Chapter 11
Relations Between the EPPO and Eurojust—Still a Privileged Partnership?

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Abstract Once it is established, the EPPO will not operate as an isolated actor, but it will integrate itself in the already existing network of EU agencies and bodies. In this context, its relations with Eurojust are of fundamental importance. Both actors are active in the field of judicial cooperation in criminal matters, and the Treaty itself (Article 86 TFEU) provides for a special link between them. Provisions organising their relationship can be found in the EPPO's and Eurojust's proposals for regulations, which are still under negotiation. The present chapter analyses the modalities of their cooperation, as they are currently envisaged, with the aim to assess whether the two actors are privileged partners. This analysis is divided in three steps: it examines firstly their institutional relationship; secondly their management and administrative links and finally their operational cooperation. The analysis reveals that it is at the moment difficult to consider Eurojust as the EPPO's privileged partner. A better clarification of their bilateral relations should be included in the draft proposals, and Eurojust's expertise should be better taken into consideration. A further clarification of the distribution of competences between the EPPO, Eurojust and OLAF is also advisable, especially to avoid unnecessary tensions between the different actors.

Keywords European Public Prosecutor's Office · Eurojust · OLAF · Interagency cooperation · Administrative and management links · Exchange of information · Operational cooperation

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11.1 Introduction

Several agencies and bodies coexist within the Area of Freedom, Security and Justice (AFSJ), and some are active in the protection of the Union's financial interests. The establishment of the European Public Prosecutor's Office (EPPO) will clearly impact the current landscape, including the other EU agencies and bodies competent in this field. The importance of inserting the EPPO in the AFSJ in a coherent and efficient way has been and must be stressed. As M. Coninsx rightly pointed out, the EPPO "should not be conceived as an isolated actor, but rather seen in the context of part of a multilevel interaction".[1] If the purpose of its establishment is to ensure an efficient fight against offences affecting the Union's financial interests, then complementarity, consistency and smooth and close cooperation between all EU agencies/bodies will be crucial. However the integration of the EPPO's work within the existing system of institutions, in particular with Eurojust, is one of the main difficulties of its establishment.[2]

The relations between the EPPO and Eurojust are indeed of fundamental importance.[3] Not only the two actors are both active in the field of judicial cooperation in criminal matters, but their special link has also been provided for in the Treaty itself, via the final wording of Article 86(1) TFEU referring to the establishment of an EPPO "from Eurojust". As it is well known, the exact meaning of such expression is far from clear and its concretisation has been extensively debated.[4] Nevertheless, it implies that the two entities shall—at the very minimum—form

[1] Coninsx 2014, p. 28.

[2] Commission staff working document, Impact assessment accompanying the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, 17 March 2013, p. 5.

[3] The importance of their relations has been highlighted in two research papers written for the LIBE Committee of the European Parliament: see Weyembergh et al. 2014 and Weyembergh and Brière 2016.

[4] See among others, Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20–22 Sept. 2010), "Eurojust and the Lisbon Treaty, towards more effective action?", Council Doc. No. 17625/10 REV 1, 9 Dec. 2010; Eurojust/ERA conference "10 years of Eurojust. Operational achievements and future challenges", The Hague, 12 and 13 Nov. 2012,

a privileged partnership. The present chapter intends to analyse the modalities of the cooperation relationship between the EPPO and Eurojust, as they are currently envisaged in the EPPO draft Regulation, with the aim to assess whether they are indeed privileged partners.

The moment is particularly timely to address the issue of their cooperation. Concerning the EPPO, a Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office[5] was finally published on the 17 July 2013, after years of discussions and consultations. The Commission also published the same day the proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust).[6] Both proposals are at the moment of writing still under negotiations. However, whereas the negotiations on Eurojust Regulation have somehow been paused for more than a year,[7] those on the EPPO have been intensified more and more. The objective was indeed to adopt a general approach on the full text by the end of 2016.[8] Considering that the negotiations of the provision in the draft Eurojust Regulation are paused while awaiting progress on the draft EPPO Regulation, the discussion will focus on the content of Article 57 of the draft EPPO Regulation. References to the current version of the EPPO proposal refer to the latest public version of the draft Regulation, dated of 28 October 2016.[9]

The issue of their bilateral cooperation has been explicitly addressed by the two proposals put forward by the Commission. In each of these drafts, a specific provision, whose wording is not yet final, is devoted to their bilateral relations: Article 57 of the draft Regulation for the establishment of the EPPO,[10] on the one hand, and Article 41 of the draft Eurojust Regulation,[11] on the other hand. In addition, the principle of sincere cooperation, enshrined in Article 4 TEU, will apply to their relations. By virtue of this principle, the relevant Union bodies, including Eurojust, "should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it to the fullest extent possible, from the moment a suspected offence

(Footnote 4 continued)

Council document 8862/13, 26 April 2013, pp. 15 and 16; Hamran and Szabova 2013, particularly pp. 46 and ff.

