The Material Competence of the EPPO and the Concept of Inextricably Linked Offences

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Article

ABSTRACT

The effectiveness of the EPPO demands a functional interpretation of Art. 22(3) of the EPPO Regulation . Yet, the precise contour of this functional interpretation is far from being shaped, and such a task must be accomplished by practitioners, academics, and jurisprudence in the years to come.

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According to Art. 22 of Council Regulation (EU) 2017/1939 (the "EPPO Regulation"), the material competence of the new EU body shall cover three different clusters of criminal conduct:

- First and foremost, at least from a quantitative point of view, the Regulation covers offences affecting the financial interests of the European Union that are provided for in the PIF Directive (Directive (EU) 2017/1371), as implemented in national law;[1]
- Secondly, the Regulation covers participation in a criminal organisation, as defined in the applicable national law implementing Framework Decision 2008/841/JHA, as long as the organisation is focused on committing PIF offences;
- Thirdly, the Regulation covers offenses that are *inextricably linked* to those falling in the first cluster (but not in the second one).

While the first two clusters are – each on their own – conceivable and immediately understood by experienced legal practitioners, the third cluster has a rather "fluid" nature. In fact, it is possible to produce a list of offences or to outline a number of criminal activities falling under paragraphs 1 and 2 of Art. 22, but cases in which paragraph 3 shall be applicable can only be perceived in connection to an actual situation involving a PIF offence, as defined in paragraph 1 of Art. 22. In other words, paragraph 3 does *not* provide for a *stand-alone material competence*; this competence can only exist if, at the same time, the EPPO is materially competent based on paragraph 1.[2] One could say that paragraphs 1 and 2 of Art. 22 establish the core of the EPPO's material competence, whereas paragraph 3 contains an extension of said competence.

The reasons for extending the competence of the EPPO to any other criminal offence inextricably linked to a PIF crime can be found in Recital 54 of the EPPO Regulation. They stem from the need to carry out efficient investigations and from the implications of the *ne bis in idem* principle. As noted by some authors, this extended or ancillary competence may encompass non-harmonized offences and even offences that do not fall under the scope of the Union's (prescriptive) jurisdiction, as defined in Art. 83(1) and (2) TFEU.[3] The extension is limited, however, by the application of the principle of preponderance,[4] along with other criteria such as the instrumentality of the offence or the amount of damage caused or likely to be caused to the Union's financial interests, as laid down in Art. 25(3) of the EPPO Regulation. It goes without saying, of course, that any extension of the EPPO's material competence under Art. 22(3) must be in line with Art. 86 TFEU.[5]

As already mentioned, the construction of a concept of *inextricably linked offences,* as a key component of the (extended) material competence of the EPPO, must take two aspects into consideration:

- The need for an *efficient investigation of offences* affecting the Union's financial interests ;
- The implications of the *ne bis in idem principle* in light of the case law of the CJEU.

The legislator expressly mentioned that the concept in question must be considered in light of the jurisprudence of the CJEU on *ne bis in idem*,[6] which has consistently rejected a *normative* vision and affirmed "*idem*" as a factual notion. In *Van Esbroeck* (C-436/04), the Court established the *identity of the material acts* as the relevant criterion for the application of Art. 54 of the Convention implementing the Schengen Agreement (CISA). This jurisprudence was followed by the Court in subsequent rulings, for instance in *Kraaijenbrink* (C 367/05):[7]

> 26 (…), it should be noted that the Court has already held that the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (see *Van*

> *Esbroeck*, paragraph 36; Case C 467/04 *Gasparini and Others* [2006] ECR I 9199, paragraph 54, and Case C 150/05 *Van Straaten* [2006] ECR I 9327, paragraph 48).
>
> 27 In order to assess whether such a set of concrete circumstances exists, the competent national courts must determine whether the material acts in the two proceedings constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see, to that effect, *Van Esbroeck*, paragraph 38; *Gasparini and Others*, paragraph 56, and *Van Straaten*, paragraph 52).

Based on this jurisprudence and in line with Recital 54, two offences should be considered inextricably linked if the underlying facts are *substantially identical*, regardless of their legal classification, such that a decision on the merits of one would bar the prosecution and/or trial of the other.[8] This approach is only one side of the same coin, however, the other being the efficiency of the investigations.

The effectiveness of the EPPO demands a functional interpretation of Art. 22(3) that, within the limits of the Treaty and in line with the jurisprudence of the CJEU, might lead to a solution allowing for an extension of the material competence of the EPPO to include ancillary offences based on identical facts but also avoid any artificial splitting of the criminal conduct or an erosion of the guarantees of defence. Yet, the precise contour of this functional interpretation is far from being shaped, and such a task must be accomplished by practitioners, academics, and jurisprudence in the years to come.

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1. And involving the limitation as regards VAT fraud also expressed in Art. 22(1) of the EPPO Regulation.↩
2. D. Brodowski, in: H-H. Herrnfeld, D. Brodowski and C. Burchard, *European Public Prosecutors Office*, Article-by-Article Commentary, 2021, Art. 22, mn. 100 (p. 168).↩
3. P. Caeiro and J. Amaral Rodrigues, "A European Contraption: The relationship between the competence of the EPPO and the scope of Member State's jurisdiction over criminal matters", in K. Ligeti, M. João Antunes and F. Giuffrida (eds.), *The European Prosecutor's Office at Launch,* 2020, p. 65.↩
4. See Recitals 55 and 56 on the criteria of preponderance.↩
5. For a thorough analysis on the need to keep the application of Art. 22(3) of the EPPO Regulation in line with Art. 86 of the TFEU, see E. Sitbon, "Ancillary Crimes and *Ne Bis in Idem*", in: W. Geelhoed, L. H. Erkelens and A. W. H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office*, 2018, pp. 129 et seq..↩
6. See Recital 54 of the EPPO Regulation.↩
7. Extensive information on the jurisprudence of the CJEU can be found in the Eurojust report on case law by the Court of Justice of the European Union on the principle of *ne bis in idem* in criminal matters, April 2020, available at: <https://www.eurojust.europa.eu/case-law-court-justice-european-union-principle-ne-bis-idem-criminal-matters>. See also A. Weyembergh, "La Jurisprudence de la CJ relative au principe *ne bis in idem*: une contribution essentielle à la reconnaissance mutuelle en matière pénale", in : *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, 2013, pp. 539 et seq.↩
8. Critically, see N. Bitzilekis, "The Definition of Ancillary Competence According to the Proposal for an EPPO Regulation", in: Petter Asp (ed.), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, p. 112, 114-115.↩

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