

The EPPO and International Co-operation— New Kid on the Block

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The European Public Prosecutor’s Office (“EPPO”) is a new European Union body responsible for investigating and prosecuting criminal offences affecting the Union’s financial interests in 22 of its 27 Member States.¹ The EPPO is expected to begin investigations in November 2020.

Fraud against the EU’s financial interests is an international phenomenon: in 2019, the European Anti-Fraud Office (“OLAF”) concluded 181 investigations into the use of EU funds, 29 of which concerned countries outside the EU.² In this part of our series of analyses of the EPPO³ we therefore consider the framework for the EPPO’s future international co-operation. This includes dealings with enforcement authorities in non-participating EU Member States as well as the rest of the world.

Context

EU funds are spent in and by all Member States, including those that are not part of the EPPO, but there are also significant links between EU money and the rest of the world: Third country entities are sometimes entitled to receive EU funds directly as part of EU spending programmes such as Horizon, the EU’s largest research and innovation programme,⁴ and the European Agricultural Guarantee Fund, which, amongst other things, provides funding for the promotion of farm products in third countries. Further, non-EU entities may well be involved in EU-backed infrastructure projects. In addition, OLAF has reported a growing threat of environmental fraud, as increasing amounts of EU funds are being invested in “green” policies and projects, also outside the EU.

¹ See 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](#)”).

² The [OLAF report 2019](#) page 12.

³ See the [Debevoise EPPO practice page](#).

⁴ The European Council’s most recent conclusions concerning the EU’s 2021-2027 budgetary period includes an allocation of some EUR 76 billion for the Horizon Europe programme [<https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>].

Examples of such environmental frauds include biodiesel dumping and trade in endangered species.⁵

It will therefore be key for the EPPO's success that it is able effectively to co-operate internationally. The EPPO Regulation enables the EPPO to enter into working arrangements with authorities outside its territorial field of operations about, in particular, the exchange of strategic information and the secondment of liaison officers. More significantly, however, it also provides frameworks for formal mutual legal assistance ("MLA") with authorities in non-participating Member States, as well as with third countries and international bodies.

Co-operation with Authorities in Non-participating EU Member States

The EPPO was established through the enhanced co-operation mechanism, a procedure enabling a minimum of nine Member States to proceed with advanced integration or co-operation initiatives within and using EU structures but only involving those Member States that opt in. Presently, 22 of the 27 Member States participate in the EPPO, with Denmark, Hungary, Ireland, Poland and Sweden currently outside.

The EPPO Regulation envisages the possibility of a "legal instrument relating to cooperation in criminal matters and surrender" between the EPPO and authorities in non-participating Member States. Until such an instrument has been agreed, the EPPO will be able to make use of the existing EU instruments on co-operation in criminal matters. These include, significantly, the European Investigation Order⁶ and the European Arrest Warrant.⁷ For these purposes, the participating Member States will have to notify the EPPO as a competent authority to issue/apply for orders pursuant to such instruments in respect of cases falling within its competence. In principle, therefore, the EPPO should be in no worse position in relation to authorities in non-participating Member States than its national counterparts.

The EPPO Regulation reminds non-participating Member States of their duty of sincere co-operation, a key constitutional principle of EU law enshrined in the Treaty on the Functioning of the EU. On this basis, non-participating Member States should accept

⁵ The OLAF report 2019, page 25.

⁶ [Directive 2014/41/EU](#) of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁷ [Council Framework Decision 2002/584/JHA](#) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

orders issued by or on the application of the EPPO for the purpose of the EU's ever deepening framework for co-operation in criminal matters.⁸

Co-operation with Authorities in Third Countries and International Bodies

Given the extraterritorial reach of its jurisdiction,⁹ and the involvement of non-EU entities in projects involving EU funds, establishing strong working relationships with authorities in third countries and international bodies (together, "Third Parties") will likely be a priority for the EPPO.

The EPPO Regulation sets out a menu of options for MLA co-operation with Third Parties:

- Pursuant to a MLA agreement concluded by the EU with a third country, covering co-operation between the EPPO and authorities in that third country. Currently no such agreements are in existence.
- In the absence of dedicated MLA agreements covering the EPPO, participating Member States shall seek to make notifications to include the EPPO in the list of authorities able to originate requests under multilateral MLA agreements to which they are parties.¹⁰ If necessary, participating Member States shall seek to amend those agreements to enable the recognition and acceptance of the EPPO for the purposes of those agreements.

In this regard, developments in relation to the one free-standing MLA agreement for criminal matters between the EU and a third country, that with Japan from 2009,¹¹ will likely be illustrative. Member States should in principle seek to include the EPPO in the list of authorities competent to originate requests under this agreement. If this is not accepted by Japan, the EU should normally seek to amend the agreement.

- Participating Member States may make competent authority notifications in relation to other, in particular bilateral, MLA agreements to which they are parties.

