

Herrnfeld / Brodowski / Burchard

# European Public Prosecutor's Office

Article-by-Article Commentary



Herrnfeld / Brodowski / Burchard  
European Public Prosecutor's Office

# European Public Prosecutor's Office

Regulation (EU) 2017/1939  
implementing enhanced cooperation  
on the establishment of the  
European Public Prosecutor's Office ('the EPPO')

Article-by-Article Commentary

by

Hans-Holger Herrnfeld  
Dominik Brodowski  
Christoph Burchard

2021



*Published by*

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76530 Baden-Baden, Germany,  
email: [vertrieb@nomos.de](mailto:vertrieb@nomos.de)

*Co-published by*

Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,  
email: [bestellung@beck.de](mailto:bestellung@beck.de)

and

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,  
email: [orders@isbs.com](mailto:orders@isbs.com)

Published in North America by Hart Publishing,  
An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA

ISBN 978-3-8487-4884-6 (NOMOS Print)  
ISBN 978-3-8452-9076-8 (NOMOS ePDF)  
ISBN 978-3-406-74388-7 (C.H.BECK)  
ISBN 978-1-5099-4715-7 (Hart)

First Edition 2021

© Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2021. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich, Germany.

## Foreword

The creation of the European Public Prosecutor's Office is an important step the European Union takes towards preserving the rule of law and holding responsible those who abuse the confidence of the European citizens.

The EPPO can provide a template for further developments in creating a true common European criminal justice area, and represents a long waited response to the limitations of a national judicial response to a European sized problem of modern criminality.

As the first European Chief Prosecutor and the former Chief Prosecutor of the Romanian National Anticorruption Directorate, I am also fully aware of the challenges we are facing in setting up for the first time a supranational judicial body. Each of these challenges, if inadequately addressed, has the potential of turning the EPPO into a largely ceremonial institution, which would represent a serious letdown of the expectations that led to its creation.

If this exciting project is to be deemed a success, the EPPO has to become an institution whose effectiveness in prosecuting complex fraud offences will be accompanied by strict compliance with the procedural safeguards.

The proper interpretation of the EPPO Regulation in the context of 22 legal systems with different procedural rules and criminal law provisions is a difficult task for any legal practitioner, including the European Prosecutors and the European Delegated Prosecutors.

That is why I salute the work done by Hans-Holger Herrfeld, Dominik Brodowski and Christoph Burchard as extremely relevant for all those interested in the EPPO. The authors bring an ideal mix of practical experience in judicial matters and academic background, which ensures that all possible approaches are covered.

As it combines an intimate knowledge of the EPPO's genesis with a sophisticated and detailed legal analysis, the commentary is an excellent tool for practitioners and I easily see it becoming the reference used for solving related legal disputes.

Moreover, the passion of the authors for the subject of their work comes across the pages and makes it one of the most enjoyable legal readings I have encountered in a significant time.

I was impressed with the mastery the authors prove in addressing a multitude of apparently non-related areas concerning EU administrative law, criminal procedural law, judicial cooperation and exchange of law enforcement intelligence or data protection. As a career prosecutor, I especially appreciated the in depth understanding of criminal investigations and of the delicate interplay between the national and European provisions in this area.

The structure of the book makes it easy to navigate through the significant volume of information it contains for both the readers interested in a comprehensive understanding of the EPPO and for those looking for an answer to a specific question. This will become ever more important once the EPPO will become operational, as its innovative framework and approach towards investigations will inevitably give birth to a long list of legal questions.

## **Foreword**

In an area of free movement of people, goods and capital, one cannot efficiently fight crime when the law enforcements' powers stop at the national borders, that is why the adequate instrument to combat a European problem is a European institution.

Nevertheless, as in the case of any prosecutor's office, our efficiency will eventually be measured by the courts, which will have to reflect for the first time on the legal issues raised by the EPPO's appearance on the judicial arena.

I am confident that this book will represent an invaluable support for these reflections and there will be many readers who will have gained a broader perspective thanks to it.

August 2020

Laura Kövesi  
European Chief Prosecutor

## CONTENTS

Foreword .....	V
Preface and Acknowledgements .....	VII
List of Authors .....	XV
General Literature .....	XVII
Abbreviations .....	XXI
Introduction .....	1
 CHAPTER I SUBJECT MATTER AND DEFINITIONS  	
Article 1     Subject matter .....	11
Article 2     Definitions .....	11
 CHAPTER II ESTABLISHMENT, TASKS AND BASIC PRINCIPLES OF THE EPPO  	
Article 3     Establishment .....	17
Article 4     Tasks .....	18
Article 5     Basic principles of the activities .....	20
Article 6     Independence and accountability .....	32
Article 7     Reporting .....	37
 CHAPTER III STATUS, STRUCTURE AND ORGANISATION OF THE EPPO  	
SECTION 1 Status and structure of the EPPO	
Article 8     Structure of the EPPO .....	41
Article 9     The College .....	64
Article 10    The Permanent Chambers .....	74
Article 11    The European Chief Prosecutor and the Deputy European Chief Prosecutors .....	87
Article 12    The European Prosecutors .....	89
Article 13    The European Delegated Prosecutors .....	98
 SECTION 2 Appointment and dismissal of the members of the EPPO	
Article 14    Appointment and dismissal of the European Chief Prosecutor .....	104
Article 15    Appointment and dismissal of the Deputy European Chief Prosecutors .....	115
Article 16    Appointment and dismissal of the European Prosecutors .....	117
Article 17    Appointment and dismissal of the European Delegated Prosecutors .....	123
Article 18    Status of the Administrative Director .....	128
Article 19    Responsibilities of the Administrative Director .....	133
Article 20    Provisional administrative arrangements of the EPPO .....	134
 SECTION 3 Internal rules of procedure of the EPPO	
Article 21    Internal rules of procedure of the EPPO .....	138

