects and other persons involved in the proceedings of the EPPO.

As far as the effectiveness of the EPPO’s investigations is concerned, the situation is even more critical if we consider that Hungary and Poland, two of the five non-participating MS,⁸ are the largest beneficiaries of EU funds and are countries in which corruption and EU fraud-related problems are widespread and apparently not effectively prosecuted.⁹

As regards the fundamental rights of the persons involved in the proceedings of the EPPO, they may be compromised in the absence of a single regulation defining the relationship between the EPPO and non-participating Member States. There is a high risk that the EPPO will use evidence gathered by other EU bodies, such as OLAF, in the criminal proceedings it initiates, without respecting the procedural safeguards that apply to criminal proceedings.¹⁰ This is particularly critical, because there are fundamental rights that apply only in criminal proceedings, and most EU initiatives on harmonisation of the rights of the defence and procedural safeguards are limited to criminal law *stricto sensu*. Only a regulation precisely defining the relationship between the EPPO and OLAF, in the three cases mentioned above concerning both participating and non-participating MS, would ensure the protection of the fundamental rights of suspects.

In particular, in cases involving *only* non-participating MS, the role of Eurojust and OLAF will gain great importance, since the EPPO has no jurisdiction. Eurojust would therefore normally be competent to support and strengthen coordination between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States (Art. 85 TFEU). OLAF would be competent to conduct administrative investigations in respect of EU fraud, which results in criminal proceedings if the competent national judicial authorities decide to initiate criminal proceedings¹¹ and to coordinate administrative authorities.

The matter is considerably more complex in the scenario involving *both* participating and non-participating MS. In such cases, the role of OLAF and Eurojust, just like the relationship between the EPPO and the non-participating MS, is not yet at all clear. As far as the relationship with OLAF is concerned, there is a particular risk of duplication of investigations or, conversely, a risk that neither the EPPO nor OLAF would conduct an investigation because each agency relies on the other having the competence to launch an investigation. This could result in a negative conflict of competence at the Union level. The role of Eurojust in these mixed cases is important as it could help coordinate the EPPO’s investigations with those conducted in the non-participating MS and strengthen the coordination between the EPPO and national authorities of non-participating MS.

The conditions under which cooperation between the EPPO and the non-participating Member States is organised determines the effectiveness of the investigations and prosecutions carried out by the EPPO. However, the solution adopted in the EPPO Regulation is not satisfactory in this regard. According to Art. 105 of the EPPO Regulation, which regulates the relationship between the EPPO and the non-participating MS, the forms of cooperation are scarce and have a limited scope of application. The relations that the EPPO can establish with non-participating Member States are the same as those that can be established between the EPPO, third countries, and international organisations (Art. 104). Duplicating the current provisions on Eurojust,¹² the EPPO may conclude working arrangements on the exchange of strategic information and the secondment of liaison officers to its Office and, in agreement with the competent authorities concerned, designate contact points in the non-participating MS "in order to facilitate cooperation in line with the EPPO's needs" (Art. 105(2) of the EPPO Regulation). In addition to these forms of cooperation between the EPPO and the non-participating MS, the third paragraph of Art. 105, which was finally included in the EPPO Regulation after discussions in the Council, provides the following: in the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the non-participating MS, "the participating Member States shall notify the EPPO as a competent authority for the purpose of implementing applicable Union acts on judicial cooperation in criminal matters," which means that the EPPO would be able to rely autonomously on existing EU instruments on judicial cooperation in its relations with non-participating Member States.¹³ As a result of this set-up, the relationship between the EPPO and the non-participating MS will be characterised by fragmentation, as it will rely on working agreements concluded between the EPPO and the non-participating MS, of which there may be as many different ones as there are non-participating MS. Thus, there is a risk of undermining not only the effectiveness of the EPPO's investigations and prosecutions, but also the legal certainty of the rules applicable to the proceedings, which is a fundamental right in criminal proceedings. Legal certainty is particularly at stake because the applicable legal framework would not be foreseeable and accessible for suspects and other persons involved in the proceedings, considering the different provisions applicable.

