The EPPO's Hybrid Structure and Legal Framework

Issues of Implementation – a Perspective from Germany

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Article

ABSTRACT

This article addresses several issues concerning additional measures required for a proper imple-mentation of the EPPO Regulation from the point of view of a Member State with a federal struc-ture. These issues include matters involving Member States' personnel working for the EPPO, clarification of the relevant national legal framework (in particular as regards the conduct of in-vestigations), and the future cooperation between the EPPO and the national authorities of the (participating) Member States. The article concludes that the hybrid structure and current legal framework of the EPPO will create new challenges for the authorities of the Member States and may certainly stimulate further (academic) debate on the approach chosen by the EU legislator.

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I. Introductory Remarks

Notwithstanding its establishment as a "body" of the European Union with a legal personality of its own (Art. 3 of the Regulation 2017/1939 on the establishment of the European Public Prosecutor's Office, in the following: "EPPO Regulation")[1] and its independence from the Member States (Art. 6), the European Public Prosecutor's Office (EPPO) will largely rely on existing structures and human resources in the Member States, and the legal framework provided by the EPPO Regulation will be interwoven with the different national legal regimes.[2] In spite of the fact that the EPPO Regulation is directly applicable in those Member States participating in the establishment of the EPPO, the EPPO Regulation will require Member States to take additional legislative and other measures. The following contribution intends to describe some of the issues that need to be addressed from the perspective of a Member State.

II. Structure – Personnel

In terms of internal structure, the EPPO will consist of a Central Office, which will include the European Chief Prosecutor and two Deputies (Art. 11), as well as one so-called "European Prosecutor" for each of the participating Member States (Art. 16(1)),[3] who will jointly form the "College" of the EPPO (Art. 9) and carry out certain functions within the "Permanent Chambers" of the EPPO (Art. 10). The European Prosecutors' primary role in the day-to-day operations will be to supervise the investigations carried out by and on behalf of the EPPO in their Member State of origin and to act as a liaison between the Permanent Chambers and "their" European Delegated Prosecutors (Art. 12(1) and (5)). In addition, the EPPO will also have a "decentralized level" (Art. 8(2)), consisting of so-called "European Delegated Prosecutors" ("EDPs") in the Member States, who – save for certain exceptional circumstances (Art. 28(4)) – will be responsible for conducting the investigations and prosecutions (Art. 13(1)).

1. European Prosecutors

Even though there will be one European Prosecutor from each Member State contributing the necessary knowledge of the national language(s) and legal expertise from their Member State of origin, the European Prosecutors should definitely not be acting as "representatives" of "their" Member State when carrying out the functions of supervising the investigations in their own Member State (Art. 12(1)) or in their capacity as members of one of the Permanent Chambers (Art. 10). In spite of the fact that the European Prosecutors will also be members of the EPPO's College, their position in and their relationship with "their" national authorities will be considerably different from those of the national members of Eurojust. Consequently, and unlike the EDPs, the European Prosecutors will be employed as temporary agents of the EPPO under Art. 2(a) of the Conditions of Employment (Art. 96(1)). Furthermore, again unlike the EDPs (cf. II.2. below), the EPPO Regulation does not provide that European Prosecutors remain active members of the public prosecution service or judiciary of the respective Member States during the time of their appointment as European Prosecutors. Member States will, however, need to ensure that whenever "their" European Prosecutor decides to conduct an investigation personally, he/she is, in fact, entitled to order or request investigative and other measures and has all the powers, responsibilities, and obligations of an EDP (cf. Art. 28(4)). Rather than awarding a "double-hat" status to their European Prosecutor, Member States could provide in their legislation for an "assimilation" of his/her status under national law with that of their EDPs and/or national prosecutors for situations in which the European Prosecutor decides to handle a case personally, thereby ensuring that he/she has all the powers, responsibilities, and obligations of an EDP under national law – without actually utilizing such status as national prosecutor.

In Germany, it should be possible to grant the European Prosecutor a special leave of absence status under applicable civil service legislation, which would allow the prosecutor to return to his/her position as prosecutor upon completion of his/her tenure at the EPPO. In view of Art. 28(4), it will be necessary to consider amending the German Courts Constitution Act (*Gerichtsverfassungsgesetz* – the law regulating, *inter alia*, the structure and competences of the courts and prosecution offices), in order to specify that the European Prosecutor, when acting in accordance with Article 28(4), has the same powers, responsibilities, and obligations as the German EDPs even though the European Prosecutor will not be serving as national prosecutor during his/her tenure at the EPPO.

