Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

(JUST/2022/PR/JCOO/CRIM/0004)

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Table of abbreviations

CFREU	Charter of Fundamental Rights of the European Union		
CJEU	Court of Justice of the European Union		
ECP	European Chief Prosecutor		
EDP	European Delegated Prosecutor		
EP	European Prosecutor		
EPPO	European Public Prosecutor Office		
Eurojust	European Union Agency for Criminal Justice Cooperation		
Europol	European Union Agency for Law Enforcement Cooperation		
EU	European Union		
IBOAs	Institutions, bodies, offices and agencies of the EU		
OLAF	European Anti-Fraud Office		
PIF	Protection of the EU's financial interests		
TEU	Treaty on European Union		
TFEU	Treaty on the Functioning of the European Union		
VAT	Value-Added Tax		
AT	Austria	**HR**	Croatia
BE	Belgium	**IT**	Italy
BG	Bulgaria	**LT**	Lithuania
CY	Cyprus	**LU**	Luxembourg
CZ	Czech Republic	**LV**	Latvia
DE	Germany	**MT**	Malta
EE	Estonia	**NL**	Netherlands
EL	Greece	**PT**	Portugal
ES	Spain	**RO**	Romania
FI	Finland	**SI**	Slovenia
FR	France	**SK**	Slovakia

Abstract

This document constitutes the Final Report for the 'Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office' (EPPO) for the European Commission – Directorate-General for Justice and Consumers conducted by Spark Legal and Policy Consulting and Tipik. The objectives of the study are 1) to assess whether the national legislation in the 22 Member States participating in the EPPO is in conformity with Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('EPPO Regulation'), and 2) to deliver a conformity correlation table and a national summary report for each Member State, as well as an overall report assessing the situation for the Member States in their entirety. To achieve this objective, the Study relied on data collected through national desk and field research carried out by a network of national legal experts on the implementation of the EPPO Regulation into their Member States' law. This document provides the results of the abovementioned data collection and presents the results of the assessment of the compliance of national legislation with the EPPO Regulation, looking at the situation per Member State, as well as assessing the situation in the Member States in their entirety.

Executive summary

Introduction

This document constitutes the Final Report for the 'Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO)', (hereinafter: 'the Study') for the European Commission – Directorate-General for Justice and Consumers (hereinafter: 'the Commission') conducted by Spark Legal and Policy Consulting and Tipik, with the support of Key Legal Experts and a network of National Legal Experts (hereinafter: 'the Study Team'). The objectives of the Study are 1) to assess whether the national legislation in the 22 Member States participating in the EPPO is in conformity with Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: the 'EPPO Regulation' or 'the Regulation'),[1] and 2) to deliver a conformity correlation table and a national summary report for each Member State, as well as an overall report assessing the situation for the Member States in its entirety.

EU legal context

The EPPO Regulation was adopted on 12 October 2017 and entered into force in November 2017. It establishes the legal framework in accordance with which the EPPO exercises its functions. The EPPO is the independent public prosecution office of the European Union (hereinafter also referred to as 'EU' and the 'Union'), which is responsible for investigating, prosecuting and bringing to judgement perpetrators of, and accomplices to, crimes affecting the Union's financial interests that are provided for in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter: 'PIF Directive').[2]

The EPPO took up its investigative and prosecutorial tasks on 1 June 2021.[3] With the entry into force of the EPPO Regulation, Member States were required to adapt their national legislative framework in general, and their national criminal justice system in particular, to make these compatible with the Regulation. The EPPO Regulation, albeit binding in its entirety and directly applicable in all Member States, required amendments of national laws to ensure the proper functioning of the EPPO.

The EPPO operates as a single and indivisible Office across all participating Member States. The European Chief Prosecutor (hereinafter: the 'ECP'), the Permanent Chambers, the College, the European Prosecutors (hereinafter: the 'EPs') and the European Delegated Prosecutors (hereinafter: the 'EDPs') are members of the EPPO and operate in the interest of the European Union. The central level is headed by the ECP, together with her/his Deputies (who also exercise functions as EPs), and includes the EPs from the Member States participating in the EPPO. The

[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, available at https://eur-lex.europa.eu/eli/reg/2017/1939/oj (last accessed on 17 July 2023).

[2] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29-41, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1371 (last accessed on 21 December 2022).

[3] Commission Implementing Decision (EU) 2021/856 of 26 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks, C/2021/3763, OJ L 188, 28.5.2021, p. 100-102, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D0856 and https://www.eppo.europa.eu/en/background (last accessed on 21 December 2022).

decentralised level includes instead the EDPs, who are active members of the public prosecution service or the judiciary of their Member States and members of the EPPO at the same time.

The material competence of the EPPO covers three different types of criminal conduct: 1) offences affecting the financial interests of the European Union (hereinafter: 'PIF offences') that are provided in the PIF Directive; 2) participation in a criminal organisation,[4] as long as the focus of the criminal activity of the organisation is the commission of PIF offences; and 3) offences that are inextricably linked to those falling into the first type, provided that the conditions set out in Article 25(3) of the EPPO Regulation are met.[5]

The tasks of the EPPO are to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, offences affecting the financial interests of the Union (as defined in the PIF Directive) and offences inextricably linked to them. The EPPO shall undertake investigations, carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States until the case has finally been disposed of. It is the EDPs who are tasked with carrying out these tasks on the ground, with EPs carrying out the investigations personally in the exceptional circumstances set out in Article 28(4) of the EPPO Regulation.

Methodological approach

To meet the objectives outlined above, with the support of a team of National Legal Experts, data was collected for the 22 participating Member States at the national level to assess the compliance of all relevant national measures with the EPPO Regulation. To this effect, the National Legal Experts completed correlation tables. In the correlation tables, the National Legal Experts gathered the necessary data in their Member State, identifying the relevant legal provisions and providing a detailed assessment, for each relevant provision, on whether the national law complies with the EPPO Regulation. Additionally, the national legal experts were instructed to contact either an EDP or the EP of their Member State for interviews to have a better and more comprehensive overview of the situation in their Member State. Once the correlation tables were completed, the Study Team drafted summary correlation tables for each Member State by inserting the national measures which implement the relevant provisions of the EPPO Regulation. After the finalisation of the correlation tables, the National Legal Experts drafted the national summary reports. The national summary reports provided an overview of the relevant legal framework in the Member States, as well as an overview of the main findings from the correlation table; they also further assessed any compliance issues of the national measures with the EPPO Regulation, providing any potential reasons for the lack of compliance, where available. Furthermore, they detailed the main discussion points from the interviews with the EDP/EP in the Member States. Finally, to validate the soundness of the preliminary results and discuss any preliminary trends identified in the Member States, a validation workshop was held with the Core Team, the Key Legal Experts, the Commission, OLAF, and the EPPO (the Deputy European Chief Prosecutor and the Acting Head of the Legal Service).

The data collected at the national level were then further compared by the Core Team which then carried out an assessment of the situation in the Member States in its entirety, as presented in the present Report. The situation of the Member States with investigative judges or other national

[4] As defined in Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11.11.2008, p. 42-45, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0841 (last accessed on 13 December 2022).

[5] The concept of inextricably linked offences should be considered in light of relevant case law of the CJEU on the principle of *ne bis in idem*. See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=CS (last accessed on 21 December 2022), Recital 54.

authorities involved in investigation and prosecution was examined, comparing the different approaches and assessing the potential overarching issues where these authorities retained prerogatives over EPPO cases. Some specific provisions of the Regulation were chosen to be analysed in depth, in agreement with the Commission, i.e. Articles 4, 6(1), 24(1)-(3), 25(6), 28, 29(1), 39 and 42(2) of the EPPO Regulation. These were identified because they involved one or both of the following: there may be a significant knock-on effect on the EPPO's tasks under the Regulation and/or a majority of Member States were found to not be in full compliance, showing it is a potential concern to the overall functioning of the provision in question. The in-depth analysis involved looking at the underlying context or potential reasons for the lack of compliance, the consequences of this lack of compliance, the similarities across Member States, and some best practices adopted by those Member States found to be in compliance with those provisions.

