The EPPO and the authorities of non-participating Member States and third states

Proff.ssa Ubertazzi

Jean Monnet Course Coordinator

EPPO

EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Enhanced Cooperation

- 22 EU Member States currently participate in the enhanced cooperation.
- Hungary, Poland and Sweden have decided not to participate in EPPO.
- Denmark and Ireland have an opt-out in the areas of freedom, security and justice.

Judicial Cooperation with Non-Participating Member States is found in Chapter X of Council Regulation 2017/1939

CHAPTER X

PROVISIONS ON THE RELATIONS OF THE EPPO WITH ITS PARTNERS

Article 99

Common provisions

1. In so far as necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union in accordance with their respective objectives, and with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations.

2. In so far as relevant to the performance of its tasks, the EPPO may, in accordance with Article 111, directly exchange all information, with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in this Regulation.

3. For the purposes set out in paragraphs 1 and 2, the EPPO may conclude working arrangements with the entities referred to in paragraph 1. Those working arrangements shall be of a technical and/or operational nature, and shall in particular aim to facilitate cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States.

- Article 99 (1) addresses ‘cooperative relations’ with non-participating member states.

Article 99(3) sets out 'working arrangements' with non-participating member states and third states.

3. For the purposes set out in paragraphs 1 and 2, the EPPO may conclude working arrangements with the entities referred to in paragraph 1. Those working arrangements shall be of a technical and/or operational nature, and shall in particular aim to facilitate cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States.

So how many working arrangements have been concluded with the non-participating Member States?

None as of yet, but they are currently being developed!

The relevance of Article 105 and its two dimensions

The first dimension follows from the general principles on cooperation between the EPPO and its partners in Article 99.

- Paragraph 1 states that 'the working arrangements referred to in Article 99 (3) (…) concern the exchange of strategic information and the secondment of liaison officers to the EPPO'.
- Paragraph 2 allows the EPPO 'to designate, in agreement with the competent authorities concerned, contact points (…) in order to facilitate cooperation in line with the EPPO's needs'.

The second dimension: are non-participating Member States legally obliged to cooperate with EPPO?

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 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 [NPMS].

Two critical questions about 105(3)

1: The first part of the paragraph seems to contain an implicit assumption that judicial cooperation and surrender between the EPPO and NMPS will in fact require the adoption of a separate legal instrument or instruments, something the Member States facing the prospect of staying outside the EPPO were clearly in favour of because they were in need of legal certainty.

2. Paragraph 3 equally obliges the Member States that take part in the enhanced cooperation to notify the NPMS that the EPPO will act as a competent authority in criminal matters falling under the competence of the EPPO.

So then, how do we interpret Article 105(3)?

Both Regulation 2017/1939 itself and the Treaties contain elements which may provide some legal guidance, be it, perhaps, inconclusive.

Starting with the Regulation, recital 110 states:

'Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation.'

It is safe to say that in legal terms it would be very difficult to disagree with this point of departure.

Recital 110

Also lays down that the Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and the 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.

But what about the TEU reference?

Perhaps inadvertently adding to the general confusion, recital 110 intriguingly makes explicit reference to the duty of sincere cooperation in accordance with Article 4(3) TEU,[15] possibly suggesting in the process that NPMS may be under a legal obligation to cooperate with the EPPO to some extent anyhow, regardless of the adoption of a separate instrument or not.

More support for Recital 110?

Article 20(4) TEU states that 'Acts adopted in the framework of enhanced cooperation shall bind only participating Member States', which appears to be in line with the first part of Recital 110.

Article 327 TFEU: 'Any enhanced cooperation shall respect the competences, rights and obligations of [NPMS]. [NPMS] shall not impede its implementation by the participating Member States', which provision seems to derive from the duty of sincere cooperation embodied in Article 4(3) TEU.

Practical implications of Article 105(3)

If Article 4(3) TEU were to prove an inadequate legal basis for providing information or even evidence, which looks like being the case, which alternative legal basis would then need to be used to avoid the risk of evidence being disregarded at the trial stage later on?

The application of EU instruments on mutual recognition

Instruments such as the Directive on the European Investigation Order (EIO)[18] apply the concept of a 'Member State authority competent by virtue of domestic law'.[19] Clearly, the EPPO cannot be considered as such, having been established as an EU body if you like 'by virtue of' EU law. Will a unilateral notification in line with Article 105(3) suffice to bring the EPPO into the realm of the EIO Directive, despite its not being a 'Member State authority competent by virtue of domestic law' per se?