[5] COM(2013) 534 final.

[6] EPPO Commission Proposal 2013.

[7] No further development since the adoption of a partial General Approach in February 2015 (Council, Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)—General Approach, Council doc. no. 6643/15, 27 Feb. 2015). See especially para 10, p. 3.

[8] EPPO Council Proposal 2016. At the time of writing the latest version of the proposal dated of 28 October 2016.

[9] Ibidem.

[10] *Supra* note 6.

[11] Commission, Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, 17 July 2013.

is reported to the EPPO until it determines whether to prosecute or otherwise dispose of the case" (current text, Preamble, Recital 59).

The wording of this provision in the Commission's proposal was particularly representative of the special and privileged link between the two agencies. In contrast with its relationship with Europol and OLAF, the initial EPPO proposal dealt rather extensively with the cooperation with Eurojust, as evidenced by the number of references to each other in the respective proposals. Eurojust was also the only EU agency benefiting from a provision dealing exclusively with its cooperation with the EPPO. The EPPO's relations with other EU agencies/bodies, such as Europol or OLAF, were envisaged in a catch-all and far less detailed provision (Article 58—Relations with Union institutions, agencies and other bodies). This differentiated treatment was justified in the explanatory memorandum accompanying the proposal, by the fact that "special rules apply to the relationship of the EPPO with Eurojust given the special links that tie them together in the area of operational activities, administration and management".[12]

However, the content of the regulation has evolved substantially in the course of the negotiations. The provisions organising the EPPO's relations with its partners do not depart from this trend. The relations between the EPPO and Eurojust are no longer the only ones being the object of a specific provision, and it can be questioned whether according to the currently available text of the Regulation Eurojust can still be considered to the EPPO's privileged partner. New provisions dealing with the relations between the EPPO and OLAF and between the EPPO and Europol have indeed been inserted, and they envisage with a certain degree of detail the modalities of their bilateral cooperation. Furthermore, the provision dealing with the relations between the EPPO and Eurojust has been substantially amended.

In a first part, their relationship will be analysed from a broad perspective, i.e. addressing their institutional relationship (Sect. 11.2). Their administrative and management links will then be examined (Sect. 11.3). Finally, their operational cooperation, including the exchange of information between the two bodies, will be addressed (Sect. 11.4).

11.2 General Overview of the EPPO-Eurojust Relations

From an institutional point of view, three main scenarios have been envisaged when designing the structural relations between EPPO and Eurojust.[13] The first option saw the EPPO as a separate and autonomous entity, with its own budget, distinct

[12] Commission, Explanatory memorandum, in Proposal for a Regulation on the establishment of the EPPO, COM (2013) 534 final, 17 July 2013, 63 pages, p. 8.

[13] In this regard, see for instance Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20–22 September 2010), 'Eurojust and the Lisbon Treaty, towards more effective action?", Council Doc. No. 17625/10 REV 1, 9 Dec. 2010, especially workshop 6, pp. 22 ff. See also Ligeti and Weyembergh 2015; see also White 2012, p. 73.

from Eurojust.[14] Under the second option, the EPPO would have been a part of Eurojust, e.g. a specialised unit within Eurojust,[15] and they would have thus shared one budget. In the third option, the EPPO and Eurojust would have been two separate entities, with common services (for instance IT services). From the very beginning, i.e. the publication of the Commission's proposal, the choice has been made in favour of creating the EPPO as an independent body distinct from Eurojust, and thus disregarding the second option. The current version of the EPPO regulation reveals that the choice has been further reinforced in favour of the first option. In other words, EPPO and Eurojust remain separate and independent entities, with distinct budgets, but that will cooperate with each other.[16]

The first paragraph of Article 57 of the draft EPPO regulation organises the general framework of their cooperation. It has been modified during the negotiations and now reads: "The European Public Prosecutor's Office shall establish and maintain a close relationship with Eurojust based on mutual cooperation *within their respective mandates* and the development of operational, administrative and management links between them as defined below" (emphasis added). The provision does no longer refer to a special relationship, but only to a close one. This new formulation constitutes a first sign that the relations between the EPPO and Eurojust are no longer to be envisaged as being qualitatively different from those with other EU agencies/bodies. The text provides indeed that the EPPO should also establish and maintain a close relationship with OLAF (Article 57a(1)) and Europol (Article 58(1)). The insertion of a reference to their respective mandates, which is also present in the provision on EPPO-OLAF relations, must be particularly welcomed. This clarification is indeed essential in order to prevent and avoid overlaps and potential competition and tensions between the two bodies.[17]