2. European Delegated Prosecutors

While the European Chief Prosecutor and the European Prosecutors are to be employed as "temporary agents" in accordance with the Staff Regulations of the European Union (Art. 96(1)), the EDPs will not be temporary agents of the Union. Instead, they will remain active members of the public prosecution service or the judiciary of their Member State (Art. 17(2)), thereby wearing a "double hat" as an EDP under the EPPO Regulation. Member States are obliged to provide such status under national law, independent of whether or not their EDPs also perform functions as national prosecutors, thus working only "part-time" for the EPPO (cf. Art. 13(3) – "dual-hat EDP"). Additionally, the EDPs will, however, be engaged as "Special Advisors" in accordance with Arts. 5, 123, and 123 of the Conditions of Employment[4] and will receive their salary from the EPPO's budget – either fully or *pro rata* to the extent that they are carrying out functions for the EPPO.

Under German law, it should be possible to utilize existing civil service legislation allowing for a (temporary) secondment of civil servants to the EU, which could be on a full-time or a part-time basis. In accordance with Art. 13(2), the European Chief Prosecutor will need to reach an agreement with the Member State's authorities on the number of EDPs as well as on the functional and territorial division of competences between the different EDPs of each Member State. In view of the fact that the courts and prosecution services in Germany are largely within the competence of the *Länder* (federal states), some initial internal discussions on this question have already taken place, but no decisions have been taken yet on the concept to be proposed for approval by the European Chief Prosecutor.

In terms of the EDPs' functions and competences, the EPPO Regulation clearly provides for the EDPs' responsibility (in the sense of "being in charge of"), not only for the prosecution phase (Art. 36) but also for the investigation (Arts. 26 to 34) of EPPO cases (cf. Art. 13(1)). While this may require some Member States to make major legislative adjustments in order to ensure that their EDPs actually have the status and powers necessary to exercise their role in leading the investigations in EPPO cases, the German system of criminal investigations already provides for the prosecutor to have the leading role in conducting the investigations (and prosecutions); thus, German law should not require any adaptations in this respect. However, a slight amendment to the Courts Constitution Act might be indicated to clarify that, in case of investigations conducted by the EPPO in Germany, the competent EDP is "the prosecutor" as referred to in relevant provisions of the German Code of Criminal Procedure and not the "national" prosecutor who would otherwise be competent. Rather than relying on the "double-hat" construction, whereby the EDP is also an active member of the public prosecution service (cf. Art. 17(2)), such a provision would serve to "assimilate" the German EDPs with "national" prosecutors in terms of powers, competences, and obligations according to Art. 13(1).

3. Office Support Staff

While the operative part of the EPPO Regulation only contains a general obligation for the Member States to provide the EDPs with the necessary resources, recital number 113 specifies that the Member States should cover the costs of the necessary "secretarial support." Such administrative staff members at the EDP's office

will not belong to the "staff of the EPPO" as referred to in Arts. 8 and 96; however, e.g., Art. 108(2)[5] will specifically also apply to such national staff members. Presumably, other provisions, such as Art. 46 subpara. 4[6] and Art. 76[7], will need to apply as well, even though these provisions do not specifically address persons "assisting" the EPPO at the national level. In this respect, Member States may need to address a number of primarily practical issues. A key question concerns situations where the administrative staff at the EDP's office will not consist of dedicated staff members, working only for the EDP but of regular administrative staff of the national prosecution service, who will be providing administrative support to the EDP in addition to their regular duties related to "national cases."

