



## Countering Fraud to the Financial Interests of the European Union through Enhanced Cooperation

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**Abstract:** This paper targets to address key issues related to the cooperation between the bodies of the European Union to counter the challenges associated with the financial interests of the Union, as well as the interaction of the Union through its bodies to achieve the goals that were set up through enhanced cooperation on one hand, and on the other hand, the relationship of the Union through its investigative bodies with third countries. The paper can be perceived as a continuation of the previous and ongoing research dedicated to the subject of the emergence of transnational justice to counter fraud and corruption. The paper aims to foresee and essentially clarify issues pertinent to such kind of challenges, as well as to contribute to the achievement of the practical goals that are followed with the setting of the enhanced cooperation initiatives.

**Keywords:** Justice; criminal proceedings; prosecution; European Public Prosecutor's Office; Europol; Eurojust, OLAF

### 1. Introduction

On 28<sup>th</sup> September 2020, a number of 22 European prosecutors that sit in the College of the European Public Prosecutor's Office and the European Chief Prosecutor, brought the solemn oath, and had a formal sitting before the Court of Justice of the European Union.

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Later, the same year, the College appointed two deputies that will be assisting the European Chief Prosecutor and that should perform assigned or delegated tasks and responsibilities. The first Romanian – Italian – German leading panel in a partnership with other 22 fellow colleagues in the College, will have to perform an important mission, especially considering that up to now the EPPO announced an estimative number of three thousand potential cases falling under the competence of the European Public Prosecutor's Office (hereinafter EPPO or Prosecutor's Office) and amounting in a € 60bn VAT alone.

It is clear that the use of estimative categories in public discourse is a matter of public relations rather than an investigative approach, but that should not prejudice the importance of the topic at issue, as we have seen from official reports, including those elaborated by the European Court of Auditors, that fraud to the Union is a matter of concern that must be addressed. Despite that, there are no clues that all the pertinent conditions have been met so far, and that relevant preparations have been done to proceed.

Further, should be noted that on March 17, 2021, the European Public Prosecutor's Office has announced that the College appointed one European Delegated Prosecutor from Belgium, that brought the total appointed number of EDP's to 33, with two more from Czech Republic, two from Croatia, and five from France later on March 26. These made an overall increase of the number of countries that delegated prosecutors to 12, out of 22 participating European Union member states.

In addition, considering that the EPPO structure involves certain key subjects, even though not all of them are strictly procedural in the pure meaning, nevertheless a considerable part of the issues has to be covered, for instance with regards to the permanent chambers, that perform a conclusive role in procedural architecture.

Subsequently, in March 2021, both the European Union Agency for Law Enforcement (hereinafter Europol) and European Union Agency for Criminal Justice Cooperation (hereinafter Eurojust) have signed working arrangements with the EPPO, and that is an important step towards the achievement of the immediate goal of the established enhanced cooperation, which is having the body ready to proceed. Although, probably the most important questions still pending and that have to be addressed are the relationship of the Prosecutor's Office with OLAF (Pântea & Pântea, 2019, p. 113) which, according to Juszcak and Sason may lead to legislative changes (Juszcak & Sason, 2017, p. 86), second, the vision design when it comes to cooperation with third countries and third, questions outlining the working processes.

In this paper we aim to address key issues related to the cooperation between the bodies of the Union, as well as the interaction of the Union through its bodies to

achieve the goals that were set up through the enhanced cooperation on one hand, and on the other hand, the relationship of the Union through its investigative bodies with third countries. It should be noted firstly that, third countries are not homogeneous in terms of interaction with the Union, at least because of the existence or non-existence of any prior or ongoing special relationship, such as the association agreements, missions and support, or even the territorial proximity.

In the same line, a particular interest of the Union should focus on the management of funds in the cooperating third countries, and that should be a priority, because funding and financial support is one of the most eloquent instruments of supporting the democracies and economies, including in the EU partnerships.

The paper analysed the normative framework, the available relevant literature and interviews with emphasis on actual or prospective enhanced cooperation, highlighting the contribution of authors such as *Spiezia, F., Csonka, P., Juszcak, A., Sason, E., Hogler, M., Hodges, L., Asselineau, V., Sarlet, M., Marin, A. P.*

## **2. Projecting the Vision to Combat Fraud**

The society expects that where the financial interests of the Union and the public property of the states inextricably linked to external financial flows are concerned, whether it is a member of the Union or a third state, such cases to be addressed and appropriately managed.

That is why, the subject of the Prosecutor's Office is closely followed, and a major shift of paradigm is expected not only by the advocates and the member states of the initiative, but also by the member states of the Union that do not take direct part in the mechanism, as well as the third countries.

As the author Ang. Perez Marin points out, it is certain that the true value of the EPPO cannot be proven through theoretical analysis and studies (Perez, 2020, p. 40) only, and it is necessary to wait for its operational activity, though should we add that some extrapolations can be made, based on experience and analysis. A scientific contribution can foresee and essentially clarify issues, as well as to contribute to the achievement of the goals and scope.