This provision has been further complemented by a clause foreseeing that the European Chief Prosecutor and the President of Eurojust shall meet on a regular basis to discuss issues of common concern (Article 57(1)). This mirrors an informal practice already existing between for instance the Director of Europol and the President of Eurojust; these meetings are perceived as a way to facilitate cooperation between EU agencies.[18] One should note that Eurojust is the only agency for which such regular meetings are envisaged, and it can be explained notably by the fact that the two entities are supposed to develop administrative and management links between each other.

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[14] Many argued that this is the most straightforward solution in terms of accountability and internal organisation. It would have the further advantage that since the two entities (EPPO and Eurojust) would be kept completely separate it would be clear that there is one unit for judicial cooperation in general whereas the other one is for investigating and prosecuting EU fraud.

[15] In this case the EPPO would be located on Eurojust's premises in order to be able to use Eurojust's facilities, but it would function independently from Eurojust.

[16] This independence between the two has been clearly confirmed by Commissioner Jourova at the JHA Council meeting of 14 October 2016.

[17] See Weyembergh et al. 2014, p. 59.

[18] Ibid., p. 17.

11.3 Administrative and Management Links Between the EPPO and Eurojust

The administrative and management links are covered in the last paragraph of Article 57 of the draft EPPO Regulation. The text of the paragraph seems to have been the object of intense negotiations. This provision remained unchanged during most of the time and listed the services to be provided by Eurojust to the EPPO (which include technical support, security, information technology, financial management, and 'any other services of common interest') and left the details to an agreement to be concluded between the two bodies.

However, it has been changed at a later stage of the negotiations. This becomes clear in the version of that provision of July 2016[19] and its wording at that time. Indeed, whereas the Commission's proposal stipulated that "Eurojust ***shall*** provide the following services", the version of July 2016 provided that "Eurojust ***may/shall*** provide **[any of]** the following services". Furthermore, the text referred to a suggestion made by France, and supported by Germany and Luxembourg, that Eurojust "shall provide services of common interest to the EPPO", and that the provision shall continue in providing "the details of this arrangement shall be regulated by an agreement" without listing them explicitly.

The most recent version of the text, i.e. of 28 October 2016 at the time of writing, seems almost final, and indicates which compromise has been reached within the Council. Article 57(5) now reads: "The EPPO may rely on the support and resources of the administration of Eurojust. To this end, Eurojust may provide services of common interest to the EPPO. The details shall be regulated by an arrangement". The provision is thus far less detailed than the one contained in the Commission's proposal, and it is drafted in vague terms. The use of the word "may" as well as the choice to leave the details to the conclusion of a posterior administrative arrangement, can be interpreted as signs of the sensitivity of the issues at stake, which are linked to two very politically delicate points, which will impact the support that Eurojust will furnish to the EPPO.

The first point relates to the localisation of the seat of the EPPO, which is one of the most sensitive political questions. The Commission's proposal (Preamble, recital 49) simply referred to the decision adopted by the Heads of State and Government level the 13th December 2003, in which they determined that the seat of the EPPO would be Luxembourg.[20] Such reference was present in the text until

[19] Council, Proposal for a Regulation on the establishment of the EPPO—Consolidated text: update of the provisional version, 28 July 2016, Council Doc. No. 11350/1/16 REV 1.

[20] On this issue see also the Presidency Conclusions, European Council of Laeken, 14 and 15 December 2001, para 57, referring to the Decision 67/446/EEC of 8 April 1965 of the representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the European Communities (notably Article 3).

December 2016 (Preamble, recital 112, now deleted).[21] Should the agreement of 2003 apply, establishing the EPPO in Luxembourg would have important consequences, particularly endangering the idea of the EPPO being supported by Eurojust in its daily functioning.[22] A location close to Eurojust would be better suited to guarantee such an objective, since it would be a more efficient and less expensive solution. However, and in spite of the huge impact the decision on the EPPO's seat will have in this regard, the final decision will most probably only be taken at the very end of the negotiations on the EPPO Regulation. This relative uncertainty[23] might explain the success of the proposal made by France, and supported by Germany and Luxembourg not to list the forms of support Eurojust would bring to the EPPO, thereby ensuring some flexibility to the choice of the EPPO's seat. In this regard, the European Parliament stated in its 2016 Resolution that it "believes that it would best for the EPPO and Eurojust to operate in the same location if the cooperation and information exchange between them is to operate efficiently".[24]