## Contents

CHAPTER IV		
COMPETENCE AND EXERCISE OF THE COMPETENCE OF THE EPPO		
SECTION 1		
Competence of the EPPO		
Article 22	Material competence of the EPPO .....	144
Article 23	Territorial and personal competence of the EPPO .....	171
SECTION 2		
Exercise of the competence of the EPPO		
Article 24	Reporting, registration and verification of information .....	178
Article 25	Exercise of the competence of the EPPO .....	195
CHAPTER V		
RULES OF PROCEDURE ON INVESTIGATIONS, INVESTIGATION MEASURES, PROSECUTION AND ALTERNATIVES TO PROSECUTION		
SECTION 1		
Rules on investigations		
Article 26	Initiation of investigations and allocation of competences within the EPPO .....	213
Article 27	Right of evocation .....	234
Article 28	Conducting the investigation .....	246
Article 29	Lifting privileges or immunities .....	261
SECTION 2		
Rules on investigation measures and other measures		
Article 30	Investigation measures and other measures .....	268
Article 31	Cross-border investigations .....	282
Article 32	Enforcement of assigned measures .....	301
Article 33	Pre-trial arrest and cross-border surrender .....	303
SECTION 3		
Rules on prosecution		
Article 34	Referrals and transfers of proceedings to the national authorities .....	309
Article 35	Termination of the investigation .....	321
Article 36	Prosecution before national Courts .....	329
Article 37	Evidence .....	345
Article 38	Disposition of confiscated assets .....	352
SECTION 4		
Rules on alternatives to prosecution		
Article 39	Dismissal of the case .....	356
SECTION 5		
Rules on simplified procedures		
Article 40	Simplified prosecution procedures .....	371
CHAPTER VI		
PROCEDURAL SAFEGUARDS		
Article 41	Scope of the rights of the suspects and accused persons .....	382
Article 42	Judicial review .....	400



## Contents

### CHAPTER VII PROCESSING OF INFORMATION

Article 43	Access to information by the EPPO .....	441
Article 44	Case management system .....	443
Article 45	Case files of the EPPO .....	447
Article 46	Access to the case management system .....	453

### CHAPTER VIII DATA PROTECTION

Introduction to Chapter VIII (Articles 47 to 89) .....	456
--------------------------------------------------------	-----

#### [SECTION 1]

##### [Principles]

Article 47	Principles relating to processing of personal data .....	461
Article 48	Administrative personal data .....	470
Article 49	Processing of operational personal data .....	471
Article 50	Time-limits for the storage of operational personal data .....	477
Article 51	Distinction between different categories of data subjects .....	479
Article 52	Distinction between operational personal data and verification of quality of personal data .....	481
Article 53	Specific processing conditions .....	483
Article 54	Transmission of operational personal data to institutions, bodies, offices and agencies of the Union .....	485
Article 55	Processing of special categories of operational personal data .....	487
Article 56	Automated individual decision-making, including profiling .....	488

#### [SECTION 2]

##### [Rights of the data subject]

Article 57	Communication and modalities for exercising the rights of the data subject .....	490
Article 58	Information to be made available or given to the data subject .....	492
Article 59	Right of access by the data subject .....	495
Article 60	Limitations of the right of access .....	497
Article 61	Right to rectification or erasure of operational personal data and restriction of data processing .....	499
Article 62	Exercise of rights by the data subject and verification by the European Data Protection Supervisor .....	504

#### [SECTION 3]

##### [Controller and processor]

Article 63	Obligations of the EPPO .....	506
Article 64	Joint controllers .....	508
Article 65	Processor .....	510
Article 66	Processing under the authority of the controller or processor .....	512
Article 67	Data protection by design and by default .....	513
Article 68	Records of categories of processing activities .....	514
Article 69	Logging in respect of automated processing .....	516
Article 70	Cooperation with the European Data Protection Supervisor .....	518
Article 71	Data protection impact assessment .....	519
Article 72	Prior consultation of the European Data Protection Supervisor .....	520

#### [SECTION 4]

##### [Security of personal data]

Article 73	Security of processing of operational personal data .....	522
Article 74	Notification of a personal data breach to the European Data Protection Supervisor .....	523

## Contents

Article 75	Communication of a personal data breach to the data subject .....	523
Article 76	Authorised access to operational personal data within the EPPO .....	524
[SECTION 5] [Data Protection Officer]		
Article 77	Designation of the Data Protection Officer .....	527
Article 78	Position of the Data Protection Officer .....	528
Article 79	Tasks of the data protection officer .....	528
[SECTION 6] [Transfers of personal data to third countries or international organisations]		
Article 80	General principles for transfers of operational personal data .....	533
Article 81	Transfers on the basis of an adequacy decision .....	534
Article 82	Transfers subject to appropriate safeguards .....	534
Article 83	Derogations for specific situations .....	535
Article 84	Transfers of operational personal data to recipients established in third countries .....	535
[SECTION 7] [Tasks of the European Data Protection Supervisor]		
Article 85	Supervision by the European Data Protection Supervisor .....	544
Article 86	Professional secrecy of the European Data Protection Supervisor .....	545
Article 87	Cooperation between the European Data Protection Supervisor and national supervisory authorities .....	545
Article 88	Right to lodge a complaint with the European Data Protection Supervisor .....	546
Article 89	Right to judicial review against the European Data Protection Supervisor .....	546
CHAPTER IX FINANCIAL AND STAFF PROVISIONS		
SECTION 1 Financial Provisions		
Article 90	Financial actors .....	550
Article 91	Budget .....	553
Article 92	Establishment of the budget .....	559
Article 93	Implementation of the budget .....	561
Article 94	Presentation of accounts and discharge .....	563
Article 95	Financial rules .....	565
SECTION 2 Staff Provisions		
Article 96	General provisions .....	566
Article 97	Temporary agents and contract agents .....	576
Article 98	Seconded national experts and other staff .....	577
CHAPTER X PROVISIONS ON THE RELATIONS OF THE EPPO WITH ITS PARTNERS		
Article 99	Common provisions .....	579
Article 100	Relations with Eurojust .....	583
Article 101	Relations with OLAF .....	595
Article 102	Relations with Europol .....	611
Article 103	Relations with other institutions, bodies, offices and agencies of the Union .....	616
Article 104	Relations with third countries and international organisations .....	621
Article 105	Relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO .....	635