Compliance issues identified

The Study identified four overarching compliance issues of national law with the EPPO Regulation. These were issues: 1) resulting from the role of investigative judges and other national authorities; 2) related to the independence of the EPPO under Article 6(1); 3) related to the reporting, registration and verification of information under Article 24; and 4) related to the resolution of conflicts of competence under Article 25(6) and the judicial review of such decisions under Article 42(2). As outlined above, these compliance issues are of potential concern since: they may 1) result in a significant knock-on effect on the EPPO's tasks, or 2) the lack of compliance by a majority of Member States may result in a potential concern to the overall functioning of the provision in question.

As well as these four overarching compliance issues, some other compliance issues were identified amongst a limited number of Member States. These issues primarily related to: the appointment and number of EDPs, as per Articles 13(2) and 17;[6] the material competence as per Articles 22 and 23;[7] some specific investigative measures, in particular, Article 30(1)(f) (i.e. tracking and tracing an object by technical means, including controlled deliveries of goods);[8] the reopening of cases under Article 39(2);[9] access to information as per Article 43(1);[10] and financial support and staff as per Articles 96(6) and (7).[11]

Overarching compliance issues resulting from the role of investigative judges and other national authorities

The role of investigative judges and other national authorities in some circumstances may cause overarching issues with regard to the compliance of national law with the EPPO Regulation.

The findings showed that Member States took different approaches regarding the role of investigative judges and other national authorities. Depending on the approach taken, some Member States[12] were found to not be fully compliant where investigative judges and other national

[6] EL, LU, RO (Article 13(2)); IT (Article 17(1)); BG (Article 17(2)) ; SI (Article 17(4)).

[7] FR (Article 22(1)); RO (Article 23).

[8] BE, MT, SI (Article 30(1)); BE, MT (Article 30(1)(a)); MT (Articles 30(1)(b) and (c)); ES, MT (Article 30(1)(e)); BE, IT, MT, PT, SI (Article 30(1)(f)).

[9] BE, EE, HR, IT, NL, RO, SI, SK.

[10] IT, MT.

[11] BE, CY (Article 96(6)); BE, LV (Article 96(7)).

[12] BE, CY, MT, SI.

authorities, in certain cases, retain the powers to investigate or prosecute PIF offences, conflicting with the general objectives and tasks of the EPPO. Pursuant to Article 4, the EPPO shall be responsible for and have all the necessary prerogatives to investigate, prosecute and bring to judgment any PIF offences. Where the pre-existing national laws have not been amended, hence permitting investigative judges and other national authorities to retain their investigative and prosecutorial powers, this could result in the EPPO being unable to conduct investigations and carry out prosecutions. Furthermore, there are questions concerning whether such situations respect the external independence of the EPPO under Article 6(1) – these specific questions are even more pressing when it comes to situations where the investigation and prosecution of EPPO cases are in the hands of administrative authorities that belong to the executive.

With regard to the EPPO's tasks more specifically, the role of the investigative judges and other national authorities in certain Member States[13] could hinder the powers of investigation exercised by the EDPs/EPs, as regulated by Articles 26-33 of the EPPO Regulation. It is clear under Articles 28(1) and 30(1) that the intervention of judges or other national authorities within the investigation of PIF offences is not, per se, a violation of the EPPO Regulation. The EDPs can indeed undertake investigative measures on their own or *instruct* national authorities, such as police investigation services, to undertake such measures (Article 28(1)). In accordance with Article 30(1), they should be able to order or *request* a number of investigative measures listed therein. Furthermore, national courts may exercise control over the investigation carried out by the EPPO, as per Articles 30(5) and 42(1) of the EPPO Regulation. The latter regulates judicial review of EPPO's acts and decisions, which may take place ex-ante, where the EDPs request national authorities to authorise the measure, or ex-post, where the courts review the legality of acts and decisions after their execution or adoption. Hence, a role for judges and other national authorities in the context of EPPO investigations, when limited to the control of some investigative acts, is not, as such, contrary to the EPPO Regulation.

However, compliance issues arise in cases where investigative judges or other national authorities not only exercise some control but take the lead in the investigations and/or have exclusive competence when it comes to the investigation and/or prosecution of PIF offences.[14] There are some instances where the investigative judge/national authority takes the lead in the investigations when specific coercive investigative measures need to be ordered, but also some cases where, for specific types of PIF offences, the EDPs/EPs are unable to undertake any investigative measures regardless of their level of intrusiveness.

To a lesser extent, the role of investigative judges and other national authorities in some Member States[15] may also cause issues with regard to the prosecution and alternative prosecution of EPPO cases under Article 35(1) of the Regulation. It should be noted, however, that the involvement of investigative judges or other national authorities in the prosecution of PIF offences is not necessarily contrary to the EPPO Regulation. As long as the decision to prosecute, refer or dismiss the case is made by the EPPO, Member States are allowed to introduce an intermediate phase prior to trial, during which national authorities review the EPPO's decision. A pre-trial phase aiming at controlling the legality of the decision to prosecute and the admissibility of evidence set out at the national level would not conflict with the Regulation.

[13] BE, MT, SI

[14] BE, MT, SI.

[15] BE, SI.

However, some potential compliance issues are observed when the decision to prosecute, refer or dismiss the case is made by an investigative judge or another national authority. For example, some issues may arise where the customs authorities are the ones leading the investigations, drafting the final investigation report and making a proposal on the decision to prosecute or not. Another potential issue arises where the EPPO can take the decision to prosecute but the EDPs/EP cannot conduct a 'judicial' investigation.[16] This is because there is a risk of the EDP not being able to gather the relevant evidence to complete the investigation, submit a report to the supervising EP and prepare a draft decision on whether to prosecute.

With regard to prosecution, it should also be underlined that the role of investigative judges or other national authorities also may impact the line of command between the central office of the EPPO and the EDPs. Indeed, the Permanent Chamber reviews the proposal of the EDP and takes the final decision. Hence, the positioning of other national authorities, such as customs authorities making the proposal on whether to prosecute, when circumventing or bypassing the EDPs, interrupts this chain of command and, thus, weakens the supervision of the Permanent Chamber in relation to the investigation and prosecution.

To conclude, the role of investigative judges and other national authorities in the Member States may cause compliance issues if this prevents the EDPs/EP from dealing independently with the EPPO's case. These compliance issues are of particular importance as they affect the overall tasks and independence of the EPPO.

Independence: Specific issues identified under Article 6(1)

Article 6(1) provides that the EPPO should be independent. A lack of full compliance with Article 6(1) may have a knock-on effect on the overall execution of the tasks of the EPPO.

Pursuant to Article 6(1) of the Regulation, the ECP, the Deputy ECPs, the EPs, the EDPs, the Administrative Director, as well as the staff of the EPPO, should not take instructions from any person external to the EPPO. However, in some instances, other national authorities maintain their investigative powers which may result in the EDPs/EPs being unable to exercise such powers. As mentioned above with regard to investigative judges and other national authorities, it should be acknowledged that judicial oversight and/or review by a national authority is not necessarily a violation of the EPPO's independence. For example, in a case where a national judge denies an investigative measure requested by an EDP/EP under Article 30(1), this is not an issue of independence provided that the EPPO remains in control of the proceedings. On the contrary, in some Member States, the customs authorities have not only administrative investigative powers and the power to impose administrative sanctions but also the power to investigate and prosecute customs offences. This is problematic since the EPPO is therefore not in a position to lead the investigations and prosecution of PIF offences. Hence, even though the EPPO is not receiving instructions, in some cases, the EPPO is hampered in the exercise of its tasks, and cannot exercise any power or direction over the national authorities. This means that in some circumstances, the EPPO cannot act in the interest of the Union as a whole, as prescribed in Article 6(1) of the Regulation.

In addition to cases where judicial or administrative authorities take the lead in investigations and prosecutions of PIF cases, there are likewise problematic cases where the agreement of other

[16] A 'judicial' investigation corresponds to the investigation normally led by the investigative judge for national offences in cases where intrusive measures should be carried out. As such, in cases where the EDPs/EP cannot conduct a 'judicial' investigation, the range of their investigative prerogatives is limited to the 'pre-trial' investigation, corresponding to less intrusive measures, such as the seizing of objects or obtention of data from public authorities.

national authorities is required before the EPPO can execute its tasks under Article 4 of the Regulation. For example, in some Member States,[17] the law which allows the Prosecutor General or Minister of Justice to impose instructions, commands and orders on prosecutors has not been amended. In these Member States, to date, this law has not been applied in practice; however, there is a risk that the application of such laws would result in the EDPs having to take external instructions which would, thus, compromise their ability to act solely in the interest of the Union.