The second issue relates to the numerous references in several documents, including in the Commission's proposal, to the fact that the envisaged EPPO will come at "zero cost". Whereas this declaration sought to reassure Member States in a time of financial crisis, no one really believed that the creation of such an EU body would require no additional EU expenses. The changes in the EPPO's structure introduced by the Council will also impact the cost of establishing the EPPO,[25] but the idea remains nonetheless to limit the expenses as much as possible and to rationalise available resources.[26] According to the Commission, these benefits include the dissuasive effect of establishing an EPPO, which is expected to significantly reduce impunity of EU fraudsters, and in terms of recovery of defrauded

[21] The version of the text we refer to is Council Doc. No. 15 200/16 of 2 December 2016, in which the former recital 112 has been deleted. The removed recital read as follows: "the Representatives of the Member States, meeting at Head of State or Government level in Brussels on 13 December 2003 have determined the seat of the European Public Prosecutor's Office."

[22] Coninsx 2014, p. 38.

[23] However, even if the location of the EPPO's seat seems to be the one agreed upon in 2003, "nothing could be considered to have been agreed before an overall agreement on the text was reached" (Press release, JHA Council meeting of 9 and 10 June 2016, p. 5).

[24] European Parliament, Resolution of 5 Oct. 2016 on the EPPO and Eurojust (P8_TA(2016) 0376), para 10.

[25] Whereas at the decentralised level the European Delegated Prosecutors have been maintained, new layers have been added to the "central" level (Article 7(3)). The central office now consists of the European Chief Prosecutor, his/her deputies, the College, the Permanent Chambers, and the European Prosecutors (one per Member State).

[26] See for an updated costs/benefits analysis the presentation by Commissioner V. Jourova in front of the JHA Council on 14 October 2016. Video available at: http://video.consilium.europa.eu/en/webcast/6917239d-893d-40ad-b2a2-339306dcb322.

EU money that would come back to the EU budget.[27] In that regard, and more fundamentally, one should pay particular attention to the new structure at the EPPO's central level, which will cost more than the initially envisaged model, and will imply important fixed costs. Despite the Commission's belief, one may doubt whether such an increase of costs will be compensated by the decreased number of cases with which it will deal given EPPO's shared competence with national authorities. Moreover, the search for savings will necessarily impact interagency relations in the field of the protection of the Union's financial interests, and notably the relations between the EPPO and Eurojust. Indeed, the more restraints are placed on the EU budget, the more important reliance on Eurojust's resources becomes. Eurojust rightly fears that its other tasks will suffer if no extra money is devoted to its supporting missions to the EPPO. M. Coninsx underlined in May 2016 before the LIBE committee that there is a need to join forces, and that Eurojust is keen on cooperating with the EPPO. However, as she stated, in the event that new tasks are assigned to Eurojust, then corresponding resources must also be allocated in order to avoid prejudice to the rest of Eurojust's work.[28] In this regard, it must be noted that non-participating Member States have already opposed the idea of a detrimental effect to the other EU agencies and bodies as a consequence of the establishment of the EPPO.[29] Should Eurojust's resources (human or financial) be transferred to the EPPO, this would be highly detrimental for the EU area of criminal justice as a whole. Eurojust's expertise does not only cover PIF crimes, but includes other forms of serious crime (including other forms of financial crime),[30] for which its services will continue to be required in cross-border cases. Moreover, the involvement of Eurojust in PIF cases will continue to be relevant in cases concerning non-participating Member States. The costs linked to these activities will still have to be covered.[31]

In definitive, the current version of the text seems to grant to both entities a large margin of flexibility, potentially explained by the sensitivity of the abovementioned underlying issues. The lack of details in the regulation itself implies that careful attention will have to be paid to the content of the arrangement that they shall conclude in the future, especially to ensure that Eurojust's resources are not drawn off by the EPPO.

[27] See intervention of Commissioner Jourova at the JHA Council meeting of mid-October 2016.

[28] Coninsx 2016.

[29] House of Lords, The impact of the EPPO's on the United Kingdom, 4th Report of session 2014–2015, p. 26, para 76.

[30] As an example, see Eurojust, Annual Report, 2015, p. 28: Eurojust registered in 2014 around 1850 cases. Whereas the agency registered 69 PIF cases, it also registered 647 fraud cases (including excise fraud and VAT fraud) and 90 corruption cases.

[31] For more details, see Weyembergh and Brière 2016, p. 52.

