

**Herrnfeld / Brodowski / Burchard**

# **European Public Prosecutor's Office**

**Article-by-Article Commentary**

**Second Edition**



Herrnfeld / Brodowski / Burchard  
European Public Prosecutor's Office

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Article-by-Article Commentary

edited by

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Second Edition

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## Preface and Acknowledgements – second edition

Work on the first edition of the EPPO Commentary had been completed by August 2020 – shortly before the College of the EPPO commenced its activity in September 2020 and about a year before the EPPO took up its operational work in June 2021. The first edition thus focussed on an analysis of the EPPO Regulation, including the history of individual provisions as well as proposals for their implementation and application by the EPPO. Five years have passed since then. The EPPO College has adopted and further developed the EPPO's internal rules of procedure. It has furthermore enacted numerous other internal procedural rules and guidelines for its operational work as well as for the administration of the EPPO. The second edition of the EPPO Commentary thus now addresses these developments and provides insights into the relevant internal rules that the EPPO observes in the application of the Regulation's provisions. Furthermore, the second edition of the Commentary provides reference and analysis of EPPO-related jurisprudence by the Court of Justice of the European Union. And it builds upon the extensive and expanding literature that has accompanied the establishment of the EPPO as well as its operational practice.

The establishment of the European Public Prosecutor's Office ('the EPPO') is a bold, long-awaited step towards further integration of European criminal justice systems. The competence to investigate and prosecute criminal offences no longer rests only in the hands of national authorities but is also exercised by prosecutors acting on behalf of this new Union body. This underlines that crimes against the financial interests of the European Union affect the European Union as a whole and not only individual Member States, and that such crimes thus warrant a truly European response.

On the basis of a proposal submitted by the European Commission, and after four years of intensive negotiations in the relevant Council bodies, the Council adopted, with the consent of the European Parliament, the landmark Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO Regulation'). When the EPPO began its operational work, 22 Member States took part in this enhanced cooperation. In 2024, two further Member States, Poland and Sweden, joined the group.

This commentary takes a systematic approach to comprehensively describe, analyse and assess the legal basis for the EPPO and its operation: the EPPO Regulation. To shed light on it as a whole, this commentary follows its structure. For each Article, it examines its respective legislative history, analyses the individual elements of each provision and refers to relevant internal procedural rules and guidelines developed by the EPPO as well as relevant jurisprudence concerning the provisions of the Regulation.

The second edition of the Commentary furthermore includes country reports on the implementation of the Regulation and the specific legal context for the EPPO's operational work in each of the 24 participating Member States. The authors of the country reports include European Prosecutors, European Delegated Prosecutors and members of the staff of the EPPO as well as members of the academia and judicial authorities of the Member States and defence lawyers practising in the field. The editors appreciate their willingness to contribute to this Commentary by offering important insights into the legal and practical framework in which the EPPO operates in the Member States.

We are also very grateful for the support we received from our research assistants, especially Levina Bauer, Florentine Dreßler, Philipp Lehnertz, Jan Letulé, Michelle Ob-sieger, Maureen Okoro, Bojan Petković, Julia Leo Reichmann, Anna Seebon, Julia Wolff and Anne Zettelmeier (from the team of Dominik Brodowski) as well as Caroline Plötz and Joachim Dorfner, João Victor Gianecchini, Antonia Jelecevic, Falk Koch, Alexander

## **Preface and Acknowledgements – second edition**

Kouril, Malte Oberbeck, Milan Pausch, Julia Roller, Tobias Samulowitz (from the chair of Christoph Burchard). Moreover, we thank the team of Nomos, in particular Dr. Matthias Knopik, for their steady, substantial support in bringing the work on this commentary to a good end.

We hope that this commentary will continue to guide practitioners – within the EPPO, in the national prosecution services, judges, and lawyers – in the interpretation of the landmark EPPO Regulation. By providing an in-depth analysis of the intricate interplay of the provisions and their constitutional, political, and practical context, we trust that this commentary will also provide a starting point for further research on the EPPO and individual aspects of the EPPO Regulation.

January 2026

*Hans-Holger Herrnfeld  
Dominik Brodowski  
Christoph Burchard*

## Foreword (first edition)

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 Herrnfeld, 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 (first edition)**

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

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## Introduction to the EPPO Regulation

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### A. Establishing the EPPO: Council Regulation (EU) 2017/1939

After four years of intensive negotiations the Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office 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 was to assume its operational work on a date to be determined by a decision of the Commission. In accordance with Art. 20 of the EPPO Regulation the Commission was responsible for the initial administrative operation of the EPPO. Work on the setting up of the EPPO's Central Office commenced in 2018 in consultation with a group of experts composed of representatives of the Member States (Art. 20(4) EPPO Reg.). Following the appointment of *Laura Codruța Kövesi* as the first European Chief Prosecutor in October 2019 as well as the European Prosecutors in July 2020, the EPPO took up its operational work on 1 June 2021.