It is necessary to point out also that, although we anticipated that the former potential forecast for *operationalization* of the EPPO in November 2020 did not necessarily and adequately reflect the authentic meaning of these processes (Pântea and Pântea, 2019, p. 107), we also argue that for such particular cases, any rush is not justified, but on the contrary, is prejudicial.

Considering the amount and complexity of the issues discussed, the question further to be answered is whether the cooperation of EPPO would be possible with third countries, considering that according to the studies, an important part of the frauds involves *offshore* jurisdictions. Secondly, it should be noted that, the matter of cooperation in such cases, where at least a third country is affected, will require strong commitment, implication and a concentrated response from European Union bodies, such as OLAF, Europol and Eurojust.

To this point, we must be pragmatic in accepting that the investigations that are going to be initiated and/or conducted by EPPO, will not always deliver and be perceived adequately by the entire society. This is mainly due to the fact that the capacities of the respective bodies are not fully inferred, the architecture and legal framework of the investigations and proceedings are not completely understood, and lastly, when issues related to funds are analyzed, an extremely important aspect refers to the separation of external and internal funds that are the subject of *fraudulent management* or misappropriation, and the legal consequences of such illegal acts. The EPPO shall not be competent for criminal offenses in respect of *national direct taxes* including offenses inextricably linked thereto.

Even if, it is expected that the EPPO will try to deliver immediate results from ongoing investigations, and address sounding proceedings from the beginning, that could take time, considering the scope of criminal proceedings. Also, we suppose that for obvious reasons, pressure will stand on the EDPs when dealing with particular cases, and it will be necessary to exclude possible attempts to turn those EDPs in advocates of the delegating countries. That is also applicable to the EP and the permanent chambers. For these reasons, we will also direct efforts in determining and explaining the current picture.

### **3. EPPO and Eurojust Cooperation**

As it was said previously, it always happens when a new body is created, regardless of whatever it is a national or international, that all the efforts are disposed to strengthen that particular entity, including setting a general obligation to cooperate. That is also the case of the EPPO, being regulated that in operational matters, it shall associate Eurojust with its activities concerning cross-border cases, including information sharing on its own investigations; also inviting Eurojust or its competent national members to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, member states of the Union that are members of Eurojust but do not take part in the establishment of the EPPO, as well as third countries.

Though a competition between the two bodies is expected, a sincere cooperation is desirable. It should be noted that the EPPO and Eurojust have established a working agreement, and that those bodies and their interaction might be a strong basis for a future and potential fusion. That comes not only from arguments of procedural economy, logical and legal reasoning, but also from the spirit of the article 86 of the TFEU, stating in the first paragraph that a possible European Public Prosecutor's Office may be established from Eurojust.

Also, it should be stressed out that, the cornerstone provision standing at the background of the interaction between the agencies are the articles 85 and 325 of the TFEU, the same points being explicitly reflected in the preamble of the above-mentioned arrangement.

Though, it should be recalled that, unlike the case of Eurojust cooperation, where the national authorities and the states are the initial beneficiaries of the interaction, in the EPPO case, the protected subject is the Union as a whole, a universality of interests that embodies the Union, its citizens, its bodies, its budget, its territory and its values.

So, as we previously mentioned, the EPPO and Eurojust signed a working arrangement. Article 3 of that document provides the areas of crime where the agencies cooperate, including specifically criminal offences affecting the financial interests of the European Union that are provided for in the PIF Directive as implemented by national law, but without limiting the scope of cooperation, stating that the cooperation shall relate to the relevant areas of crime within the mandate of both agencies.

Important to mention is that the PFI Directive replaces the previous Convention *on the protection of the ECs' financial interests*, member states should have adopted and published laws, regulations and administrative provisions necessary to comply, and that the normative framework already established or in course of implementation are going to be the pillars for further investigations (Pântea and Pântea, 2019, p.112). When it comes to other partner third countries, we believe that it is necessary to establish by the means of both comprehensive screening and voluntary questioning if and how such conduct is or is not protected by the relevant national legal framework.

The agreement provides for an obligation at article 4 paragraph 2 that Eurojust inform the EPPO of any criminal conduct in respect of which it could exercise its competence, by using an agreed template. This means that the notification of allegedly committed crime is going to embrace a certain form, which is a procedural obligation of the parties.

Accordingly, the arrangement establishes a corresponding obligation of the receiver, mostly EPPO, to inform Eurojust about the exercise of competence to initiate or not an investigation, or to pass the case to national authorities.

Further, each time EPPO is not able to exercise functions, it may request legal assistance in criminal matters from authorities of third countries in a certain case and within proper limits of material competence.

Notably, article 8 and 9 establishes that the EPPO may request Eurojust in such cases, and also make use of the involvement of Eurojust when investigation concerns members state of the Union that are not part of the enhanced cooperation. Should be the case, EPPO invites the Eurojust's national member concerned, if such exists, to provide support in judicial cooperation matters.

In cases of international agreements with one or more third countries concluded by the Union or to which the Union has acceded in areas that fall under the competence of the Prosecutor's Office, those shall be binding on it. In other cases, the member states shall, if that be the case, recognize and, where applicable, notify the Prosecutor's Office for the purpose of the implementation of multilateral international agreements on legal assistance concluded by them.

