



Ministry of Justice and Security

The EPPO, NPMS, third countries and OLAF

A short introduction

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The EPPO and NPMS



2013 Commission proposal for the EPPO

- 17 July 2013: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office: COM(2013) 534 final
- Chapter VIII, Section 2, Articles 57 *et seq* (relations with partners): mentions Eurojust, Europol and **third countries** only
- Preamble # 47: refers to Protocol 21 on the position of the UK and Ireland
- Preamble # 48: refers to Protocol 22 on the position of Denmark



Enhanced cooperation in Regulation 2017/1939

- 20 MS on board on 12 October 2017
- The Netherlands: since 22 August 2018
- Malta: since 28 August 2018
- 5 Member States do not take part: Denmark, Hungary, Ireland, Poland, Sweden
- Sweden: intention to join expressed 3 April 2019



Regulation 2017/1939 and NPMS - 1

- > - Article 99(1): EPPO may establish and maintain **cooperative relations**
- > - Article 99(2): EPPO may **directly exchange all information**, with the entities referred to in para 1
- > - Article 99(3): EPPO may **conclude working arrangements** of a technical and/or operational nature. Note: no basis for the exchange of personal data nor legally binding effect



Regulation 2017/1939 and NPMS - 2

- > *Article 105:*
- > “1. The working arrangements referred to in Article 99(3) (...) concern the **exchange of strategic information and the secondment of liaison officers** to the EPPO.
- > 2. The EPPO may **designate**, in agreement with the competent authorities concerned, **contact points** (...) in order to facilitate cooperation in line with the EPPO’s needs.”



Regulation 2017/1939 and NPMS - 3

- > *Article 105 (ctd.):*
- > **“3. In the absence of a legal instrument relating to cooperation in criminal matters and surrender** between the EPPO and the competent authorities of [NPMS], **the MS shall notify the EPPO as a competent authority** for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with [NPMS].”



Regulation 2017/1939 and NPMS - 4

- > Preamble # 110:
- > “[NPMS] **are not bound by this Regulation. The Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters** between the EPPO and [NPMS]. This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, **fully respecting the Union *acquis* in this field as well as the duty of sincere cooperation in accordance with Article 4(3), TEU.**”



Article 4(3), TEU

- > “3. Pursuant to the **principle of sincere cooperation**, the Union and the MS shall, in full mutual respect, **assist** each other in carrying out tasks which flow from the Treaties.
- > The **MS shall take any appropriate measure**, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
- > **The MS shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise** the attainment of the Union's objectives.”



Article 20(4), TEU and Article 327, TFEU

- > *20(4), TEU:*
- > **“Acts adopted in the framework of enhanced cooperation shall bind only participating MS.** They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.”
- > *327, TFEU:*
- > **“Any enhanced cooperation shall respect the competences, rights and obligations of [NPMS]. [NPMS] shall not impede its implementation by the participating MS.”**



Statement JHA Council, 8 June 2017

- > “[The Council] **invites the Commission to reflect on submitting appropriate proposals in order to ensure effective judicial cooperation in criminal matters** between the EPPO and all [NPMS].”



Issues related to the interim solution of 105(3)

- Extent of the obligation under Article 4(3), TFEU?
- What does concept of EPPO as “legal successor” entail, EPPO not having exclusive competence for PIF crimes?
- Legal effect of unilateral notification ex Article 105(3) on NPMS?
- Mutual recognition: EPPO is not a “MS authority competent by virtue of domestic law”. Is it an “issuing / executing *State*”?
- Which legal basis for future judicial cooperation between EPPO and NPMS?
- Is EPPO one-stop shop for a NPMS seeking evidence? Any kind of evidence?
- Solution for “conflicts of jurisdiction”, parallel proceedings?
- Need for additional legal instrument(s) for judicial cooperation with NPMS?