11.4 The EPPO-Eurojust Relations in Operational Matters

In operational matters, the mandate and tasks of the EPPO and Eurojust will differ substantially. Whereas the EPPO shall be able to exercise directly operational decisions, through its European Delegated Prosecutors, Eurojust shall remain an agency only supporting the operational cooperation between national judicial/prosecutorial authorities. Nevertheless, their operational cooperation would be of crucial importance and deserves close attention. It would indeed be necessary to ensure that overlaps between the two entities' mandates and tasks are avoided.

11.4.1 Preliminary Remarks

As a first preliminary remark, one should stress the important changes introduced in this respect to the text during the negotiations. Some provisions of the initial Eurojust proposal could give the impression that the EPPO would be a sort of "29th Eurojust member"—albeit one with limited powers. This impression resulted especially from Article 41(2) of the Eurojust proposal, according to which requests for support by the EPPO should be treated by Eurojust as if they had been received from a national authority.[32] This impression seems however less valid today, since the general approach on the EPPO Regulation does not follow such orientation. Such evolution will presumably lead to a system of operational cooperation between two clearly distinct EU bodies.

As a second preliminary remark, it is important to highlight that once the EPPO will be established, there will continue to be cases linked to offences affecting the Union's financial interests, in which Eurojust will play a role. This is especially true since it has been decided that the competence of the EPPO in PIF cases is no longer of an exclusive nature.[33] In this regard, some uncertainty resulting from the wording of Eurojust's

[32] It was further confirmed by other provisions, such as Articles 12(3) and 16(7) providing EPPO the possibility to participate in Eurojust's College and Executive Board meetings [wherever issues relevant to its functioning were discussed–albeit without the right to vote. According to Article 16 (8), the EPPO may also address written opinions to the Executive Board, to which it shall respond in writing without undue delay].

[33] Article 14 of the initial Commission EPPO proposal provided that the EPPO shall exercise its exclusive competence to investigate and prosecute any criminal offence referred to in Articles 12 and 13 (Directive PIF and ancillary competences).

Article 3 Eurojust GA (unchanged from the proposal) «However, its competence shall not include the crimes for which the European Public Prosecutor's Office is competent». EPPO GA—Article 17 «The European Public Prosecutor's Office shall be competent in respect of the criminal offences affecting the financial interests of the Union which are [provided for in Directive 2017/xx/EU, as implemented by national law] 57, irrespective of whether the same criminal conduct could be classified, under national law, as another type of offence.»

competences as phrased in the draft Eurojust Regulation should be removed ("its competence shall not include the crimes for which the EPPO is competent").[34]

The cooperation between the two bodies in the field of the protection of the Union's financial interests will be especially important in the situations described hereafter.[35] Firstly Eurojust may continue to play its classic facilitator role with regard to cases concerning participating Member States in the event of minor frauds,[36] or wherever the EPPO does not exercise its competence. Secondly, Eurojust will maintain its current competence in PIF files with regard to cases that exclusively concern non-participating Member States. At first sight, in such cases, the EPPO will not be involved, and there will thus be no need for the two bodies to cooperate. However, if one deepens a bit the reflection, such cooperation might be useful anyway, especially in order to detect potential links between cases in non-participating and participating States. Thirdly, Eurojust will play a role in PIF cases concerning participating and non-participating Member States.[37] Finally, Eurojust may play a role in the relations between the EPPO and third countries.[38] Indeed, the draft EPPO Regulation, i.e. both the Commission's proposal and the latest version of the text, foresees that the EPPO may request the support of Eurojust in the transmission of its decisions or requests for mutual legal assistance in cases involving third countries (Article 57(2) (b)). That provision must be read in combination with Article 41(3) of the Eurojust proposal providing that Eurojust shall make use of its agreements with third countries and its liaison magistrates to support the cooperation of the EPPO with third countries.[39] But, it should be noted that, like Eurojust, the EPPO will also be able to establish working arrangements

[34] The General Approach of the Eurojust regulation of February 2015 still contains this sentence, however it is placed between brackets and considered outside the general approach (Article 3(1), footnote 18).

[35] Besides the four hypotheses mentioned in the corpus of the text, Eurojust could also play a role in hybrid cases where PIF offences are connected to other offences (the so-called "ancillary offences"). Indeed, Articles 13(2) and 57(2) c) of the Commission's proposal for an EPPO regulation foresaw a role for Eurojust in the determination of the competent authority to deal with the ancillary offence (EPPO or the Member State concerned). In the event that the EPPO would not be competent over such offences, then cooperation between the EPPO and Eurojust could become essential, as Eurojust's assistance would be essential to liaise between the EPPO and the competent national authorities. If by contrast the EPPO would take over the investigation and prosecution of ancillary offences, then there could be a role for Eurojust as an advisor/expert in judicial cooperation issues relating to those ancillary offences. It is however important to note that the relevant provision (Article 57(2) c)) has been deleted during the negotiations in the Council. There is thus some uncertainty as to the role of either body—and their cooperation—in relation to ancillary offences.