## Contents

### CHAPTER XI GENERAL PROVISIONS

Article 106	Legal status and operating conditions .....	644
Article 107	Language arrangements .....	646
Article 108	Confidentiality and professional secrecy .....	648
Article 109	Transparency .....	650
Article 110	OLAF and the Court of Auditors .....	652
Article 111	Rules on the protection of sensitive non-classified and classified information .....	654
Article 112	Administrative inquiries .....	655
Article 113	General regime of liability .....	656
Article 114	Implementing rules and programme documents .....	661
Article 115	Exercise of the delegation .....	663
Article 116	Urgency procedure .....	666
Article 117	Notifications .....	667
Article 118	Review of the rules relating to the protection of natural persons with regard to the processing of personal data by the EPPO .....	671
Article 119	Review clause .....	672
Article 120	Entry into force .....	676
COUNCIL REGULATION (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') .....		683
DIRECTIVE (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law .....		771
Index .....		787

## List of Authors

**Dominik Brodowski** Junior Professor of Criminal Law and Criminal Procedure at Saarland University, Saarbrücken, Germany; Dr. iur. (Tübingen University); LL.M. (University of Pennsylvania)

*Articles 7, 21, 22, 29, 30, 38 to 41, 99 to 118, 120*

**Christoph Burchard** Professor of German, European and International Criminal Justice, Comparative Law and Legal Theory, Goethe University Frankfurt am Main, Germany; Dr. jur. (Passau University); LL.M. (NYU)

*Articles 1 to 6, 8 to 19, 32, 33, 37, 119*

**Hans-Holger Herrfeld** Senior Federal Public Prosecutor; Head of Division at the Federal Ministry of Justice and Consumer Protection, Berlin, Germany, Dr. jur. (University of Hamburg)

*Introduction, Articles 20, 23 to 28, 31, 34 to 36, 42 to 46, Introduction to Chapter VIII, Articles 47 to 98\**

---

\* The contributions to the commentary express solely the personal view of the author.

## Introduction

A. Genesis of the EPPO Regulation .....	1
B. Article 86 TFEU – legal basis – enhanced cooperation .....	7
C. Material competence of the EPPO .....	10
D. Structure of the EPPO and cooperation with national authorities .....	12
E. Procedural law framework for the EPPO .....	13

### A. Genesis of the EPPO Regulation

The Council Regulation (EU) 2017/1939 on the establishment of the European Public Prosecutor’s Office (“the EPPO”) was adopted on 12 October 2017<sup>1</sup> and entered into force on 20 November of that year. In accordance with Article 120 of the Regulation, the EPPO shall assume its operational work on a date to be determined by a decision of the Commission, which shall not be earlier than three years after the date of entry into force of the Regulation. The **legislative history** of the EPPO Regulation began on 17 July 2013 when the European Commission published its Communication “Better protection of the Union’s financial interests: Setting up the European Public Prosecutor’s Office and reforming Eurojust”<sup>2</sup>, presenting a package of measures addressing institutional aspects of protecting the Union’s financial interests. This package consisted of two legislative proposals: a “Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office”<sup>3</sup> as well as a “Proposal for a Regulation on the establishment of the European Agency for Criminal Justice Cooperation (‘Eurojust’)”<sup>4</sup>. The package also included a Communication on “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”<sup>5</sup>. The presentation of the 2013 package followed up to an earlier Commission communication on the subject matter of protection of the Union’s financial interest,<sup>6</sup> as well as the Commission’s proposal for the so-called “PIF-Directive”, harmonizing, to some extent, the relevant criminal law provisions on the protection of the Union’s financial interests<sup>7</sup>.

The proposal to establish the EPPO as a new Union body with an exclusive competence for the investigation and prosecution of crimes committed against the financial interest of the Union was the core element of the package proposed by the Commission in July 2013. The Commission’s intention behind the proposal to replace the Council Decision on Eurojust<sup>8</sup> by a new Eurojust Regulation was to create synergies between the

---

<sup>1</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283, 31.10.2017, 1.

<sup>2</sup> COM (2013) 532 final, 17.7.2013.

<sup>3</sup> COM (2013) 534 final, 17.7.2013.

<sup>4</sup> COM (2013) 535 final, 17.7.2013.

<sup>5</sup> COM (2013) 533 final, 17.7.2013.

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers’ money, COM (2011) 293 final, 16.5.2011.

<sup>7</sup> Commission proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM (2012) 363 final, 11.7.2012.

<sup>8</sup> Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, 14.

## Introduction

EPPO and Eurojust,<sup>9</sup> as well as to overcome deficiencies in the existing legal framework for Eurojust<sup>10</sup>. The Communication on OLAF sketched out further legislative measures which the Commission considered necessary to further amend the OLAF Regulation, which had already been under revision at that time<sup>11</sup>, with a view to adjusting the legislative framework on OLAF in light of the future competences of the EPPO and the needs for an effective cooperation between OLAF and the EPPO.<sup>12</sup> Following the adoption of the PIF Directive in July 2017<sup>13</sup> and the EPPO Regulation in October 2017<sup>14</sup>, negotiations on the proposal for a new Eurojust Regulation were concluded in 2018,<sup>15</sup> whereas negotiations on the Commission's proposal for an amendment of the OLAF Regulation<sup>16</sup> were still ongoing as of early 2020.