There are also instances[18] where reporting on the EPPO's tasks, directly or indirectly, to the Minister of Justice is required by national law, which may raise the risk of compromising the independence of the EPPO. The reporting on the EPPO's tasks in such contexts allows the Minister of Justice to potentially exert political influence on the execution of the tasks under Article 4 via their insight into the EPPO's working practices; this may constitute a risk to the EPPO's external independence.

Overall, the independence of the EPPO is crucial for ensuring the proper execution of its tasks under Article 4 of the Regulation. The legitimacy of the EPPO's activities may be undermined where national authorities are involved in the investigations and prosecutions of PIF offences; this is because there is a risk that the personnel of the EPPO will be prevented from acting in the Union's interests. In EPPO cases with a political dimension – for example, those involving corruption of public officials – there is an even greater risk of undermining the EPPO's legitimacy. These issues should be considered in the context of the wider execution of the EPPO's tasks and, thus, the provisions of the Regulation as a whole.

Reporting, registration, and verification of information: Specific issues identified under Article 24

Article 24 of the Regulation regulates the reporting, registration and verification of information. The overarching issues found concern Article 24(1), (2) and (3).

Article 24(1) provides that: '[t]he institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent under applicable national law shall without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Article 22, Article 25(2) and (3).'

In many Member States,[19] national authorities are expected to submit their report to another national authority before reporting to the EPPO. This national authority is most often the national prosecutor's office.[20] In other instances,[21] it is a different national authority, such as the Attorney General or the police. There is a risk in said situations that the national authority could filter out some cases; in addition to this, reporting to another national authority is likely to result in undue delay in informing the EPPO, contrary to the rule laid down in Article 24(1).

Furthermore, there are some dual reporting mechanisms in place in some Member States,[22] namely cases where national legislation, or administrative guidance, provides for two different options of reporting, either directly to the EPPO or through an intermediary. This situation may result in a lack of certainty and also an undue delay in informing the EPPO. Even more problematic are the cases where the national authorities fail to recognise the EPPO's competence and, thus, choose to initiate

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[17] BE, LV, NL.

[18] AT, BE.

[19] BE, CY, CZ, ES, FI, HR, MT, PT.

[20] BE, CZ, ES, FI, and PT.

[21] CY, ES, HR, MT.

[22] BG, RO, LT.

an investigation on PIF cases themselves rather than informing the EPPO. However, it should be noted that such a lack of reporting may not necessarily be in bad faith and instead may result from a lack of awareness on the part of the national authorities as to the material competence of the EPPO.

Article 24(2) provides that: '[w]hen a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence in accordance with Article 22, Article 25(2) and (3), or where, at any time after the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that an investigation concerns such an offence, that authority shall without undue delay inform the EPPO so that the latter can decide whether to exercise its right of evocation in accordance with Article 27.' Article 24(3) provides that: '[w]hen a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence as defined in Article 22 and considers that the EPPO could, in accordance with Article 25(3), not exercise its competence, it shall inform the EPPO thereof.'

The potential compliance issues under Articles 24(2) and 24(3) are mostly the same as those explained under Article 24(1). However, it is worth noting that the issues under Article 24(2) may cause more obstacles in practice. This is because investigative judges and police are not used to handing over their investigative powers to another authority.

To conclude, where Member States require one national authority to submit the report to another national authority before notifying the EPPO, there is a risk that the case could be filtered out if the national authority fails to notify the EPPO of a case for which it could exercise its competence. Direct reporting to the EPPO would instead allow the EPPO to make its own decision on whether the case falls within its competence. In addition, with the additional step of another national authority deciding whether or not to submit the case to the EPPO, there is also the risk of an undue delay in informing the EPPO of a case potentially falling within its competence.

Conflict of competence and judicial review: Specific issues identified under Articles 25(6) and 42(2)

Article 25(6) stipulates that '[i]n the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2), or (3) or Article 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall specify the national authority which will decide on the attribution of competence.'

Article 25(6) should be read in conjunction with Article 42(2) of the Regulation. Article 42(2) provides that: '[t]he 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.'

In almost all the Member States,[23] the competent authority designated to decide on the conflicts of competence between the EPPO and national prosecutors cannot refer the matter to the CJEU for

[23] BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PT, RO, SI.

a preliminary ruling, as it does not amount to a 'court' or 'tribunal'. Most Member States[24] designated a high national prosecutorial body as the competent authority to decide on said conflicts as, traditionally, these are the authorities deciding on the conflict of competences between national prosecutors. However, the choice of such authorities can hardly ensure that the conflict of competence is dealt with with the necessary impartiality, notably when the designated national authority belongs to the same structure as the national prosecution that is directly involved in the conflict.

In some Member States,[25] there is a recourse to the courts against the decision of the competent authority. However, if none of the two parties (the EPPO or national prosecutors), lodge such recourse, no preliminary question will be referred to the CJEU. Moreover, even if recourse is lodged, that does not automatically mean the court will refer a question to the CJEU for a preliminary ruling.

Therefore, non-compliance with Articles 25(6) and 42(2) stems from the fact that the majority of the Member States have designated a higher prosecutorial body as the competent national authority to deal with conflicts between the EPPO and the national prosecution. Such competent national authority – which is not a court or tribunal – cannot lodge a request for a preliminary ruling pursuant to Article 267 TFEU.

Conclusions

The findings of this Study were based on the data collected on the national legal frameworks of the Member States with regard to their implementation of the EPPO Regulation. The Study took into account both the national legislation implementing the Regulation, as well the wider national legal systems, to assess whether the choices made for the implementation of the provisions of the Regulation – including where there was no national implementing legislation and the Member State relied upon direct applicability and/or previous legislation – were in conformity with the EPPO Regulation.

The Study found that the Member States have taken different approaches to implementation. Some Member States chose to implement the Regulation via the introduction of new national procedures, replacing old procedures that would encroach upon the competence, and impede the functioning, of the EPPO. This approach was more common amongst inquisitorial systems rather than adversarial systems.

The different approaches taken to implementation highlight the fact that, despite the direct applicability of the Regulation, the successful functioning of the EPPO Regulation is reliant upon the adaptation of national law.

The Member States were found to be in full compliance with the majority of the provisions of the Regulation. However, some overarching compliance issues were identified in the majority of the Member States.

The first overarching compliance issue identified relates to the independence of the EPPO. Multiple instances were identified where national authorities of a political nature or politically appointed individuals may need to be consulted on matters involving the EPPO. This may result in the personnel of the EPPO being prevented from acting in the interest of the Union. In addition, if there

[24] BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PT, RO, SI.

[25] DE, FI.

is any political influence on the EPPO's activities, this may, as a result, undermine its independence and legitimacy as well as the protection of the financial interests of the Union as a whole.

The second overarching compliance issue identified relates to the reporting. Many instances were identified where national authorities report to other national authorities *before* they report to the EPPO. This may result in delays in the launch of investigations on crimes affecting the financial interests of the Union by the EPPO, or in a worst-case scenario, in cases where national authorities start to investigate such offences – rather than the EPPO – due to the failure to inform the EPPO accordingly. These situations would undermine the EPPO's power to conduct investigations on the PIF offences.

The third overarching compliance issue identified is where decisions on conflicts of competence are made by high-level members of the same authority that is directly or indirectly involved in the conflict itself (e.g. Prosecutor General), which are not a 'court' or 'tribunal' within the meaning of Article 267 TFEU. Hence they cannot lodge a request for a preliminary ruling to the CJEU on any questions regarding the interpretation of the Regulation.

The fourth overarching compliance issue identified involves situations where the EPPO has chosen to exercise its competence, but it may not still fully exercise its tasks due to the remaining conflicting powers of national authorities such as investigative judges or, worse, authorities that are part of the executive branch of government. These situations primarily arise in those Member States where the traditional inquisitorial system was not properly adapted to implement the EPPO Regulation. This issue has a knock-on effect on the compliance of national law with various provisions of the EPPO Regulation.

