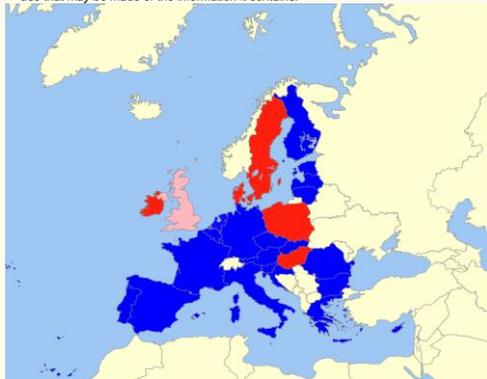


Defence in Future EPPO proceedings: Introduction to the EPPO

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Dr. Hans-Holger Herrfeld



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Overview

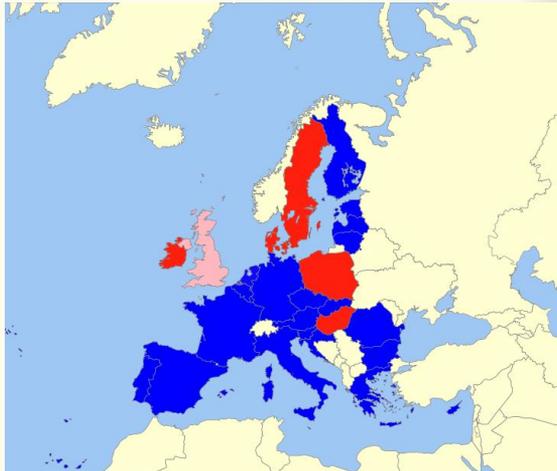
- Enhanced cooperation on the establishment of the EPPO
- Some major elements of the EPPO Regulation
 - The hybrid structure and the status of the EPPO
 - Material, territorial and personal competence of the EPPO
 - Reporting to the EPPO – how does a case become an EPPO case?
 - Internal division of competences – allocation of cases within the EPPO
 - Conducting EPPO investigations – investigation measures
 - Relationship with non-participating Member States and third countries
 - Termination of investigations – prosecution before national courts
 - Scope of the rights of the suspects and accused [and other] persons
 - Judicial review by national courts – with a little help from the CJEU
- Current state of development – what else is left to do?

EPPO - Territory

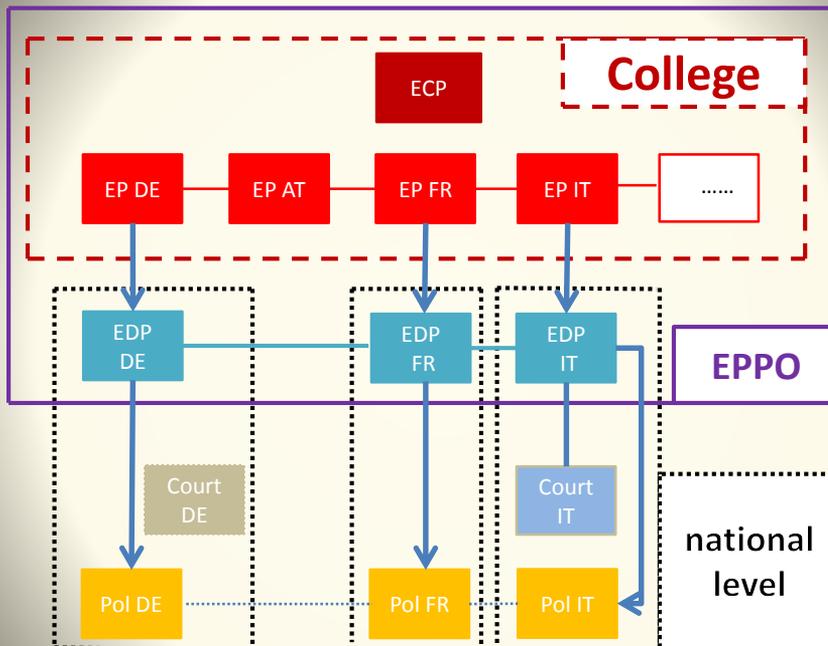
Participating MSs



Non-Participating MSs



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European Delegated Prosecutors