- 3 The **idea of establishing a European Public Prosecutor's Office** has a **long history**. The needs for a better protection of the Union's financial interests, but also concerns, as well as various proposals have been well documented.<sup>17</sup> The Commission already issued a Green Paper on the EPPO in 2001<sup>18</sup> and a follow-up report thereto in 2003.<sup>19</sup> The Lisbon Treaty, which entered into force in December 2009, laid the ground for establishing the EPPO by inserting the present Article 86 into the Treaty on the Functioning of the European Union, providing a legal basis for establishing the EPPO "from Eurojust". Following further consultations, the Commission then presented its proposal for the EPPO Regulation in July 2013.
- 4 Even prior to the presentation of the proposal by the Commission, discussions had started at the EU level as well as between Member States, in particular on the appropriate design of the EPPO as a new European judicial body, which evidently would assume competences previously exercised by national authorities. Against this background, the idea of establishing the EPPO met different degrees of enthusiasm when the Commission presented its proposal for the EPPO Regulation. Under the so-called "**yellow card procedure**" in accordance with Protocol (No 2) "on the Application of the Principles of Subsidiarity and Proportionality", 14 parliaments of 12 Member State voiced their opin-

---

<sup>9</sup> Cf. COM (2013) 532 final, 17.7.2013, 8.

<sup>10</sup> Cf. COM (2013) 532 final, 17.7.2013, 4.

<sup>11</sup> Regulation (EU, EURATOM) 883/2013 of the European 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, OJ L 248, 18.9.2013, 1.

<sup>12</sup> Cf. COM (2013) 532 final, 17.7.2013, 9.

<sup>13</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, 29; cf. for the genesis and an analysis of this directive → Article 22 mn. 8 ff.

<sup>14</sup> Council regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, 1.

<sup>15</sup> Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, 138. On this regulation, → Article 100 mn. 3 ff.

<sup>16</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM (2018) 338 final, 23.5.2018. On OLAF and its legal framework, → Article 101 mn. 3 ff.

<sup>17</sup> Cf., i.a., Mireille Delmas-Marty and John Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, Vol. 1 (2000); Katalin Ligeti, 'The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?' (2011) 1 EuCLR, 123; Marianne L. Wade, 'A European public prosecutor: potential and pitfalls' (2013) 59 Crime, Law and Social Change, 439.

<sup>18</sup> Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, 11.12.2001.

<sup>19</sup> Follow-Up Report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, 19.3.2003.

## Introduction

ion on the proposal and questioned the proper observance of the subsidiarity principle. The Commission, in accordance with Article 7(2) of that Protocol, provided its reply to the parliaments on 2 December 2013, essentially stating that in its view, the “proposal complies with the principle of subsidiarity enshrined in Article 5(3) TEU, and that a withdrawal or an amendment of that proposal is not required”<sup>20</sup> and thus maintained its proposal.

Formal **negotiations in the Council Working Group COPEN** started in October 2013 and were largely concluded in that format by October 2016. During that period, the Justice and Home Affairs Council regularly received reports from the Presidency with a view to a possible “partial general approach” on certain sections or articles of the draft regulation, and eventually obtained at least a “broad conceptual approach” on the text presented. Several controversial issues that were still unresolved in October 2016 were then further discussed in other formats. A consolidated version of the full draft text was presented to the December 2016 Justice and Home Affairs Council for agreement. While the majority of Member States expressed at least “general support” for the draft text and commitment to participate in the establishment of the EPPO, some Member States still had certain concerns with the proposal. In line with its intervention at the Council meeting in December, Sweden formally stated in January 2017 that it would, at the present time, refrain from participating in the establishment of the EPPO. This announcement provided the basis for the Council to formally register the absence of unanimity, required under Article 86(1) TFEU for the adoption of the EPPO Regulation. This was subsequently confirmed by the meeting of the European Council on 9 March 2017 – thus giving way to the possibility for establishing the EPPO under the enhanced cooperation procedures (*infra* → mn. 8).

In parallel to this process, the Slovak and the Maltese Council Presidencies continued efforts to reach agreement (between the “willing” Member States) on the full text of the EPPO Regulation. By letter of 3 April 2017, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission that they wished to participate in an **enhanced cooperation** on the establishment of the EPPO. In accordance with the third subparagraph of Article 86(1) TFEU, the authorisation to proceed with enhanced cooperation thus was “deemed to be granted”. Subsequently, also Latvia, Estonia, Austria and Italy indicated their wish to participate in the enhanced cooperation to establish the EPPO. The fact that the Regulation would thus be binding only for the “participating Member States” required some further amendments to the draft Regulation. Also, a few of the Member States that eventually expressed their willingness to participate in the enhanced cooperation had requested some further amendments to the draft text. Negotiations were finally concluded in May 2017. Following the **European Parliament’s approval** given on 5 October 2017<sup>21</sup>, the

---

<sup>20</sup> Communication from the Commission to the European Parliament, the Council and the national Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2013) 851 final, 27.11.2013, 13.

<sup>21</sup> P8\_TA(2017)0384 = OJ C 346, 27.9.2018, 246; cf. for earlier critical positions of the European Parliament on the Commission proposal: Resolution of 12 March 2014 (P7\_TA(2014)0234 = OJ C 378, 9.11.2017, 151) and on the draft EPPO Regulation, as it evolved in the course of the negotiations in the Council : Resolution of 29 April 2015 (P8\_TA(2015)0173 = OJ C 346, 21.9.2016, 27); cf. for further analysis: Wouter van Ballegooij, ‘European Public Prosecutor’s Office – A View on the State of Play and Perspectives from the European Parliament’ in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor’s Office* (2018), 27; Anne Weyemberg and Chloé Brière, *Towards a European Public Prosecutor’s Office (EPPO). Study for the LIBE Committee* (2016).

## Introduction

EPPO Regulation was adopted by the Justice and Home Affairs Council (the 20 participating Member States<sup>22</sup>) at its meeting on 12 October 2017.