A solution could be to adopt a separate instrument regulating in detail the relationship between the EPPO, the non-participating MS, and Eurojust and OLAF. In this regard, the Council invited the Commission to submit appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and the non-participating Member States.¹⁴ The adoption in the near future of a separate instrument to regulate cooperation in criminal matters and surrender between the EPPO and the competent authorities of non-participating MS would be a welcome clarification of the relationship between them and would provide a uniform regulation of their form of cooperation. It would be particularly positive if it contained detailed rules on support by the non-participating MS of the EPPO's investigations and fostered the exchange of information between the EPPO and the competent authorities of the non-participating MS. Clarification of the relationship of the EPPO with Eurojust and OLAF when non-participating MS are involved would also be welcome.

In this regard, Art. 325(4) TFEU has been suggested as a legal basis for adopting such a separate instrument aimed at regulating judicial cooperation in criminal matters between the EPPO and the UK, Ireland, and Denmark as non-participating MS in the EPPO regulation.¹⁵ Art. 325(4) TFEU could admittedly serve as an appropriate legal basis for adopting such an instrument if the EPPO is granted limited competence over criminal offences affecting the financial interests of the EU. However, it would not be a suitable legal basis in the event that the competence of the EPPO is extended to serious crime having a cross-border dimension, such as terrorism. In that case, it would be necessary to adopt another separate instrument on a different legal basis to regulate the same relationship as far as terrorism-related crimes are concerned. In the event of adoption of two regulations on two different legal bases, there would be a risk of discrepancies between the two instruments. This is the reason why in the author's view, it is preferable to adopt only one regulation

relying on a different legal basis rather than Art. 325(4) TFEU. The adoption of such a regulation is extremely important, considering that the absence of a uniform and coherent separate instrument regulating the relationship between the EPPO, the non-participating MS, and the existing EU agencies could create incoherence and facilitate the creation of safe havens where the perpetrators of serious and transnational crime could look for impunity.

III. Extension of EPPO's Competence to Terrorism-Related Crimes

In the author's view, the establishment of the EPPO via enhanced cooperation also raises concerns in respect of another issue, namely the possibility of extending the competence of the EPPO to serious crimes having a cross-border dimension, such as terrorism-related offences. The question is whether the unanimous decision of all the MS would be necessary in order to extend the competence of the EPPO to serious crime having a transnational dimension, such as terrorism. In other words: would, the unanimous decision of only the MS participating in the enhanced cooperation suffice? This issue is not purely theoretical if one considers that one of the reasons that led one MS, Italy, not to immediately participate in the regulation establishing the EPPO was the fact that the draft Council regulation implementing enhanced cooperation on the establishment of the EPPO did not extend its competence to terrorism-related crimes.¹⁶ It is also important to remember that the extension of the competence of the EPPO to cross-border terrorist crimes was envisaged by Commission President Junker in his 2017 State of the Union Address¹⁷ and by French President Emmanuel Macron in his 2017 speech at the Sorbonne University.¹⁸

The answer to this question is of considerable importance because the prospective decision to extend the competence of the EPPO to terrorism-related cases could end up being practically impossible or excessively difficult if the unanimous decision of all the MS were necessary. Two different opinions exist. In the view of some authors, the EPPO's competence can only be extended by all the EU MS.¹⁹ On the contrary, a Council document for the press and concerning the proposal on the creation of a EPPO affirmed that "[t]he decision to extend the powers of the EPPO would have to be taken unanimously at the level of the European Council by the member states participating in enhanced cooperation."²⁰

Some argue that the solution to embrace is the one proposed by the Council. In the author's view, the combined reading of paragraphs 1 and 4 of Art. 86 TFEU supports this interpretation. Although Art. 86 TFEU is a *lex specialis* in respect of the rules of Title III of Part VI concerning enhanced cooperation, the same article itself explicitly states that the rules on enhanced cooperation apply.²¹ These general rules on enhanced cooperation should be considered *lex generalis*, while, in respect of the EPPO, Art. 86 TFEU has to be considered *lex specialis*. It follows that the general rules on enhanced cooperation stipulated in the Lisbon Treaty may be applied with respect to the EPPO as far as they do not conflict with the specific provisions enshrined in Art. 86 TFEU.