### B. Legislative history of the EPPO 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

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<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

## Intro

“PIF-Directive”, harmonizing, to some extent, the relevant criminal law provisions on the protection of the Union’s financial interests<sup>7</sup>.

- 3 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 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> and the amendment of the OLAF Regulation was finalized in 2020.<sup>16</sup>
- 4 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

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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.

<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> Regulation (EU) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 881/2013 as regards cooperation with the European Public Prosecutor’s Office and the effectiveness of the European Anti-Fraud Office investigations, OJ 28.12.2020 L 437/49. On OLAF and its legal framework, see → 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 EuCLRev, 123; Marianne L. Wade, ‘A European public prosecutor: potential and pitfalls’ (2013) 59 Crime, Law and Social Change, 439; Valsamis Mitsilegas, ‘European prosecution between cooperation and integration: The European Public Prosecutor’s Office and the rule of law’, (2021) 28, Maastricht Journal of European and Comparative Law, 245 (246 ff.).

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.

Even prior to the presentation of the proposal by the Commission, discussions had started at 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 opinion 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. 9).

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,

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<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.

<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.

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

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

- 8 The **legal basis for the EPPO Regulation**, Article 86 TFEU, had been 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 for Eurojust 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 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(2) 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. 12). 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 regulation(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

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<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 Weyembergh and Chloé Brière, *Towards a European Public Prosecutor’s Office (EPPO). Study for the LIBE Committee* (2016); Anže Erbežnik, EU Criminal Law and the Way Forward in the Case of the Functioning of the EPPO in Zlata Đurđević and Marin Bonačić (eds.), *Integration of the EPPO in the National Criminal Justice Systems: Institutional, Procedural and Cooperative Challenges*, Croatian Annual of Criminal Science and Practice, (2020) Vol. 27, 55 (65 ff.).

<sup>22</sup> This group was subsequently joined by Malta, the Netherlands, Poland and Sweden – cf. *infra* → mn. 10.

<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.

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 a criminal court anyhow.

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 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, but prior to the start of the operational work by the EPPO, the Netherlands and Malta have joined the group (→ Article 120 mn. 12), following the necessary confirmation by the Commission (Article 331 TFEU)<sup>25</sup>. In January 2024, Poland gave a formal notification about its intention to participate in the enhanced cooperation on the establishment of the EPPO, which was confirmed by Commission Decision of 29 February 2024.<sup>26</sup> And on 5 June 2024 also Sweden indicated its intention to become a "participating Member

<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.

<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> Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L, 29.2.2024, 1.

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State”, which was confirmed by the Commission on 16 July 2024.<sup>27</sup> These two Member States thus joined the EPPO after the EPPO had started its operational work in June 2021. This made it necessary to clarify the date on which the EPPO would become operational in these Member States. The Commission Decisions on the participation of Poland and Sweden thus indicate that Article 24 to 27 and 31 EPPO Reg. apply only as from the twentieth day of the appointment of the respective European Prosecutors (→ Article 120 mn. 13 f.). On the other hand, Poland wished for the EPPO to be competent to investigate and prosecute offences committed after 1 June 2021 and thus prior to the entry into force of the Commission Decision on the confirmation of Poland’s participation. This was confirmed by the Commission in Article 2(1) of its Decision.

- 11 Establishing the EPPO by way of enhanced cooperation means that **non-participating Member States** – currently Denmark, Hungary and Ireland – are not bound by the EPPO Regulation (cf. Article 20(4) TEU),<sup>28</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)).

## D. Major elements of the EPPO Regulation

### I. Material competence of the EPPO

- 12 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. 8), determines the EPPO’s “**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 refers primarily to the PIF-Directive<sup>29</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

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<sup>27</sup> Commission Decision (EU) 2024/1952 of 16 July 2024 confirming the participation of Sweden in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L, 18.7.2024, 1.

<sup>28</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.”

<sup>29</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.

criminal activity is to commit PIF offences (→ Article 22 mn. 101 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. 106 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 principle, **shared with national authorities**; different from the Commission proposal<sup>30</sup>, the Regulation does not award the EPPO 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**.