1. Introduction

1.1. Introduction

This document constitutes the Final Report for the 'Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office' conducted for the Commission by Spark Legal and Policy Consulting and Tipik, with the support of Key Legal Experts and a network of National Legal Experts. This Final Report provides an overview of the findings of the Study and illustrates the methodology and the tasks conducted.

The main objectives of this Study are:

1) To assess whether the national legislation adopted to adapt the national legal systems or the pre-existing national legislation regulating the EPPO's activities in the 22 Member States is in conformity with the Regulation and
2) To deliver a conformity correlation table and a national summary report for each Member State, as well as an overall report assessing the situation for the Member States in their entirety.

As such, this report contains five chapters. The current Chapter 1 introduces the legal context and background relating to the EPPO Regulation. Chapter 2 describes the objectives of the Study and presents the methodology. Chapter 3 provides an overview of the different types of national legal frameworks amongst the Member States participating in the EPPO, and details the role of investigative judges and other national authorities which may impact the compliance of a Member State. Chapter 4 provides an overview of the different compliance issues identified in the Member States with regard to each relevant Chapter of the Regulation, and provides an analysis of some specific compliance issues that were identified for specific Articles. Chapter 5 contains the conclusion of the key findings of the Study.

Finally, Annex I contains a compliance overview for each Member State and Annex II includes a table summary of the compliance of the 22 Member States by Article of the EPPO Regulation.

1.2. Legal context and background

1.2.1. The creation of the EPPO

The establishment of the EPPO is envisaged in Article 86 of the Treaty on the Functioning of the European Union (hereinafter: 'TFEU').[26] Under this Article, even in the lack of unanimous agreement in the Council, nine Member States could establish the EPPO on the basis of enhanced cooperation. In April 2017, sixteen Member States notified their intention to launch such cooperation and four Member States joined the enhanced cooperation procedure later. Finally, in 2018, two more Member States officially requested to join the EPPO.

[26] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (last accessed on 21 December 2022).

The EPPO Regulation was adopted on 12 October 2017 and entered into force in November 2017. It establishes the legal framework in accordance with which the EPPO should exercise its functions. The EPPO is the independent public prosecution office of the Union, which is responsible for investigating, prosecuting and bringing to judgement perpetrators of crimes affecting the Union's financial interests that are provided in the PIF Directive.[27]

Before the EPPO became operational, only national authorities could investigate and prosecute fraud against the EU budget. However, their powers stopped at national borders, whereas existing EU agencies and offices, such as the European Union Agency for Criminal Justice Cooperation (hereinafter: 'Eurojust'), the European Union Agency for Law Enforcement Cooperation (hereinafter: 'Europol') and the European Anti-Fraud Office (hereinafter: 'OLAF'), do not possess the necessary powers to carry out criminal investigations and prosecutions.[28] The EPPO should establish close relationships with these entities based on mutual cooperation within their respective mandates.

The EPPO became operational and assumed its investigative and prosecutorial tasks on 1 June 2021.[29] With the entry into force of the EPPO Regulation, Member States were required to adapt their national legislative framework in general, and their national criminal justice system in particular, to make these compatible with the Regulation. It should be in fact noted that the EPPO Regulation, albeit binding in its entirety and directly applicable in all Member States, required amendments of national laws in order to ensure the proper functioning of the EPPO.

Currently, the EPPO Regulation applies to the 22 participating EU countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, and Spain. With the exception of Denmark, as a result of its opt-out from the Union's Area of Freedom, Security and Justice, the other EU Member States (Ireland, Hungary, Poland, and Sweden) are able to join the EPPO at any time.[30] In 2019, Sweden announced its intention to join the EPPO.

1.2.2. The EPPO

The internal organisation of the EPPO

The EPPO is organised on a centralised and decentralised level as shown in the figure below.

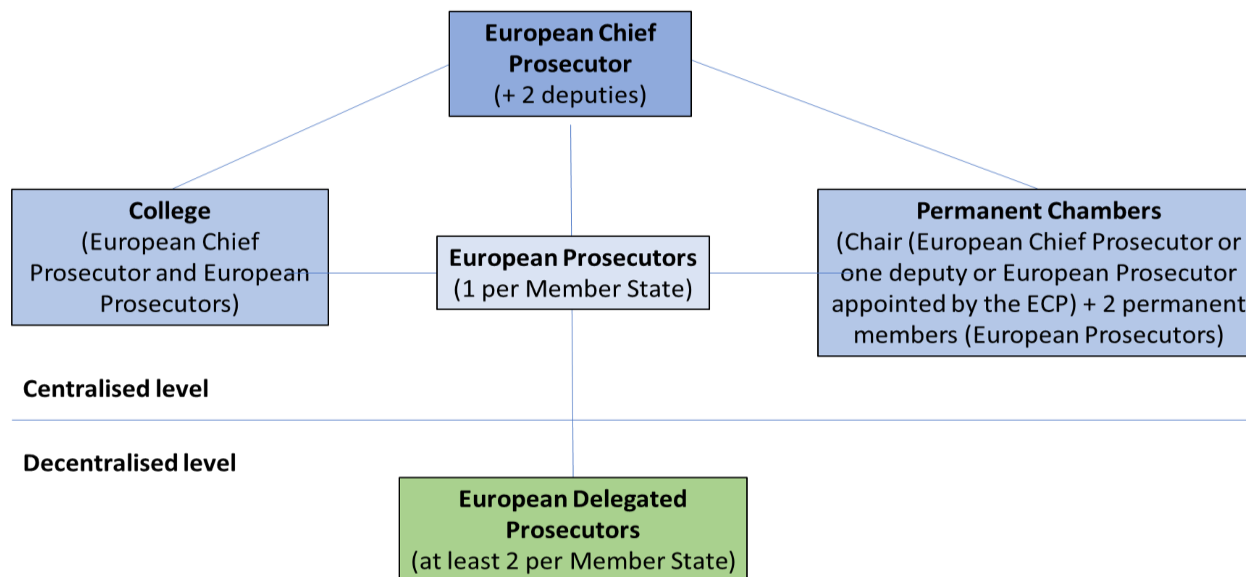
[27] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29-41, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1371 (last accessed on 21 December 2022).

[28] European Public Prosecutor's Office (the EPPO), European Commission, available at: https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office-eppo_en (last accessed on 21 December 2022).

[29] Commission Implementing Decision (EU) 2021/856 of 26 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks, C/2021/3763, OJ L 188, 28.5.2021, p. 100-102, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D0856 and https://www.eppo.europa.eu/en/background (last accessed on 21 December 2022)

[30] The establishment of the European Public Prosecutor's Office, European Commission, Directorate-General for Justice and Consumers, Document 32017R1939, available at: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32017R1939 (last accessed on 13 January 2023).

Figure 1 - Structure of the EPPO



The EPPO operates as a single and indivisible Office across all participating Member States. Therefore, all the EPPO staff included in the figure above fully belong to the EPPO and operate in the interests of the European Union.

The EPPO has a two-tiered, hybrid structure. The two tiers are the central level (which includes, for what is relevant for the purposes of this study, the ECP, the College, the Permanent Chambers, and the EPs and the decentralised level (which includes the EDPs)

The central level is headed by the ECP, together with his/her Deputies (who also exercise functions as EPs), and includes the EPs from the Member States participating in the EPPO. The main work is organised in both the College and the Permanent Chambers.

The ECP heads, organises and directs the work of the EPPO.[31] Their role is of a managerial nature but also encompasses operational aspects; they can chair Permanent Chambers but may also delegate this power to the Deputies or an EP according to the internal rules of procedure.[32] They also represent the EPPO vis-à-vis the European institutions, the Member States and third parties, including giving an account of the general activities of the EPPO.[33]

The EPs are appointed by the Council among three candidates who are nominated by each Member State and interviewed and ranked by a selection panel.[34] There is one EP per Member State. The role of the EPs is to supervise investigations and prosecutions on behalf of the Permanent Chamber in charge of a case. Moreover, they monitor the implementation of the tasks of the EPPO in their respective Member States, in compliance with both national law and the

[31] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=CS (last accessed on 21 December 2022), Article 11(1).

[32] Ibid, Article 10(1).

[33] Ibid, Article 7(2).