Considering that neither paragraph 4 nor paragraph 1 of Art. 86 TFEU stipulates the meaning of unanimous decision of the Council in case of enhanced cooperation (i.e., if the unanimity is reached with the consent of all the MS or with the consent of only the MS participating in the enhanced cooperation), Art. 326 TFEU to 334 TFEU apply. The relevant provision for present purposes is Art. 330 TFEU, which states that "[a]ll members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. Unanimity shall be constituted by the votes of the representatives of the participating Member States only." The ECJ has clearly espoused this approach in the *EU Unitary Patent* judgment in which it stated that "nothing in Article 20 TEU or

in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced co-operation within the ambit of those competences that must, according to the Treaties, be exercised unanimously. On the contrary, it follows from Article 333(1) TFEU that, when the conditions laid down in Articles 20 TEU and in Arts. 326 TFEU to 334 TFEU have been satisfied, those powers may be used in enhanced cooperation and that, in this case, *provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity.*²²

As a result, taking up the jurisprudence of the ECJ and the wording of Art. 86 TFEU, the unanimous consent of the MS participating in the enhanced cooperation is sufficient for the extension of competence of the EPPO to serious transnational crimes. According to such an interpretation of the unanimity requirement contained in Art. 86 TFEU, the establishment of the EPPO via enhanced cooperation does not, at least from a procedural point of view, hinder the possibility of extending the competence of the EPPO to terrorism-related offences. As explained above, however, the absence of a clear and detailed act that regulates the relationship between the EPPO and the non-participating MS may hinder the effective investigation and prosecution of the perpetrators of such crimes in practice.

IV. Concluding Remarks

In conclusion, the establishment of the EPPO via enhanced cooperation does not ensure the achievement of the objectives pursued by the creation of such a supranational prosecutorial authority. These objectives are to investigate and prosecute the offences falling within its competence effectively and in full compliance with fundamental rights, to increase the number of prosecutions of crimes affecting the financial interests of the Union, to increase the deterrent effect for potential criminals, and to solve the “problems related to different applicable legal systems.”

In the absence of clear rules that would regulate the relationship between the EPPO, the non-participating MS, and the EU agencies concerned, *i.e.*, Eurojust, Europol, and OLAF, prosecutions may be impeded in practice by possible conflicts of jurisdiction – both positive and negative ones.

The possibility to escape the investigations of the EPPO in the non-participating MS will neither increase the deterrent effect for potential criminals nor solve the problems related to different applicable legal systems, considering also that the EPPO regulation refers to the relevant national laws of procedure. In addition, the minimal harmonisation envisaged in the regulation will not apply in respect of the non-participating MS. Consequently, this fragmentation and lack of uniformity will also undermine the fundamental rights of suspects and other persons involved in the EPPO’s proceedings.

To conclude on a positive note, one should recall that, despite the shortcomings highlighted above, the final EPPO regulation undoubtedly constitutes the first step towards the creation of a supranational EU body that may be assigned the competence to deal with terrorism-related crimes in the future – even if it is established via enhanced cooperation.

1. In this regard, unanimity means the consent of 25 Member States. Denmark, according to Article 1 of Protocol 22 annexed to the Treaties, does not participate in the EPPO regulation, and the UK and Ireland did not indicate that they wish to take part in the adoption and application of the EPPO regulation within three months of the publication of the Commission’s proposal. According to Articles 1 and 3 of Protocol 21 annexed to the Treaties, they are therefore not taken into account for the purpose of the unanimous decision of the Council. As far as the United Kingdom is concerned, on the 29th March 2017, the European Council received a letter from the British Prime Minister notifying it about the United Kingdom’s intention to leave the European Union. This notification follows the referendum of 23 June 2016 and starts the withdrawal process under Article 50 TEU. However, the UK is currently still a Member State of the EU – until the date of entry into force of the withdrawal agreement or “failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”. See Article 50 TEU.²³