Art. 13 (1)

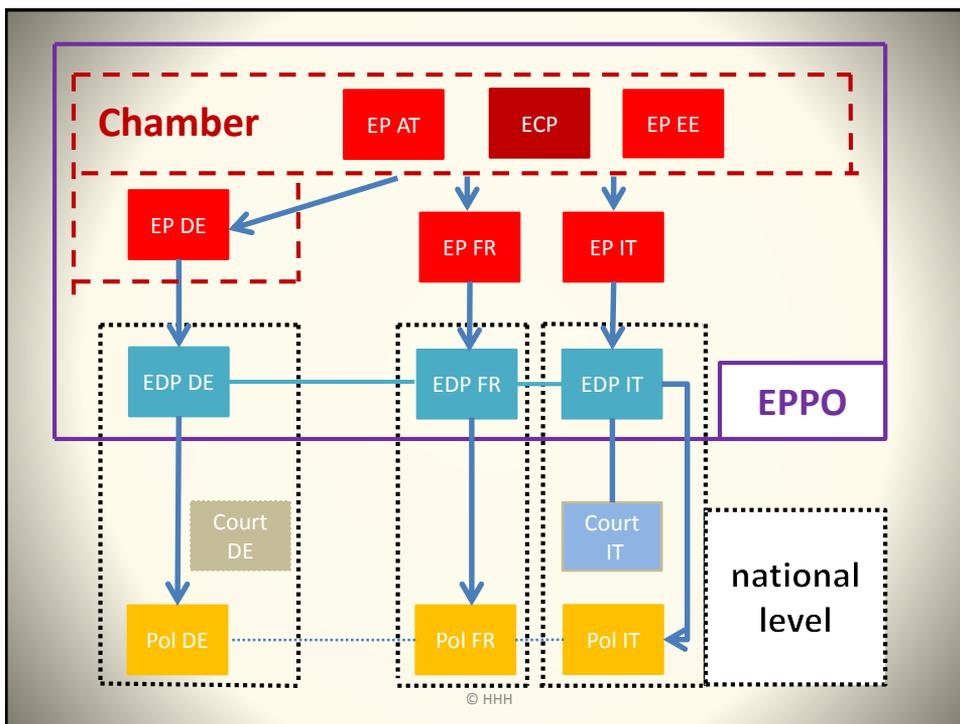
The European Delegated Prosecutors shall act on behalf of the EPPO in their **respective Member States** and shall have the **same powers as national prosecutors** in respect of investigations, prosecutions and bringing cases to judgment, **in addition and subject to the specific powers and status conferred on them, and under the conditions set out in this Regulation.**

Art. 13 (3)

The European Delegated Prosecutors **may also exercise functions as national prosecutors**, to the extent that this does not prevent them from fulfilling their obligations under this Regulation.

Art. 28 (1)

The European Delegated Prosecutor handling a case may, **in accordance with this Regulation and with national law**, either **undertake the investigation measures** and other measures **on his/her own** or **instruct the competent authorities in his/her Member State.**



Article 5 (3) – applicable national law

Principle:

The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.

Special rule: Article 31 on cross-border investigations within the EPPO territory