### B. Article 86 TFEU – legal basis – enhanced cooperation

7 The **legal basis for the EPPO Regulation**, Article 86 TFEU, was inserted by the Lisbon Treaty. It allows (“may”) the establishment of a European Public Prosecutor’s Office, by way of regulations, “from Eurojust”. The purpose and meaning of the latter phrase has been subject to different considerations.<sup>23</sup> In practice, it remained a rather empty promise and merely gave reason to confirm the EPPO’s special relationship with Eurojust in Article 3(3) of the EPPO Regulation. In accordance with Article 86(1) TFEU, the task of the EPPO, as a minimum, is to “combat crimes affecting the financial interests of the Union”; its specific competences in this respect are to be determined by the regulation(s) establishing the EPPO (cf. Article 86(3) TFEU). An extension of competences to other types of crime would be possible, subject to a decision of the European Council (cf. Article 86(4) TFEU; *infra* → mn. 11). In accordance with paragraph 2 of Article 86 TFEU, the EPPO shall be responsible for “investigating, prosecuting and bringing to judgement the perpetrators of and accomplices” in the offences determined in the regulations(s) establishing the EPPO and it “shall exercise the functions of prosecutor in the competent courts of the Member States”. The essence of this provision is reflected in Article 4 of the EPPO Regulation, clarifying that the EPPO’s task, contrary to the prosecutor’s tasks in some Member States, is not only to prosecute the case once an investigation conducted by another authority has been completed, but that the EPPO’s European Delegated Prosecutors (“EDP”) have full responsibility already for leading the investigations (→ Article 28 mn. 2). Article 86 TFEU does not address the enforcement of judgments, which in some Member States is also a responsibility of or carried out under supervision of the prosecution service. Article 4 of the EPPO Regulation is more specific in this respect, clarifying that the EPPO’s tasks end once the case “has been finally disposed of”, thus not including the enforcement phase. Finally, paragraph 2 of Article 86 TFEU specifically provides that the EPPO shall prosecute the cases in the national courts (→ Article 36 mn. 3) – and thus not at the CJEU, which has not been designed to function as such a criminal court anyhow.

8 Article 86(1) TFEU provides for a “**special legislative procedure**” (cf. Article 289(2) TFEU), under which the regulation(s) is/are to be adopted by the Council, acting unanimously after obtaining the consent of the European Parliament. In order to ensure that the establishment of the EPPO would not be blocked by just a few Member States, subparagraphs two and three of Article 86(1) TFEU provide for a special mechanism to establish the EPPO by way of **enhanced cooperation**<sup>24</sup>, which has been applied in the present case. Contrary to the normal procedure for a Council Decision to authorize a

---

<sup>22</sup> That group was subsequently joined by Malta and the Netherlands – cf. *infra* → mn. 9.

<sup>23</sup> Cf. i.a. Markus Kotzur, in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds.), *European Union Treaties* (2015), Article 86 TFEU mn. 1; Katalin Ligeti and Anne Weyembergh, ‘The European Public Prosecutor’s Office: Certain Constitutional Issues’ in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 53 (69 ff.); José Lopes da Mota, ‘Eurojust – The Heart of the Future European Public Prosecutor’s Office’ [2008] *eu crim*, 62; Jorge A. Espina Ramos, ‘The Relationship Between Eurojust and the European Public Prosecutor’s Office’ in Lorena Bachmaier Winter (ed.), *The European Public Prosecutor’s Office* (2018), 87.

<sup>24</sup> Cf. for an analysis: Julian J. E. Schutte, ‘Establishing Enhanced Cooperation Under Article 86 TFEU’, in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 196.



## Introduction

group of Member States to establish enhanced cooperation in a particular area covered by the EU Treaties (cf. Article 329 TFEU), no such specific Council Decision is necessary in the case of Article 86(1) TFEU. As the European Council on 9 March 2017 did not reach consensus, it was sufficient for a group of “at least nine Member States” to formally express their “wish to establish enhanced cooperation”. In accordance with the third subparagraph of Article 86(2) TFEU, the authorization to proceed with enhanced cooperation referred to in Article 20(2) TEU and Article 329(1) TFEU then was “deemed to be granted and the provisions of enhanced cooperation shall apply” (i.e. Article 20 TEU and Articles 326 to 334 TFEU).

As a consequence, not only the adoption of the EPPO Regulation, but also all further decisions by the Council in the implementation of the EPPO Regulation or its future amendment are taken with only the **participating Member States** enjoying a right to vote (cf. Article 330 TFEU). Any other Member State may at any point in time express its wish to participate in the enhanced cooperation (cf. Article 331 TFEU). Subsequent to the adoption of the EPPO Regulation by 20 Member States in October 2017, the Netherlands and Malta have joined the group (→ Article 120 mn. 17), following the necessary approval by the Commission (Article 331 TFEU)<sup>25</sup>. Establishing the EPPO by way of enhanced cooperation means that **non-participating Member States** are not bound by the EPPO Regulation (cf. Article 20(4) TEU),<sup>26</sup> and the participating Member States – as well as the EPPO created by their decision – “shall respect the competences, rights and obligations” of the non-participating Member States while, in turn, the latter are obliged not to impede the enhanced cooperation (cf. Article 327 TFEU). As the EPPO was to be established by enhanced cooperation, the Council considered it appropriate to specifically clarify by way of a definition (cf. Article 2 No. (1) of the EPPO Regulation) that the term “Member State” used in the Regulation normally only refers to the participating Member States with some exceptions in particular in Chapter VIII, where certain provisions on data protection also refer to (but not impose obligations on) non-participating Member States (→ Introduction to Chapter VIII mn. 10). The definition of the term “Member State” as applying only to participating Member States is particularly relevant for the scope of the EPPO’s territorial and personal competence (→ Article 23 mn. 3). The fact that the EPPO was to be established by way of enhanced cooperation also required the insertion of specific provisions on the cooperation between the EPPO and non-participating Member States (cf. Article 105) as well as on the financing of the EPPO by the participating Member States (cf. Article 91(7) and (8)).