[34] Ibid, Article 16(2). See also Article 14(3).

instructions provided by the competent Permanent Chamber.[35] The EPs may give instructions to EDPs handling cases[36] and, under exceptional circumstances, they may carry out the investigation themselves.[37]

The College of the EPPO consists of the ECP and one EP per Member State.[38] The College is chaired by the ECP. Its role is to monitor the strategy and policy activities of the EPPO; adopt decisions on strategic matters; ensure coherence and consistency in prosecution policy; and adopt decisions on general issues arising from specific cases.[39] The College also sets up the Permanent Chambers[40] and appoints EDPs upon the proposal of the ECP.[41] It does not have operational powers and, therefore, cannot take operational decisions in individual cases.

The Permanent Chambers are composed of 4 members. Specifically, there is the Chair (which can be the ECP, one of the Deputies or another EP), 2 EPs as permanent members, and the EP supervising an investigation or prosecution in a specific case as a non-permanent member. Their structure and competences shall take due account of the functional needs of the EPPO.[42] The Permanent Chambers have the duty to monitor and direct investigations and prosecutions conducted by the EDPs in accordance with the EPPO Regulation and shall coordinate investigations and prosecutions in cross-border cases.[43] It is the Permanent Chambers which are responsible for making key operational decisions when investigations are conducted.

The decentralised level includes the EDPs. The EDPs are responsible for conducting investigations.[44] There are at least two EDPs in each Member State[45] and they are nominated by the Member States and appointed by the College upon proposal from the ECP.[46] As active members of the public prosecution service or the judiciary of their Member State and members of the EPPO at the same time, the EDPs may be said to have a 'double hat'.

The PIF Directive and the material competence of the EPPO

The material competence of the EPPO covers three different types of criminal conduct:[47]

- PIF offences that are provided in the PIF Directive, as implemented in national law;

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[35] Ibid, Article 12(1), (5).

[36] Ibid, Article 12(3).

[37] Ibid, Article 28(4).

[38] Ibid, Article 9.

[39] Ibid, Article 9(2).

[40] Ibid, Article 9(3).

[41] Ibid, Article 17(1).

[42] Ibid, Article 10. See also Decision of the Permanent Chambers as adopted by Decision 015/2020 of 25 November 2020 of the College of the EPPO and amended by Decision 085/2021 of 11 August 2021, European Public Prosecutors Office, available at https://www.eppo.europa.eu/sites/default/files/2022-09/2020.015%20-%202021.085%20Consolidated%20version%20Decision%20on%20the%20Permanent%20Chambers.pdf (last accessed on 22 February 2023).

[43] Ibid.

[44] Ibid, Article 13(1).

[45] Ibid, Article 13(2).

[46] Ibid, Article 17(1).

[47] Ibid, Article 22.

- participation in a criminal organisation, as defined in the applicable national law implementing Framework Decision 2008/841/JHA,[48] as long as the focus of the criminal activity of the organisation is the commission of PIF offences; and
- offences that are inextricably linked to those falling into the first type, provided that the conditions set out in Article 25(3) of the EPPO Regulation are met. The concept of inextricably linked offences should also be considered in light of relevant case law of the CJEU on the principle of ne bis in idem.[49]

The material competence of the EPPO mostly concerns PIF offences. The PIF Directive harmonises the definitions, sanctions, and limitation periods of criminal offences against the financial interests of the EU for which the EPPO is competent. The Member States, OLAF, and the EPPO cooperate with each other in the fight against criminal offences affecting the Union's financial interests.

The PIF Directive is binding for all Member States, except for Denmark. The deadline for the Member States – including the ones participating in the EPPO – to transpose the Directive into their national law was 6 July 2019. The Directive provides for the definition of the following offences, which fall within the mandate of the EPPO:[50]

- Fraud affecting the EU's financial interest, including cross-border Value-Added Tax (hereinafter: 'VAT') fraud involving total damages of at least EUR 10,000,000;[51]
- Corruption which damages, or is likely to damage, the EU's financial interests;[52]
- Misappropriation of EU funds or assets by a public official in any way which damages the Union's financial interests;[53] and
- Money laundering which involves property derived from the criminal offences covered by the PIF Directive.[54]

The EPPO is also competent for offences that are inextricably linked to the PIF offences. This is where such offences should be prosecuted in order to allow for an efficient investigation of offences affecting the Union's financial interests.[55] The notion of 'inextricably linked offences' should also be considered in light of the relevant case-law of the Court of Justice of the European Union (hereinafter: 'CJEU').[56] Finally, the PIF Directive does not impose direct corporate criminal liability

[48] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11.11.2008, p. 42-45, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0841 (last accessed on 13 December 2022).

[49] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=CS (last accessed on 21 December 2022), Recital 54.

[50] Mission and tasks, European Public Prosecutor's Office, available at: https://www.eppo.europa.eu/en/mission-and-tasks (last accessed on 6 April 2023)

[51] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29-41, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1371 (last accessed on 21 December 2022), Articles 2(2) and 3.

[52] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=CS (last accessed on 6 April 2023), Article 4.

[53] Ibid.

[54] Ibid.

[55] Ibid, Recital 54.

[56] Ibid.

for the offences that are provided therein. Rather, it is Article 6 which states that Member States have to ensure that legal entities can be 'held liable' for such offences committed 'for their benefit'.[57]

The tasks of the EPPO

The tasks of the EPPO are to investigate, prosecute and bring to judgment the perpetrators and accomplices of offences affecting the financial interests of the Union (as defined in the PIF Directive) and offences inextricably linked to them. The EPPO shall undertake investigations, carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States until the case has finally been disposed of.

It is the EDPs who are tasked with carrying out these tasks on the ground. When carrying out their activities, the EDPs operate in accordance with both the EPPO Regulation and their national law, and in complete independence from their national authorities.[58] However, it should be noted that, in the exceptional circumstances set out in Article 28(4) of the EPPO Regulation, the supervising EP may decide to carry out the investigations personally.[59]

The EPPO shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union (hereinafter: 'CFREU') and respect the basic principles of the rule of law and proportionality.[60] Investigations shall be conducted in an impartial manner and all the relevant evidence shall be sought.[61] The EPPO shall be an independent body, acting in the interests of the Union as a whole, and shall refrain from seeking or taking instructions from any person or entity outside the organisation.[62] Independence is in fact one of the EPPO's most important features, as it is an essential guarantee against abuse of power; the Member States and all the other EU entities shall respect it.[63] Finally, the EPPO shall be accountable to the European Parliament, to the Council and to the Commission for its general activities, and shall issue annual reports.[64]

The institutions, bodies, offices and agencies of the Union (hereinafter: 'IBOAs') and authorities of the Member States shall report to the EPPO any criminal conduct in respect of which it could exercise its competence.[65]

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[57] Robin Lööf: The EPPO and the Corporate Suspect – Jurisdictional Agnosticism and Legal Uncertainties, Eucrim 2020/4, p. 310 – 314, available at: https://eucrim.eu/articles/the-eppo-and-the-corporate-suspect-jurisdictional-agnosticism-and-legal-uncertainties/ (last accessed on 21 December 2022).

[58] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=CS (last accessed 6 April 2023), Articles 26 and 27. See also Structure and characteristics, European Public Prosecutor's Office, available at: https://www.eppo.europa.eu/en/structure-and-characteristics (last accessed on 21 December 2022).

[59] Ibid, Article 28(1).

[60] Ibid, Article 5.

[61] Ibid.

[62] Ibid, Article 6.

[63] Ibid.

[64] Ibid, Article 7.

[65] Ibid, Article 24.

In case the EPPO is informed of a case falling within its competence, it shall initiate an investigation[66] or decide whether to use its right of evocation.[67] Once the EPPO exercises its competence, the national authorities shall refrain from exercising their own competence.[68] In addition, where an offence within the scope of the EPPO's material competence (see Section 1.2.2.ii above) caused or is likely to cause damage to the Union's financial interests of less than EUR 10,000, the EPPO can only exercise its competence if: (a) case has repercussions at the Union level which require an investigation to be conducted by the EPPO, or (b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence.[69] Finally, for inextricably linked offences, the EPPO shall refrain from exercising its competence and refer a case without undue delay to the national competent authorities if: (a) the maximum sentence for a PIF offence is equal or less severe than the maximum sanction for an inextricably linked offence; or (b) there is a reason to assume that the damage caused or likely to be caused by an offence within the EPPO's competence does not exceed the damage caused, or likely to be caused, to another victim.[70]

[66] Ibid, Article 26.