2. See 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. 1–71.²⁴

3. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, p. 51. ↵
4. H. Satzger, "The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided", in: P. Asp (ed.), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, European Criminal Policy Initiative, 2015, pp. 69, 78. ↵
5. House of Lords, European Union Committee, "The impact of the European Public Prosecutor's Office on the United Kingdom", 4th Report session 2014-15, <<https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/53/5302.htm>>, par. 55. ↵
6. V. Mitsilegas, Follow-up evidence to House of Lords European Union Committee for their inquiry on "The impact of the European Public Prosecutor's Office on the United Kingdom", 4th Report, session 2014-2015, HL Paper 53. ↵
7. Article 22(3) of the current draft regulation. For further details, see S. Pawelec, "Implications of Enhanced Cooperation for the EPPO Model and Its Functioning", in: L.H. Erkelens A.W.H. Meij, and M. Pawlik (eds.), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon?*, 2015, p. 209 ff.. ↵
8. The five non-participating Member States are Sweden, the Netherlands, Malta, Hungary, and Poland. For a detailed overview of the Dutch position on the EPPO, see J. Van Der Hulst, "No Added Value of the EPPO?", (2016) *eucrim*, 99-103. ↵
9. F. Giuffrida, "Now or Never: the European Public Prosecutor's Office and Enhanced Cooperation", Societal Security Network, <<http://observatory.societalsecurity.net/blog/now-or-never-european-public-prosecutor%20%99s-office-and-enhanced-cooperation>> accessed 10 October 2017. ↵
10. In this regard, the Commission issued a communication aimed at reinforcing the procedural safeguards applying in OLAF investigations. The safeguards envisaged by the Commission in the communication, however, are lower in any case than those applying in criminal proceedings. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office, Brussels, 17.7.2013 COM(2013) 533 final. ↵
11. See Arts. 1, 2, 3, 11 of the Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, L 248/1, 18 September 2013. ↵
12. According to Articles 26a and 27a of the Eurojust decision (see the consolidated version at Council doc.5347/3/09 REV 3 of 15 July 2009), liaison officers can be seconded to Eurojust, and contact points can be designated in numerous countries. ↵
13. A. Weyembergh and C. Briere, "The future cooperation between OLAF and the European Public Prosecutor's Office (EPPO)", [http://www.euro-parl.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA\(2017\)603789_EN.pdf](http://www.euro-parl.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA(2017)603789_EN.pdf), accessed 7 November 2017, p. 25. ↵
14. Council, Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office – Draft Council Declarations, Brussels, 7 June 2017, 9896/17 ADD 1. Also see in this regard Recital 110 of the current draft regulation. ↵
15. Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Discussion paper on cooperation between EPPO and non-participating Member States, Brussels, Council doc 12341/16 of 19 September 2016. ↵
16. The Italian Justice Minister Andrea Orlando wrote in a letter addressed to the European Justice Commissioner, Vera Jourová, and to his Estonian counterpart, Urmas Reinsalu: "We have to start thinking of extending the European Prosecutor's powers with regards to terrorism-related crimes, as envisioned in the treaties, through the same procedure that brought EPPO [European Public Prosecutor's Office] to tackle crime and fraud against the European budget." <<https://www.euractiv.com/section/politics/news/italy-pushes-for-deeper-european-cooperation-on-terrorism/>> accessed 10 October 2017. ↵
17. See, European Commission – Speech, President Jean-Claude Juncker's State of the Union Address 2017, Brussels, 13 September 2017, http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm. ↵
18. See President Macron, discours à la Sorbonne, published on 26 September 2017, <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>. See also T. Wahl in the news section of this issue. ↵
19. See J.J.E. Schutte, "Establishing Enhanced Cooperation Under Article 86 TFEU", in: L.H. Erkelens, A.W.H. Meij, and M. Pawlik (eds.), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon*, p. 195, 202, who writes that "in that case, all its members, including the heads of government of Denmark, the UK and Ireland, including the President of the Commission, as well as the President of the European Council, have the right to take part in the vote, even if the regulation establishing the EPPO has been adopted in enhanced cooperation and is applicable in a limited number of Member States only." See also, from a slightly different perspective, K. Ligeti, "Introduction to the Model Rules of Procedure of the EPPO", in: K. Ligeti (ed.), *Toward a prosecutor for the European Union*, 2013, p. 2, footnote 5, in which the author affirms the following: "It is hard to imagine that the Council would agree to extend the material scope of the EPPO by unanimous decision to cover cross-border crime, on the one hand, and disagree at the same time on the establishment of the EPPO per se, on the other". ↵
20. Council of the European Union, Factsheet, Brussels, 7 March 2017, Proposal on the creation of a European Public Prosecutor's Office (EPPO), State of play. It is implicitly assumed in this document that the unanimous decision should be taken by the MS participating in the enhanced cooperation and not by all the MS, including the non-participating MS. ↵
21. Art. 86(1) TFEU states that, in the event that at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, "the authorisation to proceed with enhanced cooperation referred to in Art. 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply." ↵
22. ECJ, 16 April 2013, joined cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v. Council of the European Union*, para. 35. Emphasis is added. ↵

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