

# The Conflict of Competence between the European Public Prosecutor's Office and Spanish Prosecutors – Lessons Learned

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## ABSTRACT

The rules on the exercise of competence by the European Public Prosecutor's Office have been discussed by several authors. It has been put forward that the way in which material competence is regulated is highly complex; as is the division of competences between the European Public Prosecutor's Office and national authorities. In addition to jeopardising legal certainty, this poses a major challenge to the practical application of the law. Such challenges recently came to light in a case of positive conflict of competence involving the Spanish Prosecutor's Office and the European Public Prosecutor's Office. This article recapitulates the case and argues that while the conflict has been temporarily resolved, the parties' statements indicate that its roots go deeper than flawed EU regulation, testing the limits of the principle of the primacy of EU law.

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# I. Introduction: Rules on the Division of Competences between the European Public Prosecutor's Office and National Authorities

The European Public Prosecutor's Office (EPPO) became operational in the 22 EU Member States that have joined the effort via enhanced cooperation on 1 June 2021. The organisational setup and functioning of the EPPO is governed by Council Regulation (EU) 2017/1939.<sup>1</sup> A source of EU law containing normative orders which is directly applicable in the Member States, this regulation forms an integral part of the national law of the EU Member States without – in principle – necessitating a separate legal implementation act.<sup>2</sup>

Regulation 2017/1939 provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the European Union.<sup>3</sup> One way of exercising its competence is the EPPO's right of evocation, which will see the EPPO "take over" a case that has been initiated by a national authority of the participating Member States. However, an informed decision on whether or not to exercise this right of evocation requires the national authorities to submit the necessary information. When a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence, that authority must without undue delay inform the EPPO. The same applies when, at any time after the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that an investigation concerns such an offence.<sup>4</sup> While it goes without saying that the EPPO is also under an obligation to provide information to the Member State in accordance with the principle of loyal cooperation, this is of no further relevance to the topic at hand and will thus be disregarded.

Next to taking over an investigation, the EPPO may also exercise its competence by initiating its own proceedings where it has reasonable grounds to suspect a criminal offence that falls under its competence. In such instances, a European Delegated Prosecutor (EDP) in the Member State that has jurisdiction in accordance with its national legislation initiates an investigation and registers the case in the case management system, flagging it as a potential EPPO matter.<sup>5</sup> The EPPO must inform the national authorities of its decision to open an investigation without undue delay.<sup>6</sup>

In the event of a conflict of competence between the EPPO and the Member State authority, Regulation 2017/1939 also contains provisions that should be followed by both the EPPO and the Member State authority concerned. Drawing an analogy to the theory of public administration, a conflict of competence can be described as a situation in which the question of which authority is responsible for the administration of a case is contested. A distinction needs to be made between positive and negative conflicts of competence. In a positive conflict of competence, several authorities may wish to act on the same case. However, such situations are relatively rare compared to negative conflicts of competence, which occur when neither authority considers itself responsible. It needs to be noted that any conflict of competence between the EPPO and a national authority represents a dispute between a Member State and a supranational EU body.

A number of legal experts have previously pointed out inaccuracies and difficulties of interpretation of Art. 24 of Regulation 2017/1939, which regulates the exercise of the EPPO's material competence.<sup>7</sup> The premise of the Regulation is that in the event of the EPPO deciding to exercise its competence, the authorities of the Member States may no longer exercise their own competence in respect of the same criminal conduct.<sup>8</sup> Consequently, the EPPO's competence has priority. However, a seemingly unambiguous legal situation is complicated by several exceptions stipulated by the Union legislator with regard to the exercise of competence in Art. 25 of Regulation 2017/1939, turning the issue into a Gordian knot. The most obvious of these

exceptions concerns offences not classified as “pure” PIF offences, with the EPPO entitled to exercise its competence over a number of offences which are only related to the “pure” PIF offences under Art. 22(1) of Regulation 2017/1939, such as the “inextricably linked offences” as defined in Art. 22(3). In this case, Art. 22(3) refers to Art. 25(3), according to which the EPPO must refrain from exercising its competence and refer the case to the national authority if the sanction for the PIF offence under the relevant national law is not sufficiently severe compared to the inextricably linked offence, unless the latter offence has been instrumental to commit the PIF offence.<sup>9</sup> Likewise, the EPPO should refrain from exercising its competence if the damage caused to the financial interests of the Union by the offence giving rise to the EPPO’s material competence does not exceed the damage caused to another victim by the same offence (except for some offences defined in the PIF Directive).<sup>10</sup> In addition, Art. 25 of Regulation 2017/1939 states that for offences that cause less than €10,000 in damages, the EPPO may only exercise its competence if certain conditions are met (for example if EU officials are involved) – even if a criminal offence generally falls within the EPPO’s competence.<sup>11</sup>