Issues in relation to additional legal instrument

- Legal basis: Article 82(1), TFEU, 86(3), TFEU or 325(4), TFEU?
- Commission proposal or MS initiative?
- Legal form: binding instrument required (Directive or Regulation)?
- *Note: working arrangements ex Article 99(3) cannot contain provisions on MLA and extradition*
- Special position Denmark implies Agreement EU-Denmark
- Scope?
- Timing?



Conclusion

- Legal issues identified point to need of an additional legal instrument even if number of NPMS is low and may further diminish
- Commission to reflect on appropriate proposal to cover legal loopholes (or else at least 7 MS)
- [See article in **New Journal of European Criminal Law**, October 2018, Vol. 9(3), 291–299.]



The EPPO and third countries



Is there a problem, anyway?

- > 17 EU spending programmes under (in)direct management open to third countries
- > OLAF activity report 2018 contains many examples of forms of fraud involving third countries
- > 37 out of 84 investigations concluded in 2018 concerned country outside the EU
- > And 87 out of 414 ongoing investigations in 2018
- > Big VAT fraud cases dealt with by Eurojust (e.g. operation Vertigo)



2013 Commission proposal for the EPPO

- > *Article 59 - Relations with third countries and international organisations*
- > “3. In accordance with Article 218, TFEU, the European Commission may submit to the Council **proposals for the negotiation of agreements** with one or more third countries regarding the cooperation between the EPPO and the competent authorities of these third countries **with regard to [MLA/extradition]** in cases falling under the competence of the EPPO.
- > 4. Concerning the criminal offences within its material competence, the MS **shall either recognise the EPPO as a competent authority for the purpose of the implementation of their international agreements** on MLA/extradition, **or, where necessary, alter those international agreements** to ensure that the EPPO can exercise its functions on the basis of such agreements when it assumes its tasks in accordance with Article 75(2).”



Regulation 2017/1939 and third countries - 1

- › *Article 23 – Extraterritorial competence of the EPPO*
- › Applies when PIF-offences were committed:
- › (a) (...)
- › (b) **by a national of a MS**, provided that a **MS has jurisdiction for such offences** when committed outside its territory, or
- › (c) outside the territories of EU MS **by a person who was subject to the Staff Regulations or to the Conditions of Employment** (provided that a MS has jurisdiction for such offences).



Regulation 2017/1939 and third countries – 2

- > » Common provisions applicable (Article 99, EPPO)
- > *Cooperation with third countries under Article 104:*
 - > - EPPO may conclude **working arrangements for** the exchange of strategic information and the secondment of liaison officers to the EPPO (para 1): no basis for exchange personal data or MLA!
 - EPPO may designate **contact points** (para 2)



Regulation 2017/1939 and third countries - 3

- > *Conclusion of or accession to an international agreement principle in Article 104(3)*
- > **“International agreements with one or more third countries concluded by the Union or to which the Union has acceded** in accordance with Article 218 TFEU in areas that fall under the competence of the EPPO, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, **shall be binding on the EPPO.**”



Regulation 2017/1939 and third countries – 4

- > *Succession principle in Article 104(4):*
- > **“In the absence of an agreement** pursuant to para 3, the MS shall, **if permitted under the relevant multilateral international agreement and subject to the third country’s acceptance, recognise and, where applicable, notify the EPPO as a competent authority** for the purpose of the implementation of multilateral international agreements on [MLA] concluded by them, including, where necessary and possible, by way of an **amendment** to those agreements.
- > **The MS may also notify the EPPO as a competent authority** for the purpose of the implementation of other international agreements on [MLA] concluded by them, including, by way of an **amendment** to those agreements.”



Regulation 2017/1939 and third countries - 5

- › *Double hat principle under Article 104(5):*
- › “In the absence of an agreement pursuant to para 3 or a recognition pursuant to para 4 of this Article, the handling EDP, in accordance with Article 13(1), may have **recourse to the powers of a national prosecutor of his/her MS** to request [MLA] from authorities of third countries, **on the basis of international agreements concluded by that MS or applicable national law** and, where required, through the competent national authorities. In that case, the EDP **shall inform and where appropriate shall endeavour to obtain consent from the authorities of third countries** that the **evidence collected on that basis will be used by the EPPO** for the purposes of this Regulation. In any case, the third country shall be duly informed that the final recipient of the reply to the request is the EPPO.”