[36] Article 20(2) of the draft EPPO regulation.

[37] See *infra* Sect. 11.4.2.

[38] On the risk of diminishing Eurojust's relations with third parties in light of the proposal for a Eurojust Regulation, see Deboyser 2014, p. 93.

[39] These elements are provided for in provisions outside the scope of the General Approach on the Eurojust regulation. They can be considered as being still valid, yet potentially subject to amendments once the negotiations on the Eurojust regulation restart.

with third countries and international organisations (including the secondment of liaison officers to the EPPO), and may designate contact points in third countries.[40] As a consequence, the assistance provided by Eurojust in this form of cooperation will most likely be of a temporary nature, until the EPPO has concluded its own agreements with third countries. This appreciation is reinforced when reading Article 59 of the EPPO draft regulation, which envisages extensive possibilities for the EPPO to cooperate with authorities located in third countries, including on the basis of cooperation agreements concluded by participating EU Member States.[41]

11.4.2 Modalities of Their Cooperation in Operational Matters

Concerning the precise modalities of their cooperation in operational matters, two issues are particularly important: the exchange of information between them, and the situations envisaged in the regulation itself.

The draft EPPO regulation provides that the institutions, bodies, offices and agencies of the Union, including Eurojust, and the authorities of the Member States competent in accordance with applicable national law shall report without undue delay any criminal conduct in respect of which it could exercise its competence (Article 19(1)).[42] The EPPO may also under certain conditions request further relevant information available to these entities (Article 19(5)).[43] Compliance with this reporting obligation would require that EU institutions and bodies, as well as national authorities, report cases as soon as possible, i.e. as soon a suspicion of an offence within the EPPO's competence is identified and even if the assessment of some criteria, such as the level of damage, or the applicable penalty, is not immediately possible (text of 28 Oct. 2016, Preamble, Recitals 46–48). The effective implementation of that provision would ensure that the flow of information smoothly reaches the EPPO. Indeed, the importance of the transmission of information to the EPPO should not be under-estimated, as it is key to its functioning and at all levels of intervention, including the very beginning of a case.

The first relevant issue concerns the exchange of information between the EPPO and Eurojust. Provisions of the draft EPPO Regulation, such as Article 19, concern the exchange of information in general terms between the EPPO and other bodies, including Eurojust. For instance, it results from Article 19 para 1 that Eurojust shall report without undue delay to the EPPO any criminal conduct in respect of which it

[40] Article 59 EPPO COM proposal.

[41] For more details, see Weyembergh and Brière 2016, pp. 37–38.

[42] EPPO Council Proposal 2016b.

[43] These requests may concern infringements which caused damage to the Union's financial interests, other than those within the competence of the EPPO, where it is necessary to establish links with a criminal conduct on which the EPPO has exercised its competence.

could exercise its competence. However, the exchange of information between the two entities may be further developed on the basis of Article 57(3). This provision indeed envisages an indirect access of the EPPO to the Eurojust's case management system on the basis of a hit/no hit system. Such provision is interesting[44] and seems at least at first sight more easily readable and understandable than the initial provision proposed by the Commission.[45] It must be noted that the EPPO shall have the same indirect access to the databases of OLAF (Article 57a(5)), and it remains to be seen whether Eurojust would obtain similar access to the EPPO's Case Management System.

The second issue concerns Article 57(2), which generally frames the EPPO-Eurojust bilateral operational cooperation. A comparison between the version of this provision in the Commission's proposal and in the current version of the text reveals significant changes.

Whereas the Commission proposal mentioned the possibility for the EPPO to associate Eurojust to its activities concerning cross-border or complex cases, the general approach of the Council only mentions such possibility concerning cross-border cases and not anymore concerning complex cases. This raises the question of consistency with Eurojust's regulation, more precisely Article 3 para 4 which foresees the competence of Eurojust in cases affecting one Member State only if they have repercussions at Union level.