A particularly controversial point is that in disputes arising from these special rules, the Union legislator no longer upholds the above-mentioned priority of the EPPO’s competence. Instead, it stipulates that in case of disagreement between the EPPO and the national prosecution authorities over whether criminal conduct falls within the EPPO’s competence, the national authorities who are responsible for determining the competent body for prosecution at national level also decide who may exercise their competence in this case.<sup>12</sup> As interpretation of EU law is required, Regulation 2017/1939 specifies that the Court of Justice of the European Union, in accordance with Art. 267 TFEU, has jurisdiction to give a preliminary ruling on the interpretation of this article of the regulation, i.e. on any conflict of competence between the EPPO and national authorities.<sup>13</sup>

In a conflict of competence between the EPPO as an EU body and a national prosecution/law enforcement authority, this might ultimately result in the national authority competent to decide on the attribution of competences coming to an independent conclusion – rather than requesting a preliminary ruling – when interpreting the relevant paragraphs. In turn, this could give rise to a conundrum from an EU law perspective, as the national decision is binding for the EU body. Moreover, the legislator defines in a very complex and sometimes confusing way when exactly the national authorities have to make such a decision.

It would exceed the scope of this article to explore the EPPO’s material competence and the exercise of its competence in detail. What can be established is that Regulation 2017/1939 lacks normative clarity, impinging on the principle of legal certainty.

## II. The Spanish Criminal Case and the Positive Conflict of Competence

The abstract shortcomings of this legislation are reflected in the concrete practice of the judiciary. This was illustrated by a recent criminal case in Spain (commonly referred to as the *Ayuso* case) resulting in a positive conflict of competence between the Spanish Public Prosecutor’s Office and the EPPO. The facts of this case could only be garnered from the press, preventing a detailed account. According to these reports, the subject of the prosecution was a close relative of one of Spain’s regional presidents. This person was suspected of having received a payment of around €55,000 for his participation in a transaction with a company owned by a family friend. This company was involved in the procurement of medical masks from China worth around €1.5 million during the COVID-19 pandemic. The defence put forward was that the payment represented compensation for efforts made to obtain masks below the market price.<sup>14</sup>

The Spanish prosecution service tasked with investigating corruption offences (*Fiscalía Especial contra la Corrupción*, FEC) opened criminal proceedings to investigate the allegations. The EPPO asserted its right of evocation as – according to it – the alleged offence involved EU financial resources (the paid compensation having been taken from EU funds). However, in the absence of any facts proving that the mask purchase was financed by EU funds, the prosecutor of the national prosecuting body, the FEC, disagreed with this interpretation. It maintained that the issue at stake represented a simple, common offence, thus in itself not justifying the exercise of competence by the EPPO. The FEC's lead prosecutor referred the conflict of competence to the Spanish Prosecutor General since the FEC was not in a position to prevent the EPPO from initiating proceedings to investigate whether EU funds were used for the procurement.<sup>15</sup> In turn, the EPPO suggested that – given the unusual nature of the case and the complexity of the relationship between national and EU law on the issue – the Spanish Prosecutor General should consider referring the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling.<sup>16</sup> This coincided with a proposal by the Spanish prosecution service to separate the cases. While the misappropriation of EU funds was to be investigated by the EPPO, the related offences were to be judged by the national prosecution service.<sup>17</sup>

Seeing direct and substantial national interests at stake and not convinced of an inextricable link to a criminal offence against the EU's financial interests, the Spanish Prosecutor General held that the national prosecutor's office was authorised to determine the prosecuting body and decided to separate the cases. Conversely, the EPPO took the view that a division of competence would be contrary to EU law and decided to continue the investigation. In addition, the European Chief Prosecutor criticised the procedure that led to the decision of the Spanish Prosecutor General. According to her, it was problematic for a conflict of competence between an EU body and a Member State body to be decided by that Member State's prosecutor general despite him or her being in a direct hierarchy with the authority investigating the case – this dual role preventing impartiality. Moreover, the EPPO –as the opposing party in the dispute – was not heard in the decision. The Spanish procedural rules concerning the interpretation of EU law do not explicitly provide for a right of remedy. According to the European Chief Prosecutor, these aspects prevented the Court of Justice of the European Union from exercising its exclusive power to interpret EU law, and thus jeopardised the supremacy of EU law.<sup>18</sup>

The FEC later terminated criminal proceedings in the absence of a criminal offence,<sup>19</sup> while the status of the EPPO investigation remains unknown at the time of writing (December 2022).