### C. Material competence of the EPPO

As provided for in Article 86(2) TFEU, the EPPO Regulation, aside from a general description of the EPPO’s tasks (cf. Article 4, *supra* → mn. 7), determines its “**material competence**” in Article 22. It does so not by way of independent and complete substantive criminal law provisions on offences within the competence of the EPPO. Instead, it

---

<sup>25</sup> Commission Decision (EU) 2018/1094 of 1 August 2018 confirming the participation of the Netherlands in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 196, 2.8.2018, 1; Commission Decision (EU) 2018/1103 of 7 August 2018 confirming the participation of Malta in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 201, 8.8.2018, 2.

<sup>26</sup> Also specifically acknowledged in Recital 9: “This Regulation should be binding in its entirety and directly applicable only in the Member States which participate in enhanced cooperation on the establishment of the EPPO, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU.”

## Introduction

refers primarily to the PIF-Directive<sup>27</sup> “as implemented by national law” (cf. Article 22(1)). In addition, the Regulation provides the EPPO with competence regarding the offence of participation in a criminal organization if – and only if – the focus of the criminal activity is to commit PIF offences (→ Article 22 mn. 94 ff). Also, the Regulation allows the EPPO to extend its investigations and prosecutions in a particular case to other types of criminal conduct that is “inextricably linked” to a PIF offence under investigation/prosecution (→ Article 22 mn. 99 ff). The EPPO Regulation determines the “**territorial and material competence**” of the EPPO, which builds on but does not affect the jurisdictional principles of the Member State’s criminal law (→ Article 22 mn. 1; → Article 23 mn. 4). The competences of the EPPO are in principal **shared with national authorities**; different from the Commission proposal<sup>28</sup>, the Regulation does not award the EPPO with an exclusive competence. Thus, the national authorities are not excluded from the possibility to initiate an own investigation in respect of offences for which the EPPO is (also) competent. The EPPO’s competence, however, has priority whenever it decides to exercise its competence (cf. Article 25(1); → Article 25 mn. 2). In addition to the definition of the EPPO’s competences in Articles 22 and 23, the Regulation provides in Article 25 paragraphs 2 and 3, rules obliging the EPPO to **refrain from exercising its competence** i.a. in respect of minor cases involving only a limited damage to the Union’s financial interests.

- 11 In line with Article 86(1) TFEU, Article 22 of the Regulation only provides the EPPO with a competence to investigate and prosecute offences affecting the financial interest of the Union.<sup>29</sup> While paragraph 1 of Article 22 contains a “dynamic reference” to the PIF Directive, the wording used here (“competent in respect of criminal offences affecting the financial interest of the Union”) as well as in Article 4 would ensure that the scope of the legal basis of Article 86(1) TFEU is observed even if the legislator were to subsequently amend the PIF Directive to include also offences in respect of which it may be questionable whether they actually do affect the financial interests of the Union (→ Article 22 mn. 90). Any **extension of the EPPO’s material competence** beyond the scope of Article 86(1) TFEU would require an amendment of this Treaty provision. Article 86(4) TFEU does allow for such an amendment by way of a simplified procedure, authorizing the European Council to amend paragraph 1 of Article 86 TFEU. In order to do so, the European Council would have to decide unanimously, including the Member States not participating in the EPPO.<sup>30</sup> On the basis of such an amended provision of Article 86(1) TFEU, the Council – acting in the format of the Member States participating in the enhanced cooperation – could then, again by unanimous decision, amend the EPPO Regulation in order to extend its material competences accordingly. Already on

---

<sup>27</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, OJ L 198, 28.7.2017, 29; for an analysis cf. → Article 22 mn. 8 ff.

<sup>28</sup> On the Commission proposal and the negotiations in the Council, cf. Petter Asp, ‘Jeopardy on European Level – What is the Question to which the Answer is the EPPO?’ in Petter Asp (ed.), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (2014), 51; see also Giovanni Grasso, Rosaria Sicurella and Fabio Giuffrida, ‘EPPO Material Competence: Analysis of the PIF Directive and Regulation’ in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 23 (32).

<sup>29</sup> For an analysis of this phrase, cf. Giovanni Grasso, Rosaria Sicurella and Fabio Giuffrida, ‘EPPO Material Competence: Analysis of the PIF Directive and Regulation’ in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 23 (27 ff).

<sup>30</sup> Cf. page 4 of the Commission’s Communication referred to below (n 31).

## Introduction

12 September 2018, the Commission presented a communication<sup>31</sup>, “inviting” the European Council to take such a decision on the amendment of Article 86(1) TFEU with a view to extending the EPPO’s competence to terrorist offences affecting more than one Member State. While, under the Treaty provisions, the Commission does not have a formal “right of initiative” for making such amendments, the Commission considered that this does not prevent it from presenting an initiative.<sup>32</sup> So far, the European Council has refrained from taking up this Commission initiative. Apparently, there is a wide-spread understanding that the EPPO, as a new Union body, should first become fully functional and provide proof of its effectiveness, before an extension of competences to such a vital matter as the fight against terrorism could be considered.