Regulation 2017/1939 and third countries - 6

- › *International comity (= courtesy, mutual recognition) as safety net in Article 104(5):*
- › “Where the EPPO cannot exercise its functions on the basis of a relevant international agreement as referred to in para 3 or 4, the EPPO may also request [MLA] from authorities of third countries **in a particular case and within the limits of its material competence**. The EPPO shall comply with the conditions which may be set by those authorities concerning the use of the information that they provided on that basis.”



Regulation 2017/1939 and third countries – 7

- EPPO may provide information or evidence to third countries, but only **information or evidence in its possession** = limitation on incoming mutual legal assistance requests
- EPPO extradition requests are done **through competent authorities of MS** and in **accordance with applicable treaties and/or national law**



Issues related to Article 104 - 1

- Bottom line: it takes two to tango! Reaction third countries uncertain.
- **Accession/conclusion:** what is the legal basis? Scope of treaty vs. mandate EPPO? Which exact role for EPPO: judicial authority or Central Authority? Only 22 MS taking part has effect on approval mechanism
- **Succession:** is it possible under international agreement to recognise EPPO as a non-state actor? If recognised as competent authority: for what, who and where? Risk of *géométrie variable* in relation to notifications to third countries without coordination among MS. En bloc?
- **Double hat:** which rules and conditions apply? Will using double hat principle for evidence gathering stand up in national court?



Issues related to Article 104 - 2

- **MLA:** will role CA affect EPPO? Will EPPO be allowed direct transmission? Speciality principle: use within the whole of the EPPO? Impact of Court of Justice decision in EAW cases on 27 May 2019 (C-508/18 *OG* and C-82/19 *PPU PI* and C-509/18 *PF*)?
- **National law and EPPO rules on data protection** (Ch. VIII): remain fully applicable
- **Reciprocity:** does EPPO have competence and has it exercised it, does EPPO have information or evidence *in its possession*? What about taking urgent measures? What's in it for the third country involved (*do ut des* principle)?



Conclusion

- Cooperation with third countries looks good on paper but will be very challenging
- Imminent EPPO priorities: select EPs and set up College, build up organisation at central level, develop CMS, prepare internal rules
- In longer term: need to devise external strategy, identify most relevant third countries and assess legal possibilities for cooperation, find solutions for any voids
- Most viable options for judicial cooperation would seem comity or “double hat”, but patchwork of arrangements likely, *ad hoc* cooperation. Fate of unilateral declarations is unclear.



Conclusion 2

- [See article in **New Journal of European Criminal Law**, June 2019, Vol. 10(2), 168-185.]



The EPPO and OLAF



Introduction to OLAF

- OLAF = *Office (européen) de la lutte anti-fraude*
- Set up in 1999 to replace UCLAF after Santer c.s. stepped down
- Hybrid body: independent of the European Commission, but has administrative links to it
- Commissioner accountable to EP for OLAF's functioning and its relation to Supervisory Committee
- Dependent on others for ultimate reaction to irregularities and fraud: DGs in Commission, other EU institutions, bodies and agencies, national authorities
- Original legal base: Regulation 1073/1999 (+ 2185/96 & 2988/95)
- Now: Regulation 883/2013 (after almost 10 years of negotiations!)
- Evaluation 2 October 2017, followed by proposal to amend the Regulation, 23 May 2018



OLAF's mission

- > “Detect, investigate and work towards stopping fraud involving European Union funds.”

- > *(Source: the OLAF Activity Report 2018)*



OLAF's mandate

- > OLAF's mandate is:
- > “to conduct **independent administrative investigations into fraud and corruption** involving EU funds so as to protect EU taxpayers' money;
- > to investigate **serious misconduct by EU staff and members of the EU institutions**, thus contributing to strengthening citizens' trust in the EU institutions;
- > to **develop EU policies** to counter fraud.”