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>31</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. 94). 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>32</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 12 September 2018, the Commission presented a communication<sup>33</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

<sup>30</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>31</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>32</sup> Cf. page 4 of the Commission’s Communication referred to below (n. 31).

<sup>33</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 Juszczyk and Elisa Sason, ‘Fighting Terrorism through the European Public Prosecutor’s Office (EPPO)?’ [2019] *eucri*, 66.

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that this does not prevent it from presenting an initiative.<sup>34</sup> The European Council, however, refrained from taking up this Commission initiative. Apparently, there has been 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.

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

- 14 The Regulation provides the EPPO with a rather complex structure in its Central Office in Luxemburg, consisting, in particular, of the European Chief Prosecutor and two Deputy European Chief Prosecutors (Art. 11 EPPO Reg.), European Prosecutors (one from each Member State, Art. 12 EPPO Reg.), an Administrative Director (Art. 18 EPPO Reg.) and additional support staff (Art. 8(5) EPPO Reg.). The EPPO also has a “decentral level” composed of European Delegated Prosecutors (“EDPs”) in the Member States (cf. Articles 8 to 13)<sup>35</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. 8). While the EPPO is a Union body operating as one single office (cf. Article 8(1)), the EPPO, nevertheless, needs 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>36</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 European Prosecutors (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 has as considerable number of staff members who can, on request in an individual case, support the investigations conducted by the EDPs, the success of the EPPO to a large extent depends on the competent national authorities, their availability, their resources<sup>37</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 required national legislative implementation measures in this respect in particular, where the national prosecution service is not – or not exclusively – responsible for leading criminal investigations, and where that role traditionally is carried out by police or customs authorities or the *juge d’instruction*.<sup>38</sup>

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<sup>34</sup> Cf. page 4 of the Communication (n 31).

<sup>35</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] *eu crim*, 135.

<sup>36</sup> Cf. Article 18(6) of the proposal (COM (2013) 534 final), which gave such a role to the European Chief Prosecutor.

<sup>37</sup> Cf. → Article 91 mn. 6, → Article 96 mn. 18.

<sup>38</sup> Cf., the Country Reports in this book i.a. on Belgium, France, Luxembourg, Slovenia and Spain; cf. also 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 Implementa-

### III. Procedural law framework for the EPPO

Article 86(3) TFEU provides that the regulation establishing the EPPO “shall determine 15 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”. In the past, 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>39</sup>. However, following in this respect the underlying concept of the Commission’s proposal for the EPPO Regulation<sup>40</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 terminating (Articles 34, 35, 36, 39 and 40) investigations, on the prosecution before national courts (Articles 36), 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”.

The extensive references in the EPPO Regulation to the **applicable national law** has 16 been criticized by some as attempts to retain national sovereignty and to ensure conformity of EPPO activities with relevant national law<sup>41</sup>. The fact that, to a large extent, national criminal procedure law is applied by the EPPO in conducting investigations essentially means that the EPPO does not work in a “single legal area” and its “playing field” is not as

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tion 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 *judge 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] eucrim, 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] eucrim, 124.

<sup>39</sup> Available at: <https://orbilu.uni.lu/bitstream/10993/42085/1/Model%20Rules%20and%20explanatory%20notes%20EN.pdf> (15.1.2026).

<sup>40</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).

<sup>41</sup> Cf., e.g., Lothar Kuhl, ‘The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?’ [2017] eucrim, 135.

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“level” as it – perhaps – could and should be<sup>42</sup>. One could argue that it would not have been necessary to include certain 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 the application of national law, 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 thus may help clarifying the extent to which a matter is regulated by the Regulation or 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>43</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 – or Central Office staff working under his/her instruction – conduct investigations. 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. 27).

- 17 The fact that the EPPO does not operate in a “single legal area” and that not only the question of the applicable substantive criminal law depends on the Member State in which the EPPO conducts an investigation and decides to prosecute the case<sup>44</sup>, but also the applicable procedural law 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. 15 ff.). That decision is normally also to 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 the criteria as rather “vague”<sup>45</sup>, the Regulation in this respect provides more legal certainty for suspects as would have been the case on the basis of the original Commission proposal. This should help to avoid the impression that the EPPO, operating as a “single Office” (c.f. Article 8(1), may freely choose the Member State and thus the legal framework in which it intends to prosecute the case.

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<sup>42</sup> Cf. also Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds.), *The European Public Prosecutor’s Office at Launch* (2020), 7.

<sup>43</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>44</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.

<sup>45</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.

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