III. Clarifying the Relevant National Legal Framework for the EPPO

The EPPO Regulation does not provide a "stand-alone" legal regime for conducting criminal investigations.[8] Many of its provisions specifically refer to national law. Such references ("in accordance with national law," "in compliance with applicable national law," or "in accordance with the law of his/her Member State") are intended to refer specific (and sometimes not so specific) questions to the relevant provisions of national law, in particular national criminal procedural law. Also, Art. 5(3) provides more generally that national law applies "to the extent that a matter is not regulated by this Regulation." Typically, the applicable national law is the law of the Member State of the handling EDP (i.e., the EDP in charge of the investigation) – with certain exceptions, particularly in case of cross-border investigations (Art. 31(3), Art. 32). Such specific references to national law as well as the general provision of Art. 5(3) were needed in order to fill the gaps left by the Regulation in providing the necessary legal framework for the EPPO's operational activities in investigating and prosecuting PIF offenses. While many of the specific references were added in the course of the negotiations, a rule similar to what is now Art. 5(3) had already been included in the Commission proposal for the EPPO Regulation.[9] In some cases, such references could, perhaps, have been avoided by amending the Regulation's provisions so as to provide a clear legal framework by itself. These references to national law, however, should also serve to facilitate a smooth integration of the EPPO into the criminal justice systems of Member States. What needs to be considered in this context is that the EPPO will not have its own investigators but will rely instead on national police and customs authorities to carry out investigation measures and on national courts to issue the *ex-ante* judicial authorization of investigation measures (Art. 31). Also, it will be the responsibility of the national courts to exercise judicial review of the EPPO's procedural acts (Art. 42) and – eventually – to adjudicate the case during the trial phase (Art. 36). While the references to "national law" are therefore primarily intended to refer to the "regular" criminal procedural law of the Member States, the wording of the relevant provisions of the EPPO Regulation does not exclude the possibility for Member States to set out specific provisions in their national criminal procedural law that will apply only to the investigations conducted by the EPPO.

Germany is currently in the process of identifying the need to amend, *inter alia*, the German Code on Criminal Procedure as well as the Courts Constitution Act[10] – even if only for the purpose of clarifying that certain provisions do not apply in case of EPPO investigations, as the matter is conclusively regulated in the EPPO Regulation itself (Art. 5(3)).

IV. Cooperation Between the EPPO and National Authorities

1. Reporting Information to the EPPO

In many situations, the administrative authorities of the Member States will be the first to receive indications of potentially fraudulent conduct, in terms of EU revenue and expenses. In light of this, it will be important for an effective implementation of the EPPO Regulation by the Member States to ensure that the EPPO is provided with the necessary information in accordance with Art. 24(1). The same applies where – for whatever reason – national judicial or law enforcement authorities already initiated their own investigation of a criminal offense for which the EPPO could exercise its competence (Art. 24(2)). As a result, Member States will need to determine the channel to be used to provide such information to the EPPO and whether "to set up a direct or centralized system" (cf. recital number 52) to this end. Depending on the relevant legislation and practice for initiating criminal investigations (role of the customs/police offices, role of the prosecutors' offices), Member States may need to make necessary adjustments, taking into account that – while the EPPO Regulation provides for a concurrent/shared competence of the EPPO and national authorities – it also expects the national judicial and law enforcement authorities to "refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation" (cf. recital number 58). There may be situations, however, where national law requires these authorities to first initiate their own criminal investigation before they can take certain urgent investigation measures and then to report to the EPPO in accordance with Art. 24(2) so that the EPPO may decide whether or not to exercise its right of evocation (Art. 27).

2. Conducting Investigations

Art. 28(1) stipulates that an EDP "may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State;" these authorities "shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them." The "procedures and modalities" for taking investigation measures "shall be governed by the applicable national law" (Art. 30(5)). As stated above, the EPPO Regulation entrusts the EDPs with the competence and responsibility for leading the investigations (cf. Art. 13(1)). However, the reference to "national law" in Art. 28(1) should allow Member States – within limits – a certain flexibility to take into account their national systems and procedures in terms of the roles and responsibilities of their different law enforcement authorities when conducting investigations. It will be up to the Member States to determine which of their national authorities are "competent" within the meaning of Art. 28(1), and they may be instructed by their EDPs to undertake investigation measures or be authorized to take urgent measures without specifically acting under instruction of the handling EDP (Art. 28(2)). With respect to both of these provisions of Article 28, Member States will need to notify the EPPO of the designated authorities (Art. 117). While it would presumably not be compatible with the concept of the EPPO if Member States were to designate national prosecutor's offices as competent authorities in accordance with Art. 28(1), this could be different in terms of Art. 28(2) where there may be a need e.g. in urgent cases, to rely on a national prosecutor to order certain investigation measures or to obtain such orders from the competent courts.