[67] Ibid, Article 27.

[68] Ibid, Article 25(1).

[69] Ibid, Article 25(2).

[70] Ibid, Article 25(3).

2. Methodological approach

2.1. Overview of the tasks

In order to meet the objectives of the Study, our methodology included 3 tasks (in addition to the Inception phase):

- **Task 0** – Inception;
- **Task 1** – Completing correlation tables;
- **Task 2** – Drafting national summary reports and Interim Report;
- **Task 3** – Finalisation.

Task 0 comprised the Inception phase of the Study. As part of this task, the Study Team drafted the Research Protocol and submitted the Inception Report to the Commission. The Inception Report represented the key reference document throughout the Study and contains: (i) the methodology, including a detailed work plan and single overall timetable; (ii) the Research Protocol (including conformity check guidelines); and (iii) an indicative provisional structure for the Final Report, based on the understanding of the research developed during this phase. After the kick-off meeting, which took place on 20 May 2022 and on the basis of the feedback received from the Commission, the Study Team submitted the final version of the Inception Report on 27 June 2022.

Task 1 focused on checking the compliance of all relevant national measures (new or pre-existing) with the EPPO Regulation. Upon completion of the Inception phase and the approval of the Research Protocol by the Commission, the national research was rolled-out in all Member States. As part of this national research, the National Legal Experts, following the instructions of the Research Protocol, gathered all the relevant data at the national level in order to complete correlation tables with the view to assess the compliance of all relevant national measures with the EPPO Regulation. To assist the National Legal Experts with completing the correlation table, at the request of the Commission, the Core Team contacted the EPPO to request the contact details of the most suitable stakeholders (EDPs and/or EPs) for interviews. Once these were received, the National Legal Experts were required to conduct an interview with an EDP or the EP from their Member State in order to have a better and more comprehensive overview of the situation in their Member State. The overall period provided for the experts to complete the national research was from 28 June 2022 to 18 August 2022, hence the findings of the Study present the situation in the Member States regarding the national legal framework as of 18 August 2022.

Once the National Legal Experts completed the correlation table for their respective Member States, the correlation tables were collected and reviewed provision by provision by the Core Team and the Key Legal Experts to ensure quality assurance. Following this review, the National Legal Experts were asked to address any comments. Upon finalisation of the correlation tables, the Study Team drafted the summary correlation tables by inserting all the relevant national measures which implement all the relevant provisions of the EPPO Regulation. The correlation tables for review, together with the summary correlation tables for the 22 Member States which are party to the EPPO, constitute Deliverable 2. The majority of correlation tables for review were submitted to the Commission for their comments by Friday 30 September 2022, with the exceptions of BE, DE, NL (submitted on Friday 8 October 2022), and CY (submitted on Thursday 14 October 2022).71 Following the receipt of the

[71] For those Member States where the correlation tables for review were submitted later, this was done following an agreement between the Core Team and the Commission.

Commission's comments and feedback, the Study Team amended the tables in light of these, submitting the majority of correlation tables for approval by Friday 18 November 2022, with both CZ and RO submitted on Friday 26 November 2022.

Considering the receipt of some final comments after the submission of the correlation tables for approval, the revised correlation tables for approval for 18 Member States were submitted alongside the Draft Interim Report on Friday 13 January 2023.

Task 2 involved producing the summary reports per Member State, summarising the main findings and listing any compliance issues of the national measures with the EPPO Regulation, as well as drafting the (Draft) Interim Report.

After the finalisation of the correlation tables based on the Commission's input, the National Legal Experts drafted the national summary reports, on the basis of the Research Protocol. The national summary reports provided an overview of the main findings from Task 1 on the completion of the correlation tables and listed any compliance issues of the national measures with the EPPO Regulation. Furthermore, they detailed the main discussion points from the interviews with the EDP/EP in the Member States. Once they were submitted, the Core Team reviewed the reports and ensured that all the required information was provided. For those Member States where the correlation tables were submitted alongside the revised Draft Interim Report, the information contained therein was updated in line with the relevant amendments in the revised correlation tables.

On the basis of the information provided in the correlation tables and in the national summary reports, the Study Team drafted the Draft Interim Report which described the methodology applied and reflected all the data collected as part of the correlation tables and the national summary reports. It contained an overview of the situation per Member State, as well as some preliminary findings in relation to horizontal trends across the Member States. The national summary reports (Deliverable 3) and the Draft Interim Report (Deliverable 4) were submitted on Friday 13 January 2023. Both Deliverables were presented during the Interim Report Meeting, which took place on Thursday 26 January 2023 (at the Commission's premises). During the Interim Meeting, feedback for the sake of improvement of the revised Interim Report was given and implemented within the report accordingly.

The validation workshop was held online on Tuesday 14 February 2023[72] with the Core Team, the Key Legal Experts, the Commission, and the EPPO (the Deputy European Chief Prosecutor and the Head of Legal Service). The workshop focused on testing the soundness of the preliminary results and discussing any preliminary trends identified in the Member States. The main discussion points of the workshop were discussed with both the Key Legal Experts and the Commission. Furthermore, the practical issues identified as part of the extension to this Study (please see below) were also discussed to determine the scope of the Articles to be covered. Before the validation workshop, the Draft Interim Report was shared with the EPPO, who provided some comments on its content. Those comments, when relevant for ensuring the harmonised approach throughout the reports, were reflected during the amendment of the Interim Report and the Draft Final Report.

The revised Interim Report and national summary reports were submitted to the Commission on Tuesday 28 February 2023.[73] Some final outstanding comments were addressed with a final revised Interim Report submitted on Tuesday 28 March 2023. The Interim Report was then approved on Thursday 30 March 2023.

[72] Please note that since the Inception Report, the organisation and holding of the workshop has been delayed. Following discussion and agreement between the Core Team and the Commission, this step took place on Tuesday 14 February 2023.

[73] Please note that the revised Interim Report was submitted on Tuesday 28 February instead of Friday 24 February 2023 as provided in the Inception Report. This is in line with the discussions and agreement between the Core Team and the Commission.

Task 3 reported on the overall findings of the Study.

The present Final Report was drafted on the basis of the findings summarised in the Interim Report. The structure of the Final Report was discussed and agreed upon by the Commission and the Study Team. The Final Report assesses both the situation per Member State, as well as the situation in the Member States in its entirety. It also examines the situation of the Member States with investigative judges or other national authorities involved in investigations and prosecutions, comparing the different approaches and assessing the potential overarching issues where these authorities retained prerogatives over EPPO cases. Some specific provisions of the Regulation were chosen to be analysed in-depth, in agreement with the Commission. The provisions of the Regulation chosen were Articles 4, 6(1), 24(1)-(3), 25(6), 28, 29(1), 39 and 42(2). For more detail on why these specific provisions were selected, please see Section 2.2 below. The in-depth analysis involved looking at the underlying context or potential reasons for the Member States' lack of compliance, the consequences of this lack of compliance, the similarities across Member States, and some best practices adopted by those Member States found to be in compliance with those provisions.

The Draft Final Report was submitted on Thursday 6 April 2023. The Core Team presented the Draft Final Report to the Commission during the Final Report Meeting which took place on Monday 24 April 2023 (at the Commission's premises).

Following the incorporation of any feedback from the Commission, the Final Report was submitted by Friday 15 June 2023. For some Member States, the correlation tables and national summary reports were re-submitted to ensure that the information contained therein was in line with the findings of the Final Report.

Since the Inception Report, the Commission requested an extension to this Study which intends to assess some aspects that may impact the 'effectiveness and efficiency of the EPPO and its working practices'. The extension is conducted on the basis of interviews with EDPs/EPs, as well as with the Head of the Operations and College Support Unit at the central level. The specific Articles to be assessed have been agreed upon between the Study Team, the Commission, and the EPPO. This was after taking on board the EPPO's suggestions on which other Articles could be assessed as part of the extension during the workshop held in Task 2. The main deliverable for this extension will be a separate and shorter report that will look at the provisions that may cause problems – the precise content and structure of which will be agreed upon in one of the Core Team and Commission's biweekly meetings.