### D. Structure of the EPPO and cooperation with national authorities

The Regulation provides the EPPO with a rather complex structure in its Central Office in Luxemburg as well as a “decentral level” composed of European Delegated Prosecutors (“EDPs”) in the Member States (cf. Articles 8 to 13)<sup>33</sup>. In line with Article 86(1) TFEU, the EPPO Regulation prescribes a role for the EDPs to lead the investigations to be undertaken by the EPPO (*supra* → mn. 7). While the EPPO is a Union body operating as one single office (cf. Article 8(1)), the EPPO will, nevertheless, to a large extent need to rely on **national authorities for carrying out investigation measures**. As provided for in Article 28(1), the EDPs may either undertake the investigation measures and other measures on their own or instruct the competent authorities in their respective Member State to do so. In addition, the EPPO may invite and/or request Eurojust (cf. Article 100(2), → Article 100 mn. 15 ff.), OLAF (cf. Article 101(3), → Article 101 mn. 25 ff.) and Europol (cf. Article 102(2), → Article 102 mn. 15 ff.) to provide certain types of assistance within their respective mandates, which, however, does not include the taking of criminal investigation measures on behalf of the EPPO. Also, and different from the original Commission proposal<sup>34</sup>, the members of the EPPO’s Central Office are not intended to undertake investigation measures in the Member States – aside from a limited possibility for the supervising European Prosecutor (cf. Article 12) to assume the role of an EDP of his/her Member States in exceptional circumstances by deciding to conduct the investigations personally (cf. Article 28(4)). Thus, even though the Central Office may have certain staff members who can, on request in an individual case, support the investigations conducted by the EDPs, the success of the EPPO will to a large extent depend on the competent national authorities, their availability, their resources<sup>35</sup> and their commitment, all of which are necessary to actively assist and support the investigations conducted by the EPPO (→ Article 28 mn. 4). And while the EPPO Regulation “is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organized” (cf. Recital 15), it nevertheless may require

12

---

<sup>31</sup> Communication from the Commission to the European Parliament and the European Council “A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to cross-border terrorist crimes”, COM( 2018) 641 final, 12.9.2018; for further details: Adam Juszcak and Elisa Sason, ‘Fighting Terrorism through the European Public Prosecutor’s Office (EPPO)?’ [2019] *eurim*, 66.

<sup>32</sup> Cf. page 4 of the Communication (n 31).

<sup>33</sup> For a critical review, cf., e.g., Lothar Kuhl, ‘The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?’ [2017] *eurim*, 135.

<sup>34</sup> Cf. Article 18(6) of the proposal (COM (2013) 534 final), which gave such a role to the European Chief Prosecutor.

<sup>35</sup> Cf. → Article 91 mn. 6, → Article 96 mn. 16.

## Introduction

national legislative implementation measures<sup>36</sup> in this respect in particular, where the national prosecution service is not necessarily responsible for leading criminal investigations, but traditionally shares that role with other actors such as police or customs authorities or the *juge d'instruction*.

### E. Procedural law framework for the EPPO

- 13 Article 86(3) TFEU provides that the regulation establishing the EPPO “shall determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”. Much consideration has been given to the needs and possible content of an own **code of criminal procedure for the EPPO**. The Commission had provided financial support to a project chaired by the University of Luxembourg to draft “European Model Rules for the Procedure of the future European Public Prosecutor’s Office”<sup>37</sup>. However, following in this respect the underlying concept of the Commission’s proposal for the EPPO Regulation<sup>38</sup>, the legislator decided to take a different path. The EPPO Regulation does contain procedural rules on initiating (Articles 26 and 27), conducting (Articles 28 to 33) and termination (Articles 34, 35 and 39) of investigations, on the prosecution before national courts (Articles 36 and 40), the admissibility of evidence (Article 37), procedural safeguards (Article 41) and judicial review (Article 42). Many of these provisions go into great detail in respect of internal responsibilities and decision-making competences – a result, perhaps, of the difficult negotiations in the Council Working Group on the question of a proper structure for the EPPO and the roles to be played by its different actors and organizational layers. However, on substance, many of these provisions are not “self-standing” as such, but refer to applicable national law in order to specify the conditions or procedures for their application. Furthermore, Article 5(3) clearly shows that the EPPO Regulation is not expected to provide final answers to all questions of criminal procedure law when it states that “national law shall apply to the extent that a matter is not regulated by this Regulation”.

---

<sup>36</sup> Cf., e.g., several contributions in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020): Robert Kert, ‘Specific Aspects of the Implementation of the EPPO Regulation in Austria’, 137; Hans-Holger Herrnfeld, ‘Implementation of the EPPO Regulation: a perspective from Germany’, 149; Petri Freundlich, Dan Helenius and Samuli Miettinen, ‘The European Public Prosecutor’s Office, enhanced cooperation and Finland’, 163; Gintaras Svedas and Ugne Markeviciute, ‘The EPPO implementation: A perspective from the Republic of Lithuania’, 171; Angelo Marletta, ‘It takes two to tango. The relationship between the European Public Prosecutor and the *juge d'instruction* from the Luxembourg perspective’, 187; Nicholas Franssen, ‘Comments on the EPPO from a Dutch perspective’, 197; cf. also: Pauline Dubarry and Emmanuelle Wachenheim, ‘La naissance d’un Parquet européen – les enjeux de sa mise en œuvre en France’ [2018] *eu crim*, 121; Jocelyne Leblois-Happe and Florie Winckelmuller, ‘Impact of the Setting Up of a European Public Prosecutor’s Office on National Judicial Systems – A French perspective’ in Petter Asp (ed.), *The European Public Prosecutor’s Office, Legal and Criminal Policy Perspectives* (2014), 279; David Vilas Álvarez, ‘The EPPO Implementation – A Perspective from Spain’ [2018] *eu crim*, 124.

<sup>37</sup> Available at: [http://www.en.uni.lu/fdef/news/a\\_blueprint\\_for\\_the\\_european\\_public\\_prosecutor\\_s\\_office\\_eu\\_model\\_rules\\_of\\_criminal\\_procedure](http://www.en.uni.lu/fdef/news/a_blueprint_for_the_european_public_prosecutor_s_office_eu_model_rules_of_criminal_procedure).