3. Judicial Review

The competence (and responsibility) for exercising judicial review of "procedural acts of the EPPO" will primarily rest with the courts of the Member States "in accordance with the requirements and procedures laid down by national law" (Art. 42(1)). This provision is intended to give the national courts a competence that would otherwise rest with the CJEU in accordance with the Art. 263 TFEU. Already the Commission proposal had followed a similar approach by providing for a legal fiction according to which the EPPO, for the purpose of judicial review, was to be considered being a national authority – thereby excluding judicial recourse in accordance with Art. 263 TFEU.[11] This approach as well as the solution ultimately found in the current wording of Art. 42 raise a number of legal questions and some concerns.[12] One of the questions is, whether Member States may need to take legislative measures in order to properly implement the provision of Art. 42(1). While this provision – once again – refers to "national law," it should not be interpreted as merely giving Member States the competence to allow their courts to exercise judicial review of the EPPO's procedural acts in spite of the fact that EPPO is established as a Union body. Instead, when interpreted in light of Art. 47 of the Charter – and Art. 19(1) TEU – an appropriate implementation of Art. 42(1) by the Member States may require them to amend national legislation in order to ensure that national courts will, indeed, be empowered to exercise judicial review in all situations where natural or legal persons could seek judicial review by the CJEU under Art. 263 TFEU if Art. 42(1) were not intended to exclude such direct action in respect of procedural acts of the EPPO.

V. Conclusion

Within the scope of the present article, it was only possible to sketch out some of the areas where the implementation of the EPPO Regulation may require Member States to take legislative measures in order to ensure compliance with the obligations set out in the EPPO Regulation and/or to complement its provisions with national law provisions necessary for an effective operation of the EPPO in their territory. Legislative measures may also be required to implement the Regulation's provisions on investigation measures (Art. 30), on cross-border investigations (Art. 31), and on simplified prosecution procedures (Art. 40), to name a few. Member States may also need to take a number of practical measures in order to provide the EDPs with an adequate working environment, including requisite arrangements for an effective information exchange with the EPPO's case management system on the one hand and the national authorities on the other. The hybrid nature of the European Public Prosecutor's Office and its legal framework will not only create new challenges for the authorities of the Member States when implementing the EPPO Regulation but will most certainly also stimulate further academic debate on this approach chosen by the EU legislator.

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1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, O.J. 2017, L 283/1; all references to "Articles" refer to the EPPO Regulation, except where indicated otherwise.↩
2. Cf. for an overview of the EPPO Regulation, e.g.: P. Csonka, A. Juszcak, and E. Sason, "The Establishment of the European Public Prosecutor's Office", (2017) *eucrim*, 125; H. H. Herrnfeld, "The Draft Regulation on the Establishment of the European Public Prosecutor's Office — Issues of Balance Between the Prosecution and the Defence", in: C. Brière/A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, Oxford 2018, p. 383; A. Met-Domestici, "The Hybrid Architecture of the EPPO", (2017) *eucrim*, 143.↩
3. The EPPO Regulation uses the term "Member State(s)" to refer to those Member States participating in the enhanced cooperation on the establishment of the EPPO (cf. the definition in Art. 2(1)) and "Member States of the European Union" when referring to all Member States (cf., e.g., Art. 58(3) (c) and (d)).↩
4. Council Regulation Nos. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of other Servants, O.J 45, 14.6.1962, p. 1385/62 with subsequent amendments.↩
5. According to Art. 108(2), any other person who participates or assists in carrying out the functions of the EPPO at the national level shall be bound by an obligation of confidentiality as provided for under applicable national law.↩
6. Referring to the necessary rules on access to the case management system.↩
7. Stipulating the access to operational personal data processed by the EPPO.↩
8. Cf. P. Csonka, A. Juszcak, and E. Sason, (2017) *eucrim*, op. cit. (n. 2), 129.↩

9. Cf. Art. 11(3) of the original Commission proposal of 17 July 2013, COM(2013) 534 final.↩
10. Cf. section I.1 above.↩
11. Art. 36 of COM(2013) 534 final.↩
12. W. van Ballegooij, "European Public Prosecutor's Office – A View on the State of Play and Perspectives from the European Parliament", in: W. Geelhoed/L.t H. Erkelens/A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague 2018, pp. 27, 35; Martin Böse, Die Europäische Staatsanwaltschaft "als" nationale Strafverfolgungsbehörde, *Juristenzeitung* (JZ) 2017, 82; H. H. Herrnfeld, op. cit. (n. 2), p. 407; V. Mitsilegas/F. Giuffrida, "The European Public Prosecutor's Office and Human Rights", in: W. Geelhoed/L. H. Erkelens/A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague 2018, pp. 59, 78.↩

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