2.2. The approach to in-depth analysis of specific aspects

As part of the assessment of the situation for the Member States in their entirety, the present Report includes an overview of compliance for each relevant provision of the Regulation, as well as an in-depth analysis of specific aspects. The first specific aspect chosen to be discussed concerns any compliance issues that may potentially result, more generally, from the role of investigative judges and other national authorities. More specifically, Chapter 3 examines the role of investigative judges and other national authorities in investigation and prosecution, comparing the different approaches and assessing the potential overarching issues where these authorities retained prerogatives over EPPO cases.

The other specific aspects concern specific provisions of the Regulation – these provisions are Articles 4, 6(1), 24(1)-(3), 25(6), 28(1)-(2) and (4), 29(1), 39, and 42(2). The in-depth analysis of these provisions can be found in subsections added to Chapter 4, which presents the results of the compliance assessment by Chapter of the Regulation. These provisions were chosen for in-depth analysis as they involved one or both of the following: there is a significant knock-on effect on the EPPO's tasks under the Regulation, or a majority of Member States were

found to not be in full compliance, showing it is a widespread issue. The specific reasons for choosing to analyse each provision in-depth are outlined below:

- A lack of compliance with the tasks of the EPPO under **Article 4** has a knock-on effect on the overall implementation of the EPPO Regulation.
- A lack of compliance under **Article 6(1)** also has a knock-on effect on the tasks under Article 4 of the Regulation; this is due to the concerns that the EPPO's tasks are not conducted independently and may be subject to external influence and instructions.
- The issues resulting from the lack of compliance under **Articles 24(1)-(3)** are two-fold: 1) like Articles 4 and 6(1), a lack of direct reporting to the EPPO will have a knock-on effect on its overall tasks, and 2) a lack of compliance was observed in a majority of Member States, indicating that this is a widespread issue.
- The lack of compliance in almost all the Member States was observed under **Articles 25(6)** and **42(2)**.
- There were two specific compliance issues related to **Article 28**, both of which result in wider implications for the EPPO's ability to conduct its tasks as per the Regulation. Firstly, under Articles 28(1) and (2), certain types of investigations are led by national authorities and not by the EPPO. Secondly, under Article 28(4), the EPs are unable to exercise their tasks in exceptional circumstances as prescribed by the provision.
- **Article 29(1)** was found in full compliance in all the Member States; however, should the immunity not be lifted, particularly serious implications on the EPPO's tasks could follow.
- The issues under **Article 39** result in a knock-on effect on the exercise of EPPO's tasks. For Article 39(1), some national authorities are empowered to make the final decision on whether to dismiss the case. Alternatively, for Article 39(2), many Member States were found not to be in compliance because a court/judge has to approve the reopening of a case on the basis of new facts, or national law prescribes a strict interpretation of the principle of ne bis in idem.

For each specific compliance issue, the Final Report examines any relevant considerations regarding the underlying context of the provisions that may assist the understanding of how these should be implemented by the Member States and, thus, operate in practice. Where relevant (specifically for Articles 24(1)-(3), 25(6), 28(4), 39(1), and 42(2)), best practices adopted by the Member States to address such compliance are presented.

3. Overarching compliance issues: The role of investigative judges and other national authorities

As presented in Section 1.2.2 above, the functioning of the EPPO relies heavily on the national laws on criminal proceedings existing in the participating Member States. As such, this Study reviews and analyses the national legal frameworks relevant to the implementation of the EPPO Regulation. Considering that the EPPO Regulation establishes a prosecutor-centered system, it is worth having a look in particular at the Member States that assign an important role to either investigative judges or other national authorities that are distinct from prosecutors in criminal proceedings. As such, Section 3.1 provides a general overview of the national legal frameworks with regard to such national authorities across the participating Member States, while Section 3.2 focuses on the role given to investigative judges and other national authorities in EPPO cases. Section 3.3 then explains how, in some cases, the role given to investigative judges and other national authorities results in compliance issues affecting the implementation of the EPPO Regulation as a whole.

3.1. Overview of the national legal frameworks in the Member States

The majority of the national systems of criminal procedural law are inherited from the Romano-Germanic civil law model, with, in some instances, influences from other legal systems. This is the case, in particular, with regard to the impact of the common law model on certain participating Member States, such as CY and MT. Under the influence of the Napoleonic civil law model, many Member States traditionally presented an inquisitorial criminal procedure, where an investigating judge has the lead or even the monopoly over the judicial investigation and where the function of the public prosecutor is limited to the mere prosecution. This is contrary to the adversarial system where the public prosecutor, or even the police, lead the investigation under the control of a judge (usually called 'judge of freedoms/liberties') when it comes to coercive investigative measures. In the past half-century, the majority of Member States have shifted towards a more adversarial system. For instance, in DE, the role of the investigative judge was progressively reduced to serious crime cases through several reforms, before being completely abolished in 1974. This is also the case in IT, which adopted a new Code of Criminal Procedure in 1988 establishing a mixed inquisitorial/adversarial system, where the investigation is fully in the hands of the prosecutor. A new Code of Criminal Procedure was also adopted in HR in 2008, shifting the powers of investigation from the investigative judge to the national public prosecutor. In NL, since 2013, the 'examining magistrate' is no longer competent to lead its own investigations but retains a supervisory role. Similarly, today, the majority of the participating Member States (AT, BG, CZ, DE, EE, HR, IT, LT, LV, NL, PT, RO, and SK) present a dominantly **adversarial criminal law system in which criminal investigations and prosecution are led by national public prosecutors** and where an investigative judge only rarely intervenes, e.g. for guaranteeing the protection of fundamental rights during the investigations. For example, in SK, when requested by the national public prosecutor, the search of a house has to be ordered by a 'pre-trial' judge (Article 100 of the Code of Criminal Procedure). In the context of the adaptation of their national legal frameworks to the EPPO Regulation, these Member States generally established that the EDPs (and where relevant the EP) have the same powers as the national public prosecutors for EPPO cases. For instance, in BG, Article 46(3) of the Code of Criminal Procedure states that the functions of the public prosecutor provided for in this code shall also be performed by the EP and the EDPs in accordance with their competence under the EPPO Regulation.

However, some Member States retain a more **inquisitorial approach, where an investigative judge is not only exercising judicial control over the investigations but is actively leading the investigative work and/or decides on the prosecution**. This is the case of BE, EL, ES, FR, LU and SI where investigations of serious criminal offences are mainly led by the investigative judge. In a majority of these Member States (BE, EL, ES, LU, and SI), criminal investigations are traditionally divided into two phases: the 'pre-trial' investigation that does not require intrusive investigative measures and that is fully led by the public prosecutor, and the 'judicial' investigation led by the investigative judge. For example, in LU, judicial investigations are carried out when the following investigative acts are involved: searches and seizures, special surveillance measures, and provisional measures imposed in respect of legal persons. Similarly, in EL, the Code of Criminal Procedure distinguishes between different procedures depending on the type of offence. In relation to the most serious offences, mostly felonies (most of the crimes falling within the EPPO competence would be considered as such), the public prosecutor conducts a preliminary investigation that aims at gathering the necessary evidence to decide whether to launch criminal prosecution or not. In such cases, the prosecutor launches a criminal prosecution by requesting that an investigative judge carry out the 'main investigation', and not by bringing the case to judgement. Moreover, the decision to terminate the investigation is traditionally vested to the 'Judiciary Council' (Articles 308 and 310 of the Code of Criminal Procedure) upon the proposal of the public prosecutor which is not binding. The Judiciary Council is mostly composed of three judges who do not take part in the court that decides on the merit of the case after the case is brought to judgment. The Judiciary Council is competent to decide whether to bring the case to judgement, dismiss a case, or order the investigative judge to continue the investigation if it deems that more investigative measures need to be carried out to obtain more evidence. The Judiciary Council decides to bring the case to judgment when it finds that there is sufficient evidence to support a charge against the accused for a certain act (Article 313 of the Code of Criminal Procedure). Meanwhile, in the case of less serious crimes, the prosecutor has the lead of investigations and decides whether to prosecute a case or not without the involvement of the investigative judge or the Judiciary Council. Under specific circumstances and, in particular, in the case where restrictive measures can be imposed, the public prosecutor may order the investigative judge to carry out the main investigation even for less serious crimes (misdemeanours). In turn, in FR, the most serious and complex cases are investigated by the investigative judge. It is worth noting that the French investigative judge can intervene exclusively upon the national prosecutor's request and cannot start investigations on its own initiative (Article 80 of the Code of Criminal Procedure). It should also be noted that in these systems when the investigation is led by the public prosecutor, the latter also requires specific authorisations from the investigative judge in several instances.