Where it is necessary to request the extradition of a person, the handling EDP may request the competent authority of his/her member state to issue an extradition request in accordance with applicable treaties and/or national law.

EPPO might want to make use of tools concluded by Eurojust with third countries, such as cooperation agreements, including through liaison magistrates. For example, the Republic of Moldova signed a cooperation agreement with Eurojust since 2014.

There are also other 11 third countries cooperating with Eurojust namely Albania, Montenegro, North Macedonia, Serbia, Georgia, Island, Liechtenstein, Norway, Switzerland, Ukraine and United States of America.

Besides the mutual support on operational matters when cases involve member states that are not part of the enhanced cooperation or involving third countries, Eurojust provides support to EPPO in four situations: •organize coordination meetings; •coordinate simultaneous investigations; •set out JITs and their operations; •prevent and solve conflicts of jurisdiction.

When it comes to contact point setting, article 13 of the working agreement sets that parties should establish a liaison team and a designation of entry point for contacts at working level.

The last point to be discussed refers to data transfer. As, the EPPO may transfer operational personal data to a *third country* (onward transfer), subject to compliance with the other provisions of the EPPO regulation (Pântea and Pântea, 2019, p.115), and where the conditions are met, the accomplished working arrangement further explains that it should obtain prior authorization that may be given when allowed under the applicable legal framework, including the case of data forward to other union bodies and agencies, members states or third countries.

Regarding the exchange and protection of classified information, article 24 accordingly affirms that the parties shall agree a separate instrument, that is conditional, but without prejudice to exceptional transfers. The technical and practical implementation of the working arrangement, as stated in the article 25, may take the form of a separate instrument.

#### **4. EPPO and Europol**

As the preamble of the agreement between the EPPO and Europol states, the cooperation between the two entities is mostly built on the Title V of the Treaty on the Functioning of the European Union, and on the fact that the Union has set itself the objective to establish an area of freedom, security and justice

Provisions of article 2 and 3 conclude that main purpose of the arrangement is the exchange of information regarding criminal offences against the financial interest of the Union as implemented by the states and the EPPO. We expect a more one direction information flow generated by the Europol for the EPPO, which is quite normal considering the mandate of the agencies.

Further, as the provisions of the EPPO regulation include provisions related to the transfer of operational data between member states and/or third countries, as well as the protection of such data, as it was expected, the bulk of the working arrangement is dedicated to information exchange, for instance chapter III, that reach priorities related to the protection of private interests, information exchange feedback and oversight of the information life cycle, retention of information and time limit, the verification of the information, the assessment of information, the protection of information, prior and explicit authorization and consent, and so on.

From our point of view, the core contribution of Europol resides in its operational capacity to conduct criminal analysis for the Prosecutor's Office in individual investigations. For those who are acquainted to criminal proceedings, this is probably the most important support when it comes to the projection of complex investigative analysis tasks, especially tracing connections.

Further, we observe that the parties agreed to establish a single contact point,

which means that at some point the head of the EPPO would have to delegate competences to one of the deputies, and that deputy, for obvious reasons will have to establish a team to manage the information flows, and agree on the procedures. The EPPO and Europol agreed that if no procedures are established, limited or no cooperation can be performed.

Either way, article 12 paragraph 5, article 15, article 18 of the working arrangement provides for a need of additional memorandums and procedures, which is quite clear from two opposite hypothesis: (1) the agreement was done through consensus to establish at least the main features of a future cooperation (that can be deducted also from provisions of article 20 paragraph 2) and there is need for additional, long-lasting, detailed and comprehensive specification; (2) the procedures and memorandums are already concluded, but classified and there is no public available access to them, that is quite unlikely to happen that easy.

## 5. Conclusion

To conclude, we assume that we have pointed out that cooperation between the Prosecutor's Office on one hand, and the Eurojust and Europol on the other hand is a strong necessity, and some steps were done towards accomplishment of such needs. Also, we believe that we have answered affirmative the question if and how the cooperation with authorities in third countries will take place, though not without struggle.

We observed that there are still issues to be resolved besides filling the staff and delegating the EDPs, and that is to clarify the territorial and functional competence of EDPs and of the permanent chambers, to clarify the relationship of the Prosecutor's Office with OLAF, to design a vision design when it comes to cooperation with third countries and to outline the working processes, namely in concrete cases (models), securing probable course of actions.

We conclude that in order to achieve the objective to set an area of freedom, security and justice, the countries, including the participating member states to the initiative of enhanced cooperation, should avoid trying to turn the international bodies, such as the European Prosecutors Office, and its delegated staff, into representatives of their own international departments.

As the EPPO has been established, it is still necessary to initiate and continue to prepare, negotiate and approve rules and procedures, cooperation agreements and working arrangements and other documents, including with third countries and international organizations, such as Interpol.

The most important take-away is not what the working arrangements say, but what they imply, and what the parties to the arrangements can do *motu proprio* to



achieve an area of freedom, security and justice.

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