Furthermore, the number of situations, in which operational cooperation between the two bodies are listed, has been significantly reduced in the course of the negotiations. The Commission proposal provided no less than six situations in which the EPPO could associate Eurojust in its activities concerning cross-border or complex cases: sharing information in its investigations; requesting Eurojust to participate in the coordination of specific acts of investigation; facilitating the agreement between the EPPO and Member States regarding ancillary competence; requesting Eurojust to use its powers regarding certain acts of investigations falling outside the competence of the EPPO; sharing information with Eurojust on prosecution decisions and requesting Eurojust the transmission of its decision or requests for mutual legal assistance to non-participating Member States or third countries (Article 57(2)). The current version of the text (of 28 October 2016) envisages only two of these situations: sharing information in its investigations (including personal data) on EPPO's investigations (a) and inviting Eurojust to provide support in the transmission of its decision or requests for mutual legal assistance to non-participating MSs or third countries (b). In the second situation envisaged, Eurojust would cooperate with the EPPO in cases involving non-participating Member States and third countries. Eurojust may be able to offer

[44] It is comparable to the system established between Eurojust and Europol.

[45] Article 24 of the Eurojust proposal foresees that the CMS and its temporary work files shall be made available for use by the EPPO. At the same time, Article 22 of the EPPO proposal provides for the establishment of a 'Case Management System, index and temporary files' for the EPPO. It is, however, unclear how the two systems would interact. The proposals envisage a system of automatic cross-checking of data.

some of its services to support the EPPO's cooperation with these countries, such as the assistance for setting up a Joint Investigation Team, the organisation of coordination meetings, etc. However, the text only refers to one possibility: the support that Eurojust or its competent national members may provide in the transmission of the EPPO's decisions or requests for mutual legal assistance. One should note that the wording of the provision has slightly changed. Whereas in the Commission proposal the EPPO "*may request*" such assistance, in the scrutinised version of the text, the EPPO "*may invite*" Eurojust to provide its support. The exact impact of this change remains far from clear, but it seems confer a broader margin of manoeuvre to Eurojust.

Although the current wording of the provision presents these two options of cooperation, as a non-exhaustive list,[46] its shortening raises concerns. The provision does not reflect Eurojust's scope of competence in operational matters, ignoring for instance the possibility to set up coordination centres or to offer analysis of cases in order to identify issues requiring special attention, such as conflicts of jurisdiction. It must however be noted that coordination of investigative measures in respect of cases handled by Eurojust has been added to the Preamble (recital 97). Moreover, with regard to the second form of cooperation envisaged, that is, assistance in the transmission of mutual legal assistance requests to non-participating States, this task also falls within the mandate of the European Judicial Network, which could offer such assistance to the EPPO. As it is well known, Eurojust and the European Judicial Network (EJN) have suffered from some overlaps.[47] Efforts have been made to overcome these. EJN's competence and expertise seem to have been overlooked here. The insertion in the Regulation of a reference to EJN's assistance could thus be considered, illustrating how the EPPO integrates itself in the AFSJ becoming part of a multilevel interaction and cooperation system.

The provisions relating to the EPPO-Eurojust cooperation in operational matters thus suffer from several flaws. Not only it fails to address shortcomings identified in the initial proposal of the text, but the current version of the text also raises new concerns. The main criticism concerns the organisation of their cooperation in very vague terms, and with a wording that does not take into consideration Eurojust's valuable expertise and experience, especially in operational matters.

[46] The wording "including by" indicates this. The provision is furthermore complemented by a recital in the preamble (recital 97, which reads as follows: "*The European Public Prosecutor's Office and Eurojust should become partners and should cooperate in operational matters in accordance with their respective mandates. Such cooperation may involve any investigations conducted by the European Public Prosecutor's Office where an exchange of information or coordination of investigative measures in respect of cases* ***within the competence of*** *Eurojust is considered to be necessary or appropriate. Whenever the European Public Prosecutor's Office is requesting such cooperation of Eurojust, the European Public Prosecutor's Office should liaise with the Eurojust national member of the Member State of the handling European Delegated Prosecutor. The operational cooperation may also involve third countries which have a cooperation agreement with Eurojust*.").

[47] Weyembergh et al. 2014, op. cit., pp. 28–30.

11.5 Conclusions

While the negotiations in the Council on the EPPO regulation might be reaching their final stage, the provisions on the relations between the EPPO and Eurojust could still be the object of further improvements. The Council seems indeed to fail to address one of the concerns raised by the European Parliament in its 2015 and 2016 Resolutions: a better clarification of the EPPO's bilateral relations, especially with Eurojust, taking into due consideration their respective expertise, "in order to differentiate between their respective roles in the protection of the EU's financial interests".[48] One could hope that the European Parliament, from which the Council must obtain the consent for the adoption of the Regulation, will notably insist upon such clarification of competences before giving its consent to the text.