> *(Source: the OLAF Activity Report 2018)*



OLAF's results in 2018

Figure 3: OLAF's investigative activity in 2018





Is there life for OLAF after the EPPO?

- Yes, most definitely!
- Legal and practical limits inherent to EPPO's functioning
- Only 22 Member States will take part in the EPPO, so OLAF maintains its current role for the other 5 and in mixed cases
- OLAF keeps a self-standing role: a purely criminal justice response to EU fraud is not a panacea to this phenomenon (*ultima ratio* notion)
- Fraud proof legislation, prevention, administrative measures and effective response all equally important
- OLAF and the EPPO have different, complementary roles
- Note: OLAF can carry out investigations within EPPO (article 110, EPPO)



Differences between EPPO's and OLAF's roles

- > OLAF can:
 - Carry out - internal and external - administrative enquiries only
 - **Not** exercise criminal investigation powers, only carry out **interviews, inspections and on the spot checks**, usually with the assistance of national authorities, forensic operations and missions in third countries
 - **Not** fulfil a prosecutorial role
 - Issue **recommendations**: financial, disciplinary, administrative or judicial
 - Not guarantee follow-up of judicial recommendations in Member States (prosecution rate = 36%?)



OLAF vs EPPO

<i>Table, ULB, 2017 ©</i>	OLAF	EPPO
Different contexts and instruments of different generations	Created as a Community body under the First pillar of the TEU with a long history (UCLAF)	Created as a Union body in the field of EU criminal law after communitarisation by Lisbon Treaty
Different natures	Belongs to the administrative track	Part of the criminal justice track
Material competences	Irregularities affecting the EU financial interests (Regulation No 2988/95) + sectoral instruments (CAP, EU funds...)	PIF offences as approximated by PIF Directive + possibility to extend its scope of competence (Art. 86 (4) TFEU)
Types of tasks	In charge of carrying out administrative investigations	In charge of carrying out judicial investigations, prosecuting and bringing to judgment
	Investigative measures defined in Regulation 883/2013 (including on the spot checks and inspections and interviews), read together with other instruments	Investigative measures as defined by draft EPPO Regulation with major references to national law (Art. 31 and 32, EPPO)



Relation between EPPO and OLAF 1

- › *Article 101, EPPO - Relations with OLAF*

- › 1. The EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange. The relationship shall aim in particular to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO.
- › 2. Without prejudice to the actions set out in paragraph 3, where the EPPO conducts a criminal investigation in accordance with this Regulation, OLAF shall not open any parallel administrative investigation into the same facts.
- › 3. In the course of an investigation by the EPPO, the EPPO may request OLAF, in accordance with OLAF's mandate, to support or complement the EPPO's activity in particular by:
 - › (a) providing information, analyses (including forensic analyses), expertise and operational support;
 - › (b) facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
 - › (c) conducting administrative investigations.
- › 4. The EPPO may, with a view to enabling OLAF to consider appropriate administrative action in accordance with its mandate, provide relevant information to OLAF on cases where the EPPO has decided not to conduct an investigation or has dismissed a case.
- › 5. The EPPO shall have indirect access to information in OLAF's case management system on the basis of a "hit/no hit system". Whenever a match is found between data entered into the case management system by the EPPO and data held by OLAF, the fact that there is a match shall be communicated to both OLAF and the EPPO. The EPPO shall take appropriate measures to enable OLAF to have access to information in its case management system on the basis of a hit/no-hit system.