Article 22 – Material competence of the EPPO

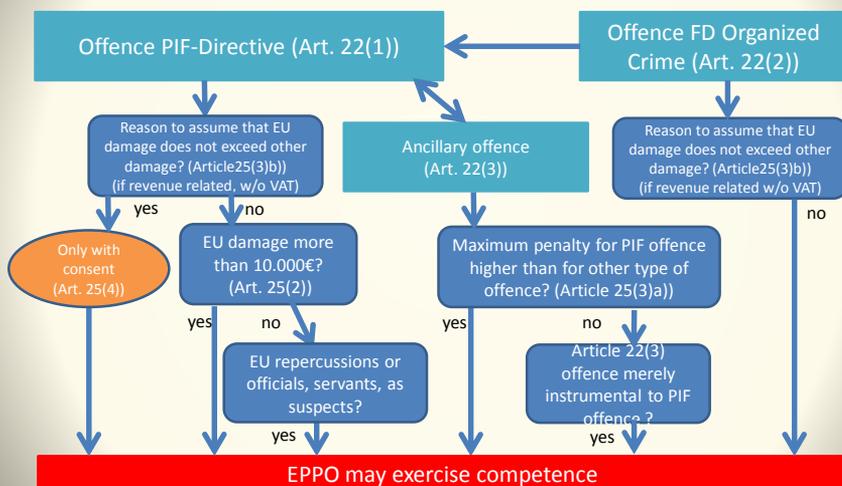
- (1) The EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are **provided for in Directive (EU) 2017/1371, as implemented by national law**, irrespective of whether the same criminal conduct could be classified as another type of offence under national law. As regards **offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371**, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are **connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million**.
- (2) The EPPO shall also be competent for offences regarding participation in a **criminal organisation as defined in Framework Decision 2008/841/JHA**, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1.
- (3) The EPPO shall also be competent for **any other criminal offence that is inextricably linked** to criminal conduct that falls within the scope of paragraph 1 of this Article. The competence with regard to such criminal offences may only be exercised in conformity with Article 25(3).

Article 23 – Territorial and personal competence

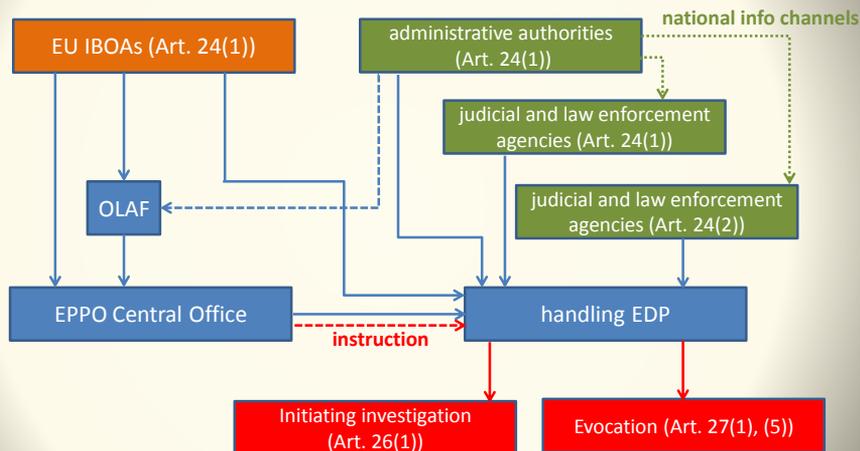
The EPPO shall be competent for the offences referred to in Article 22 where such offences:

- (a) were committed in whole or in part **within the territory** of one or several Member States;
- (b) were **committed by a national** of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
- (c) were committed outside the territories referred to in point a) by a **person who was subject to the Staff Regulations of Officials or to the Conditions of Employment**, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

Article 25 Exercising of competence by the EPPO



Information channels (Article 24)



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Article 26 – initiating / allocation of cases

Principle condition for initiating an investigation:

Art. 26(1): Investigation can be initiated by an EDP of a **Member State** which according to its national law **has jurisdiction over the offence**.

Principle for a possible choice of EDP / allocation of cases:

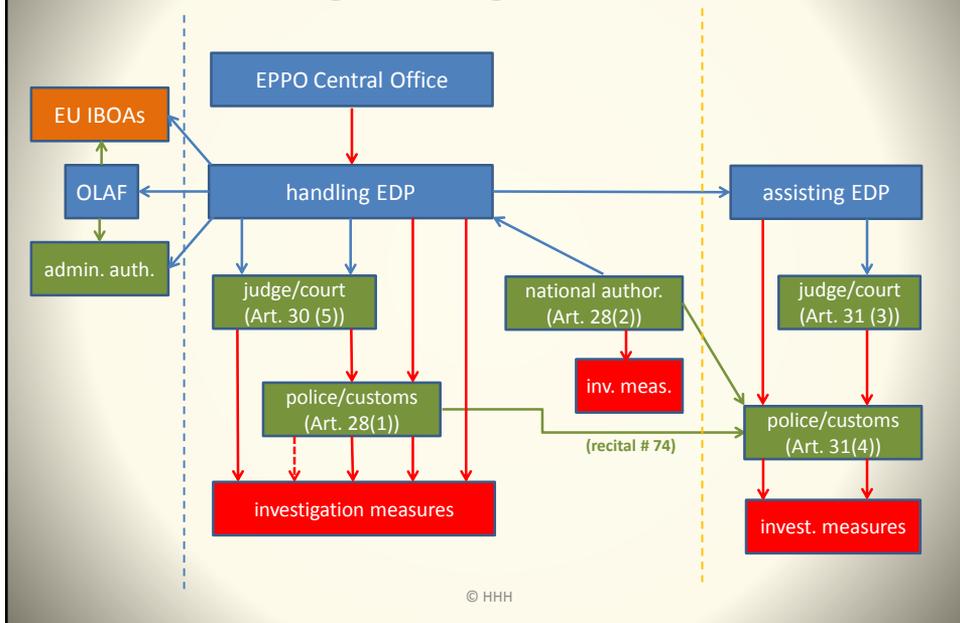
Art. 26(4): competence of the EDP from the Member State where the focus of the criminal activity is (**territory**)

Deviation from the principle where duly justified, taking into account the following criteria, **in order of priority**:

- (a) the place of the suspect's or accused person's **habitual residence**;
- (b) the **nationality** of the suspect or accused person;
- (c) the place where the main financial **damage has occurred**.

Possible subsequent reallocation (or merging/splitting of cases) by decision of the Permanent Chamber: if "in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor in accordance with paragraph 4" (Art. 26(5)).

Conducting investigations (Article 28)



Article 30 Investigation measures

At least in cases where the offence subject to the investigation is punishable by a **maximum penalty of at least 4 years of imprisonment**, Member States shall ensure that the EDPs are entitled **to order or request** the following investigation measures: ... [list of measures]

- If reasonable grounds to believe that the specific measure might provide information or evidence useful to the investigation
- and if no less intrusive measure available
- Procedures and modalities for taking the measures shall be governed by the applicable national law
- may be subject to conditions in accordance with the applicable national law if the latter are explicitly foreseen for specific categories of persons or professionals legally bound by an obligation of confidentiality.
- MSs may limit the application of ... to specific serious offences

Article 31 Cross-border investigations

adopt/assign	judicial authorisat.	competent court	recogn./enforce.	judicial review
EDP DE	no		EDP IT reviews	
EDP DE	yes, IT	IT		
EDP DE	yes, DE yes, IT	IT		
EDP DE	yes, DE	DE	EDP IT reviews	

Adoption and justification by handling EDP in accordance with the law of his/her Member State (paragraph 2). Where judicial authorisation is required, the court/judge either in the assisting EDP's or in the handling EDP's Member State is competent (paragraph 3). Judicial authorisation takes place in accordance with the law of the respective Member State. Where adoption/judicial authorisation in accordance with foreign law, the assisting EDP may raise concerns in view of compliance with own law (paragraph 5).

Article 105 – relations with non-participating Member States

- (1) and (2)
- „(3) In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States 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 Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.”
- Rational: As a result of notification by a participating MS, the EPPO would be considered as a national judicial authority of that MS and the non-participating MS would be obliged to cooperate on the basis of (e.g.) the EIO directive.
- **This solution raises numerous difficult issues. Thus there is a need for a separate legal instrument, covering judicial cooperation, information exchange and conflicts of jurisdiction**

Article 104 – cooperation with third countries

- (4): „.... the Member States 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 legal assistance in criminal matters concluded by them, including, where necessary and possible, by way of an amendment to those agreements.“
- „ may also notify the EPPO as a competent authority for the purpose of the implementation of **other international agreements** on legal assistance in criminal matters concluded by them, including, by way of an amendment... .“
- (5): „... the handling European Delegated Prosecutor, in accordance with Article 12(1) [13(1)], may have **recourse to the powers of a national prosecutor** of his/her Member State to request legal assistance in criminal matters from authorities of third countries, **on the basis of international agreements concluded by that Member State or applicable national law** and, where required, through the competent national authorities..“
- „.... the EPPO may also **request legal assistance** in criminal matters from authorities of third countries **in a particular case** 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. “