The reason why the provision on the EPPO's relations with Eurojust is significantly less developed and less detailed than the provision relating to the cooperation between the EPPO and OLAF (Article 57a)[49] remains obscure and is difficult to justify. The idea that Eurojust would become a privileged partner for the EPPO does not appear to be reflected in the provision detailing their bilateral cooperation. The provision on EPPO's relationship with OLAF is significantly more developed when it comes to EPPO-OLAF cooperation in the course of an investigation (Article 57a para 3). Such a difference is difficult to understand considering that Eurojust has always been presented as the privileged partner of the EPPO; the current version of Article 57 does not really reflect this privileged partnership anymore. It looks empty when it comes to describing the substance of their bilateral operational cooperation. It may even be questioned whether Eurojust is still the privileged partner of the EPPO, or whether in a way OLAF has taken this position. Furthermore, the provision on EPPO-OLAF relationship seems to take better into consideration the specific expertise of OLAF. Such imbalance is surprising, especially considering that Eurojust was primarily envisaged as the EPPO's privileged partner. As a consequence, coming back to the question raised in the Introduction of this chapter, i.e. whether a special link exists between the EPPO and Eurojust as provided in the Treaty, the answer has to be negative at the current stage of the negotiations.

Further clarification of the distribution of competences, especially between the EPPO, OLAF and Eurojust, would thus be needed to reduce the risks of tensions between EU agencies/bodies. Such clarification is furthermore essential to ensure that the costs generated by the establishment of the EPPO do not exceed the benefits expected from EPPO's actions. The idea of covering EPPO's costs by drawing from

[48] European Parliament, Resolution of 2015, para 29 and European Parliament, Resolution of 2016, para 9.

[49] For more details about the relations between the EPPO and OLAF, see Weyembergh and Brière 2016, pp. 32–34.

Eurojust's (and/or OLAF's) resources should be handled very carefully, as it may generate unnecessary tensions. Furthermore, should Eurojust's resources (human or financial) be transferred to the EPPO, this would be highly detrimental for the EU area of criminal justice as a whole. Eurojust's expertise does not only cover PIF crimes, but includes other forms of serious crime (including other forms of financial crime),[50] for which its services will continue to be required in cross-border cases, and/or in PIF cases involving non-participating Member States. The costs linked to these activities will still have to be covered. More generally, the multiplication of agencies/bodies in the field of judicial cooperation, without ensuring good relations among them, might lead to a dangerous fragmentation and consequent weakening of EU actors within the AFSJ. This will further deepen the already worrying imbalance between judicial and police actors at EU level, since one powerful agency already benefits from larger resources in the police field, i.e. Europol.[51] Establishing a complex and costly new EU prosecutorial body, which would "undo" pre-existing actors and/or have bad relations with them, would not only be detrimental to the AFSJ and the fight against crime (including PIF crime) but would also give relevant and concrete arguments to Eurosceptics.

Finally, besides the uncertainties relating to the EPPO Regulation, the question remains how the evolution of the EPPO draft regulation will be taken into consideration in the Eurojust Regulation. One can but underline the importance of having complementary and consistent provisions in both regulations. Furthermore, should the establishment of the EPPO be postponed to a more distant (and uncertain) future, EU institutions could envisage an interesting alternative option to improve the efficiency of fighting PIF offences, namely strengthening Eurojust by using the possibilities provided for in Article 85 TFEU. As is well known, the 2013 Commission proposal for a Eurojust Regulation did not make use of the full potential of Article 85 TFEU. However, Eurojust could be granted some limited binding powers vis-à-vis national authorities, e.g. the powers to initiate criminal investigations (Article 85(1)a) TFEU),[52] at least regarding PIF offences. This provision presents the advantage of providing for the adoption of a Regulation via the ordinary legislative procedure. This is a positive element, as it means that the European Parliament is on an equal footing with the Council and it can potentially orientate the negotiations towards granting these powers to Eurojust.[53]

[50] As an example, see Eurojust, Annual Report, 2015, p. 28: Eurojust registered in 2014 around 1850 cases. Whereas the agency registered 69 PIF cases, it also registered 647 fraud cases (including excise fraud and VAT fraud) and 90 corruption cases.

[51] About such imbalance, see Weyembergh et al. 2014, *op. cit*. p. 60.

[52] About Article 85 TFEU and its potentialities, see for instance Weyembergh 2013, pp. 177–186; Weyembergh 2011, pp. 75–99.

[53] About Article 85 TFEU and its potentialities, see for instance Weyembergh 2013, pp. 177–18 and Weyembergh 2011, pp. 75–99.

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