### III. Conclusions

This article neither intended to lend support to one or the other party involved in this specific dispute nor to draw general conclusions about the functioning of the EPPO in terms of issues that might arise in the future. Nevertheless, the highlighted case of a positive conflict of competence between Spanish authorities and the EPPO represents the first in a series of disagreements between national authorities and the EPPO.<sup>20</sup> It is a practical example of the difficulties in defining the EPPO's material competence on the one hand, and the exercise of said competence on the other. While this is only one aspect of the complexity of Regulation (EU) 2017/1939, it is undoubtedly a very relevant one. From the point of view of EU legal interests, the more favourable outcome might have been for the Court of Justice of the European Union to have had the final say in the case in question (as has been pointed out by the European Commission).<sup>21</sup> However, interpretations of EU law by the Court of Justice can only provide short-term fixes for legislative shortcomings on the basis of specific, case-related facts. This makes relying on such a solution very risky from the point of view of the enforcement of defendants' rights. Given the time frame for obtaining such a judgement, it cannot be ruled out that a defendant might be subject to coercive measures in the meantime. What is more, official statements in the case discussed in this article suggest that more is considered to be at stake than a mere

conflict of competence, echoing the long-standing and deep-rooted tension between national law and the primacy of EU law.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), O.J. L 283, 31.10.2017, 1.↵
2. Art. 288 of the Treaty on the Functioning of the European Union (TFEU).↵
3. Recital 13 of Council Regulation (EU) 2017/1939.↵
4. Art. 24(2) of Council Regulation (EU) 2017/1939.↵
5. Art. 26(1) of Council Regulation (EU) 2017/1939.↵
6. Art. 26(7) of Council Regulation (EU) 2017/1939.↵
7. G. Grasso, R. Sicurella and F. Giuffrida, "EPPO material competence: analysis of the PIF directive and regulation", in: K. Ligeti, M. João Antunes, F. Giuffrida (eds.), *The European Public Prosecutor's Office at launch – Adapting National Systems, Transforming EU Criminal Law*, Milano, Wolters Kluwer Italia S.r.l., 2020, pp. 55 et seq.↵
8. Art. 25(1) of Council Regulation (EU) 2017/1939.↵
9. Art. 25(3)(a) of Council Regulation (EU) 2017/1939.↵
10. Art. 25(3)(b) of Council Regulation (EU) 2017/1939.↵
11. Art. 25(2) of Council Regulation (EU) 2017/1939.↵
12. Art. 25(6) of Council Regulation (EU) 2017/1939. Member States must specify the national authority that will decide on the attribution of competence.↵
13. Art. 42(2)(c) of Council Regulation (EU) 2017/1939.↵
14. <<https://www.lainformacion.com/espana/anticorrupcion-abre-una-investigacion-por-el-contrato-del-hermano-de-ayuso/2860464/>>. All references to the internet in this article were last accessed on 6 February 2023.↵
15. <<https://www.lainformacion.com/espana/anticorrupcion-rechaza-dar-a-la-fiscalia-europea-la-investigacion-del-caso-ayuso/2863203/>>.↵
16. <<https://www.eppo.europa.eu/en/news/eppos-statement-competence-adjudication-spain>>.↵
17. <<https://www.epe.es/es/politica/20220328/fiscalia-europea-sugiere-delgado-lleve-13440561>>.↵
18. <<https://www.eppo.europa.eu/en/news/eppos-statement-decision-fiscal-general-del-estado>>.↵
19. <<https://www.epe.es/es/politica/20220623/anticorrupcion-delito-hermano-ayuso-archiva-mascarillas-13920498>>.↵
20. <<https://www.epe.es/es/politica/20220328/fiscalia-europea-sugiere-delgado-lleve-13440561>>.↵
21. <<https://www.lavanguardia.com/politica/20220401/8170430/bruselas-pide-tribunal-ue-resuelva-conflicto-fiscalia-europea-espanola.html>>.↵

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