Termination of the investigation

Article 35(1): “When the **handling European Delegated Prosecutor considers the investigation to be completed**, he/she shall submit a report to the supervising European Prosecutor, containing a **summary of the case** and a **draft decision** whether ”

- to **bring a case to judgment** in accordance with Article 36(1), (3) and (4);
- to **dismiss** a case in accordance with point (a) to (g) of Article 39(1)
- to apply a **simplified prosecution procedure** and to instruct the European Delegated Prosecutor to act with a view **to finally dispose of the case** in accordance with Article 40;
- to **refer a case to the national authorities** in accordance with Article 34(1), (2), (3) or (6);

Article 36 – Prosecution before National Courts

Article 36(1): “When the **European Delegated Prosecutor** submits a **draft decision proposing to bring a case to judgment**, the Permanent Chamber shall, following the procedures set out in Article 35, decide on this draft within 21 days. The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment.”

- **Choice of forum for prosecution: principle** (Art. 36(3)) is **Member State of the handling EDP**, **deviation** (Art. 36(3)): **different MS**, if sufficiently justified grounds to do so, taking into account the **criteria set out in Article 26(4) and (5)**
- **Possible joining of cases** for prosecution in a single MS (Art. 36(4), recitals 67, 68)
- **Judicial Review** (recital 87(2): “... **by national courts, at the latest at the trial stage**”.

Article 40 – Simplified Prosecution Procedures

Article 40(1):

- **If the applicable national law** provides for a **simplified prosecution procedure**
- aiming at the **final disposal**
- on the basis / upon fulfilment of the **terms agreed with the suspect**
- **conditions provided for in national law**

Article 40(2): „The Permanent Chamber shall decide on the proposal of the handling European Delegated Prosecutor taking into account the following grounds:

- (a) the **seriousness of the offence**, based on **in particular the damage** caused;
 - (b) the **willingness** of the suspected offender **to repair the damage** caused by the illegal conduct;
 - (c) the use of the procedure would be in accordance with the **general objectives and basic principles of the EPPO** as set out in this Regulation. ...”
- College shall adopt **guidelines** on the application of those grounds

Article 41 – Scope of the rights of the suspects and accused [and other] persons

Article 41(1): “The activities of the EPPO shall be carried out in full compliance with the **rights of suspects and accused persons enshrined in the Charter**, including the right to a fair trial and the rights of defence.”

Article 41(3): “... **suspects and accused persons** as well as **other persons involved in the proceedings** of the EPPO shall have **all the procedural rights available to them under the applicable national law**, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence”.

Article 41(2): “Any **suspected or accused person** in the criminal proceedings of the EPPO shall, **at a minimum**, have the **procedural rights provided for in Union law, including directives** concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law ... [list of five directives on procedural rights]”

Article 42 – Judicial Review

(1) **Procedural acts** of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to **review by the competent national courts** in accordance with the requirements and procedures laid down by national law. The same applies to **failures of the EPPO to adopt procedural acts** which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation.

(2) The Court of Justice shall have jurisdiction, in accordance with Article 267 TFEU, to give **preliminary rulings** concerning:

- (a) the **validity of procedural acts of the EPPO**, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;
- (b) the **interpretation or the validity of provisions of Union law**, including this Regulation;
- (c) the **interpretation of Articles 22 and 25 of this Regulation in relation to any conflict of competence** between the EPPO and the competent national authorities.”

Current state of development – what is left to do?

- ✓ Establishment of a selection panel (Art. 14(3) and 16(2))
- ✓ Appointment of interim Administrative Director (Article 20(1))
- Appointment of the European Chief Prosecutor (Article 14(3))
- Appointment of the European Prosecutors (Article 16(1))
- Determine number of EDPs (Article 13(2)) and appoint persons (Article 17)
- Appointment of other staff
- Infrastructure in Luxembourg and IT development (CMS)
- Draft internal rules of procedure (Article 21) and other rules (Articles 95, 96(4) and 114)
- Training – internal at EPPO and external in Member States
- Implementing legislation and other measures in Member States