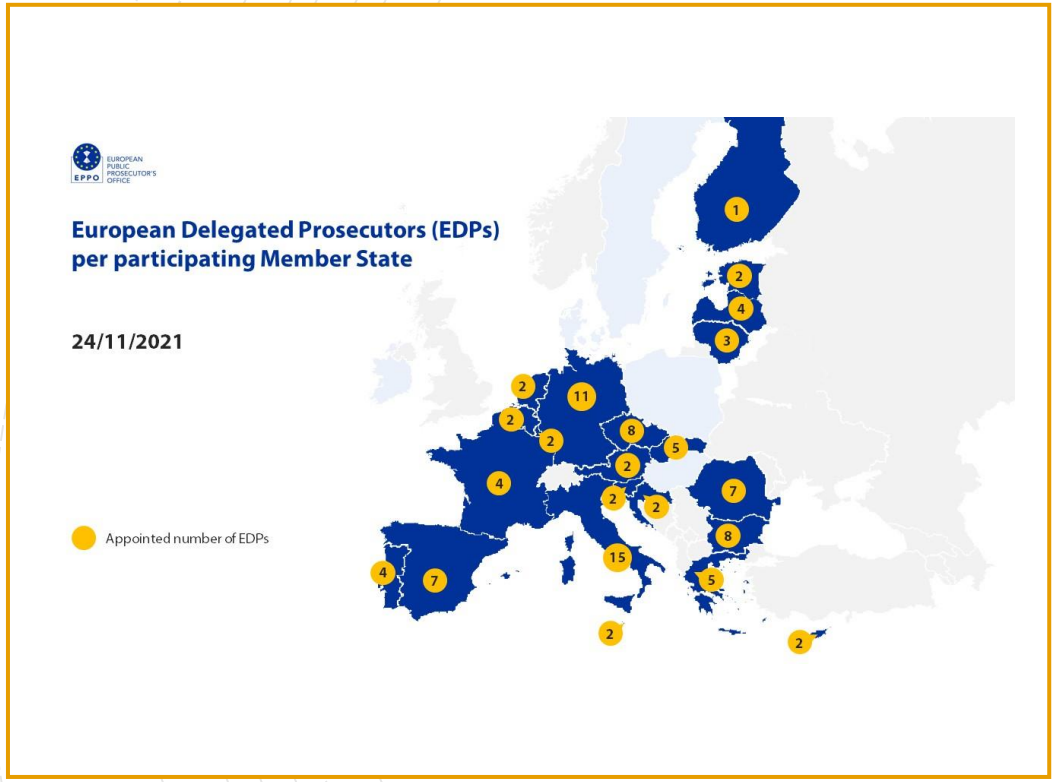
Issues related to the adoption of a separate legal instrument

Thinking back to Article 99(3), which is the legal basis to establish this instrument…

What is the most appropriate legal basis for such an instrument or instruments?

- Article 82(1) TFEU on judicial cooperation in criminal matters in the Union
- Article 86(3) TFEU on regulations in relation to the EPPO as a *lex specialis* or even
- Article 325(4) TFEU on measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union.

Who might be best placed to take the initiative to table the actual proposal or proposals?



Ideally, the Commission would heed the specific invitation from the Council as already contained in the Regulation to reflect on submitting appropriate proposals to ensure effective judicial cooperation in criminal matters between the EPPO and all non-participating Member States.

Another option?

If the Commission were eventually to decide not to table any proposal, Article 76(b) TFEU would enable at least seven Member States to launch their own initiative(s) in this regard[37] but that would be the last resort and not the preferred option.

What is the most suitable legal form to regulate judicial cooperation between the EPPO and the non-participating Member States.

- The working arrangements mentioned in Article 99(3) of the Regulation do not allow for binding provisions on mutual legal assistance and extradition to be included.
- By contrast, cooperation between the EPPO and the competent authorities of the NPMS, insofar as it concerns judicial cooperation and acts which may concern third persons, should be based on binding legal instruments and not only on administrative arrangements.

What does this mean?

- Even though Regulation 2017/1939 does now in fact foresee an interim arrangement concerning future judicial cooperation between the EPPO and the NPMS, this may only be taken as a first step and many legal issues still remain to be addressed.
- It would appear that the only way in which more legal certainty about these points can be achieved is through the adoption of a separate legal instrument or instruments, as the case may be, dealing with at least the most urgent, if not all of the issues identified in this contribution