<sup>38</sup> Cf. in particular Articles 11(3) and 26(3) of the Commission proposal for the EPPO Regulation; for a critical review, see Katalin Ligeti and Anne Weyembergh, ‘The European Public Prosecutor’s Office: Certain Constitutional Issues’ in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 53 (64 ff).

## Introduction

The extensive references in the EPPO Regulation to the **applicable national law** has been criticized by some as attempts to retain national sovereignty and to ensure conformity of EPPO activities with relevant national law<sup>39</sup>. The fact that, to a large extent, national criminal procedure law will need to be applied by the EPPO in conducting investigations essentially means that the EPPO will not work in a “single legal area” and its “playing field” will not be as “level” as it – perhaps – could and should be<sup>40</sup>. One could argue that it would not have been necessary to include numerous specific “national links” in the Regulation’s provisions. However, even if that had not been done, Article 5(3) – following a similar provision in Article 11(3) of the original Commission proposal – does leave room for a rather broad range of interpretation of the condition set out therein for such applicability, i.e. that “a matter is not regulated by this Regulation”. The specific references to national law in many of the articles of the Regulation may now help clarifying the extent to which a matter is regulated by the Regulation and where it does, indeed, leave room for an application of national law. Furthermore, the original Commission proposal did not really clarify, in situations where more than one Member State is involved in a case somehow, which Member State’s law applies in addition to or in the absence of relevant provisions of the Regulation.<sup>41</sup> Article 5(3) now clarifies that – in principle – this is the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 12(1). Also, the Regulation no longer allows that the European Chief Prosecutor may conduct investigations himself/herself. And where, in exceptional circumstances, a European Prosecutor, in accordance with Article 28(4), decides to conduct the investigations in a particular case, he/she assumes the “powers, responsibilities and obligations” of an EDP of that Member State – thus providing for subsidiary application of that Member State’s national law in terms of Article 5(3) in such cases as well (→ Article 28 mn. 25).

The fact that the EPPO will not operate in a “**single legal area**” and that not only the applicable substantive criminal law will depend on the Member State in which the EPPO conducts an investigation and decides to prosecute the case<sup>42</sup>, but also the applicable procedural law depends on which EDP is conducting the investigations, gave reason for the Council to provide for criteria on the choice of the Member State whose EDP is competent to initiate and conduct the investigations. These give preference to the Member State, “where the focus of the criminal activity is” and allow for a deviation from that principle only where “duly justified” and taking into account a number of criteria set out in Article 26(4) (→ Article 26 mn. 14 ff.). That decision shall normally also be adhered to when the EPPO decides – amongst two or more possibilities – about the Member State where the case is to be brought to trial (cf. Article 36(3); → Article 36 mn. 12 ff.) and should be subject to a possible judicial review by the national courts (→ Article 36 mn. 16 ff.). While these provisions may be criticized as still being rather “flexible” and

---

<sup>39</sup> Cf., e.g., Lothar Kuhl, ‘The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?’ [2017] *eu crim*, 135.

<sup>40</sup> Cf. also Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 7.

<sup>41</sup> On this question, cf. Hans-Holger Herrnfeld, ‘The Draft Regulation on the Establishment of the European Public Prosecutor’s Office – Issues of Balance Between the Prosecution and the Defence’ in Chloé Brière and Anne Weyembergh (eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future* (2017), 383 (393); for a critical review of the Commission proposal in this respect, see Katalin Ligeti and Anne Weyembergh, ‘The European Public Prosecutor’s Office: Certain Constitutional Issues’ in Leendert H. Erkelens, Arjen W.H. Meij and Marta Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon?* (2015), 53 (68).

<sup>42</sup> Cf. on this issue e.g. John Vervaele, ‘The Material Scope of Competence of the European Public Prosecutor’s Office: Lex incerta and unpraevia?’ in Chloé Brière and Anne Weyembergh (eds.), *The Needed Balances in EU Criminal Law* (2018), 413.

## Introduction

the criteria as rather “vague”<sup>43</sup>, the Regulation in this respect now should provide more legal certainty for suspects and should help to avoid the impression that the EPPO, operating as a “single office”, may freely choose the Member State and thus the legal framework in which it intends to prosecute the case.

- 16 Nevertheless, the EPPO Regulation, with its intensive reliance on the “applicable national law”, cannot avoid that the rights of suspects and accused persons may differ depending on the Member State in which the EPPO conducts the investigation and prosecution, despite some harmonization efforts (cf. Article 41(2), → Article 41 mn. 24 ff.). Perhaps this – as well as other difficulties arising from the multifaceted legal framework in which the EPPO will need to operate<sup>44</sup> – will at some point give rise to further considerations on providing for a more comprehensive and unified procedural law for the EPPO. While such a development would help to avoid unequal treatment and frictions within the legal framework applicable to investigations/prosecutions by the EPPO, it would inevitably create unequal treatment and frictions within the individual Member States as the applicable procedural law would depend on whether the investigation/prosecution is carried out by an EDP or by a public prosecutor of that Member State. It could lead to new difficulties if the rules applicable to the EPPO investigations in the pre-trial phase are not well attuned to the national criminal law provisions applicable in the trial phase. And any such EPPO-specific code of criminal procedure would not necessarily provide for higher standards in terms of procedural rights of the suspect compared to those applicable in purely national proceedings, and applicable to the EPPO now (cf. Article 41(2) and (3), → Article 41 mn. 31 f., 55 ff.).

---

<sup>43</sup> Cf. Thomas Wahl, ‘The European Public Prosecutor’s Office and the fragmentation of defence rights’ in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 85 (92) with further references.

<sup>44</sup> Such as e.g. the complex rules on cross-border investigations within the EPPO territory set out in Article 31; for a critical view cf. Silvia Allegreza and Anna Mosna, ‘Cross Border Evidence and the Future European Public Prosecutor. One step back in Mutual Recognition?’ in Lorena Bachmaier Winter (ed.), *The European Public Prosecutor’s Office* (2018), 141 (153 ff.).