Relation between EPPO and OLAF 2 - key words

1. Relation based on **complementarity** and **non-duplication**
2. OLAF may **support and complement** EPPO's activities
3. EPPO may **provide relevant info** to OLAF
4. EPPO has **indirect access to information** in OLAF's case management system (hit/no hit)
5. A **close relationship** with OLAF based on mutual cooperation within their respective mandates and on information exchange



Relation between OLAF and EPPO 1

- › COM(2018) 338 final of 23 May 2018 – Press Release
- › “Today's proposal to amend Regulation 883/2013 aims to ensure that OLAF becomes a **close and reliable partner** of the EPPO, and that it continues to **conduct administrative investigations to complement** the EPPO's work. OLAF will thus continue playing an essential role in the protection of the Union's financial interests. The EPPO and OLAF will work in close partnership to ensure – through their distinct but **complementary mandates** - that all available means are used to counter fraud and to protect taxpayers' money.”



Relation between OLAF and EPPO 2

- > “In the MS participating in the EPPO, OLAF's investigations will **focus on facilitating administrative recovery and preventing further harm** to the EU finances **through administrative measures**. This will **supplement the EPPO's criminal law approach**, where appropriate in close consultation with EPPO. When OLAF uncovers possible criminal offences, it will report them without delay to the EPPO, and support the EPPO's investigations on its request.”



Relation between OLAF and EPPO 3

- › “OLAF will also continue to **investigate non-fraudulent irregularities** (for which the EPPO will not be competent) in all MS. In 2016, these represented 93% of all reported irregularities, with a financial impact of approximately € 2.58 billion. Moreover, OLAF will continue its **investigations into fraud and corruption in the MS not participating** in the EPPO.”



Relation between OLAF and EPPO 4

- > in Article 1, the following paragraph 4a is inserted:
- > "[OLAF] shall establish and maintain **a close relationship** with [the EPPO] established in enhanced cooperation by Council Regulation (EU) 2017/1939. This relationship shall be based on **mutual cooperation and on information exchange**. It shall aim in particular to ensure that all available means are used to protect the Union's financial interests through the **complementarity** of their respective mandates and the support provided by the Office to the EPPO.
- > Cooperation between the Office and the EPPO shall be governed by Articles 12c to 12f".



Relation between OLAF and EPPO 5

- > Article 1(4) and 12g: **general principles** for OLAF-EPPO cooperation
- > Article 12c: **duty** for OLAF **to report** to the EPPO (*cf.* article 24, EPPO)
- > Article 12d: **non-duplication of investigations**, support to the EPPO and **complementary** investigations
- > Article 12e: procedural rules applicable to **requests from the EPPO** to OLAF, including for complementary investigation
- > Article 12f: in duly justified cases OLAF can open or continue an **administrative investigation** in close consultation with EPPO



Relation between OLAF and EPPO 6 - summary

- > There will be a self-standing, complementary role for OLAF, both in relation to MS taking part in the EPPO and other MS
- > The exact details of the relation between EPPO and OLAF will only become clear at the end of the negotiations on Commission proposal (2018) 338 or Council vs EP, round x ...
- > Ironically, OLAF may well end up having a wider task, in a more complex environment and a bigger workload than before!



Challenges of co-existence EPPO and OLAF

- Avoid overlap and parallel proceedings (*ne bis in idem*, optimal use of scarce resources)
- Enable reciprocal flow of information (mutual access to CMSs)
- Address being privileged partners at a geographical distance (BXL vs LUX)
- Limit operational risks to OLAF resulting from transfer of 45 fte to EPPO (loss of expertise, reduction of investigative staff)
- Ensure proper balance between EPPO and OLAF (no hierarchical relation, OLAF is not EPPO's investigative arm)
- Improve added value OLAF for non-participating Member States (strengthen both investigative powers and procedural safeguards, raise evidentiary value OLAF reports for national proceedings)



Way forward

- Adapt legal framework for OLAF: EP resolution of 16 april 2019 and Coreper 12 June 2019. Trilogue ongoing
- Conclude working arrangement to facilitate practical cooperation
- Promote working culture of openness, consultation, respecting each other's mandate and role
- EPPO shall accede to the Inter-Institutional Agreement of 25 May 1999 concerning internal investigations by OLAF (6 months after date set in 120.2, EPPO)



Any questions?

>