⁸ The EPPO will therefore be able to benefit from future initiatives such as the European Production and Preservation Orders for e-evidence, see [Commission Proposal of 17 April 2018](#).

⁹ See [our update on the EPPO's field of operation](#).

¹⁰ Such as the [United Nations \(UN\) Conventions against Corruption](#) (2003), [Transnational Organized Crime](#) (2000) and the [European Convention on Mutual Assistance in Criminal Matters of 1959](#). In February 2020, delegations were already asked to provide comments on the revised text for a draft declaration to [notify the EPPO as competent authority](#) under the European Convention on Mutual Assistance in Criminal Matters.

¹¹ See [Agreement between the European Union and Japan on mutual assistance in criminal matters](#).

- In the absence of any operative MLA agreements, and subject to the informed consent of Third Parties, European Delegated Prosecutors (“EDPs”) may use their powers as national prosecutors in their respective Member States (under applicable international agreements or national law) to make MLA requests.
- Finally, the EPPO may also request MLA from Third Parties independently.

In relation to incoming requests to the EPPO from Third Parties, the relevant EDP will be able to transfer “information or evidence...already in the possession of the EPPO”, subject to authorisation by the relevant Permanent Chamber of European Prosecutors, the law of her/his Member State, and the EPPO Regulation.

For extradition requests, EDPs will request the authorities of their Member States to issue extradition requests in accordance with applicable treaties and/or national law.

Existing EU Organisations

The EPPO Regulation provides that the EPPO shall enter into working arrangements with relevant existing EU bodies, such as Eurojust (the EU’s agency for criminal justice co-operation), OLAF (EU antifraud office), and Europol (EU agency for law enforcement co-operation).

The legal basis for the creation of the EPPO, Article 86 TFEU, states that it “*should be established from Eurojust*”. Reflecting this original link, Eurojust will actively co-operate with the EPPO and support its investigations and prosecutions. This co-operation is to be realised through organisational, administrative and management links, as well as information sharing, including through mutual access to their respective case management systems.

OLAF and Europol will both be linked to the EPPO through formal co-operation arrangements to assist the EPPO’s investigations and prosecutions. The amended EU Regulation concerning OLAF investigations currently under discussion¹² is also expected to provide co-operation mechanisms between OLAF and the EPPO.¹³

¹² About [amendments to Regulation No 883/2013](#).

¹³ According to the OLAF report 2019, p 44, negotiations on revisions to the regulation are still ongoing with a view to be completed by the end of the year to ensure effective cooperation with the EPPO once it becomes operational.

Brexit

Following its exit from the EU, the UK is treated as a non-participating Member State until the expiration of the transition period in December 2020.¹⁴ What the UK's status in relation to the EPPO will be after that is in theory within scope of the negotiations on a future EU-UK agreement. Neither the UK government report on the UK's criminal justice system post-Brexit nor that of the House of Lords' EU Committee¹⁵ considered the EPPO, although they both deemed Europol and Eurojust to have important roles in preventing crime in the UK. The conclusion in both these reports is that an ordinary third country relationship with the EU's criminal justice framework would not meet the UK's needs and that a bespoke relationship should be pursued. Analogous considerations may well apply to the EPPO, particularly in light of concerns expressed by the House of Lords' EU Committee in 2014 when considering the proposal for the EPPO that ineffective co-operation with the EPPO risked the UK becoming a "*safe haven for illegally obtained EU funds*".¹⁶

However, in light of the current status of EU-UK talks on a long-term arrangement, it is unlikely that special provision will be made for the UK's relationship with the EPPO in the short term which would mean that the UK will become a third country from 2021.

Conclusion

In relation to non-participating Member States, the EPPO's starting position will formally be equivalent to that of national enforcement authorities in the EU. Whether non-participating Member States will subsequently agree to any instrument seeking to privilege co-operation with the EPPO is unknown, especially given the anti-EU rhetoric coming from, in particular, the Hungarian and Polish governments.

In relation to third countries and international organisations, the quality of the EPPO's co-operation will depend both on the effectiveness of the European Commission's advocacy in international negotiations, and whether Member States will put diplomatic effort into including the EPPO in their bilateral MLA agreements. However, the most important factor will in all likelihood be its overall success; a supranational prosecutor's

¹⁴ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the "[Withdrawal Agreement](#)"), article 127.

¹⁵ The European Union Committee of the House of Lords, "[Brexit: future UK-EU security and police co-operation](#)" (2016) HM Government, "[Security, law enforcement and criminal justice](#). A future partnership paper" (2017).

¹⁶ The European Union Committee of the House of Lords, "[The impact of the European Public Prosecutor's Office on the United Kingdom](#)" (2014), at page 21.

office for white collar offences is a novelty in international co-operation in criminal matters and the EPPO will need to earn the respect of its international counterparts.

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