It is interesting to note that in two of these countries (BE and SI), legislative reforms have proposed to shift towards more adversarial systems with limited functions for the judge in criminal investigations. In BE, the draft bill issued in 2020 aimed at introducing a single prosecutor-led criminal investigation procedure in which the prosecutor would only request authorisation from the judge for coercive investigative measures.[74] This is still under review by the Parliament and has not been adopted yet. A similar reform was proposed in 2008 in SI and has not been implemented to date.

Other Member States present systems where criminal investigation and prosecution are not only led by public prosecutors. This is the case of MT, which combines elements of both civil and common law systems, forming a 'hybrid' structure. Maltese legislation provides for the police, or any other law enforcement agency, to investigate. On the other hand, both the Attorney General, taking the role of a public prosecutor, and the Executive Police have the

[74] Proposition de Loi contenant le Code de procedure pénale (Draft bill concerning the Criminal Procedural Code), 11 May 2020, available at: https://www.dekamer.be/FLWB/PDF/55/1239/55K1239001.pdf (last accessed on 28 November 2022).

power to prosecute. For the investigation of offences falling within the jurisdiction of higher courts, national law requires an 'inquiring magistrate' to conduct an independent investigation. The inquiring magistrate instructs the police's investigation, receiving, analysing, sieving and filtering the evidence to decide whether there are enough grounds for indictment. Once the investigation is complete, if there is sufficient evidence, the case is sent to the Attorney General who instructs the Executive Police to conduct the prosecution. In CY, which presents a similar common law system, the Attorney General of the Republic can instruct the police to investigate an offence and has power, exercisable at their discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings. Such power may be exercised by the Attorney General in person or by their subordinated police officers acting under and in accordance with their instructions. As such, the Attorney General can take an important role in the investigation. It can be also noted that in FI, pre-trial investigations are generally led by senior police officers, rather than public prosecutors, but the prosecutor does participate in the investigation. Once this investigation is complete, the police submit their pre-trial investigation report to the prosecutor who decides whether or not to bring charges.

Lastly, in some Member States, **specific criminal procedure rules apply to certain types of offences**. This is the case for custom-related offences in BE, FR and NL. In these countries, customs authorities do not only have administrative investigative powers and the power to impose administrative sanctions, but they also have the judicial power to investigate and prosecute customs offences. For example, in NL, tax and customs authorities do not operate under the direction of the national prosecutor in criminal investigations and they are not obliged to report to the latter. In their substantive field, they have the equivalent and exclusive powers of a public prosecutor, both in relation to judicial investigation and prosecution.

3.2. The role of investigative judges and other national authorities in EPPO cases

In the context of the implementation of the EPPO Regulation, various approaches have been observed in the Member States that, prior to its entry into force, traditionally attributed functions to investigative judges and other national authorities in criminal proceedings. The different ways national legal frameworks have been amended to combine such roles with the prerogatives of the EPPO are presented in this section.

Firstly, some of these Member States (ES, FR, LU, and NL) chose to considerably **reduce or exclude the role of the investigative judge or other national authorities within the investigation and prosecution of PIF offences**. As mentioned in Section 3.1 above, in the Member States where investigations are always led by national prosecutors, legislation was generally amended to provide that EDPs/EP have the same prerogatives. In ES, FR and LU, in turn, specific provisions were introduced to ensure that EDPs/EP have the same prerogatives as national prosecutors, as well as investigative judges, where relevant. This is the case in ES, where the Organic Law 9/2021 introduced a new prosecutor-led criminal procedure for the investigation and prosecution of offences falling under the competence of the EPPO, in opposition to the traditional investigative judge-led procedure. As such, Spanish legislation ensures that the EDPs, as well as the EP, acting on behalf of the EPPO are invested with the powers of investigating, carrying out acts of prosecution and exercising the function of a prosecutor, and/or of an investigative judge, where relevant, in all the competent national courts. Furthermore, in FR, the Code of Criminal Procedure was amended to provide that EDPs have the power to investigate and prosecute PIF offences and, as such, are given the same prerogatives as national prosecutors or investigative judges in cases where the latter would normally be competent regarding national cases. Indeed, for the investigations of the most serious cases, which are traditionally conducted by the investigative judge, Articles 696-

113 to 696-128 of the French Code of Criminal Procedure give extended prerogatives to the EDPs, which are wider than those of French public prosecutors, and encompass the investigating judges' powers. Similarly, in LU, the prerogatives of the EDPs and the EPs regarding the investigation and prosecution of PIF offences were also introduced in the Code of Criminal Procedure and the role of the Luxembourgish investigative judge has been limited to the control of the legality of certain investigative measures. While Article 136-4 provides that the EDPs shall exercise the powers of national prosecutors, an additional Article 136-9 was introduced in the Code of Criminal Procedure to clarify that 'where the EPPO has decided to exercise its jurisdiction, the EDP shall, in accordance with the law, carry out all the investigative acts they deem useful for establishing the truth.' Furthermore, this provision clearly states that Article 49 of the Code of Criminal Procedure does not apply to offences within the jurisdiction of the EPPO for which the EDP has decided to exercise jurisdiction. Article 49 relates to the mandatory opening of a judicial investigation led by the investigative judge, for certain investigative measures.

Moreover, with regard to the role of tax and customs authorities, the NL introduced specific provisions in the General Customs Act to instruct these authorities to hand in their reports to the EDPs in cases of offences falling within the EPPO's competence. As such, Dutch legislation ensures that the EPPO possesses the necessary powers to investigate and prosecute custom-related PIF offences. In FR, the Code of Customs was amended to provide that EDPs, when investigating and prosecuting custom-related EPPO cases, may conduct investigations in accordance with the provisions of this Code (Article 344-2 of the Code of Customs). Article 344-1 provides that custom-related PIF cases shall be reported to the EDPs, in accordance with Article 24 of the EPPO Regulation.

Alternatively, other Member States (BE, CY, EL, MT, and SI) took a rather more minimalistic approach with regard to the adaption of their national system to the EPPO Regulation and **maintained an important role for investigative judges or other national authorities for the investigation and prosecution of PIF offences, alongside the prerogatives attributed to the EDPs/EP**. In BE, pursuant to Article 79 of the Judicial Code, the dual system of criminal investigations either led by prosecutors or the investigative judge is also applicable to EPPO cases. As such, the investigations of the PIF offences that require intrusive investigative measures, as per Articles 55 and 56 of the Belgian Criminal Procedural Code, are led by the investigative judge, and not by the EDPs/EP. In this case, the investigative judge acts independently in order to gather exculpatory and incriminatory evidence, and the EDPs/EP are excluded from the procedure and receive the criminal file only once the investigation has been completed. At this stage, the EDPs/EP may request additional investigative measures to be conducted but the investigative judge retains the discretionary power to conduct the investigation. In this context, BE appointed specialised investigative judges to deal with the investigation and prosecution of EPPO cases. With regard to less intrusive investigative measures, the EDPs/EP can conduct the 'pre-trial' investigations but have to request authorisation from the investigative judge for certain measures, such as entering a person's domicile, and, on this occasion, the investigative judge has the discretional power to take the control of the whole investigation (Article 28 septies of the Criminal Procedural Code). Moreover, the powers of the Belgian customs authorities are also maintained with regard to the investigation and prosecution of customs-related PIF offences. Hence, for customs-related offences, the EDPs/EP cannot initiate the criminal proceedings and, while they can cooperate and discuss with customs authorities, they do not have the lead in the investigations and do not make the final decision on prosecution. A paper prepared by a group of legal scholars for the Belgian government[75] in 2021 sheds some light on the potential reasoning behind the

[75] See A.-L. Claes, A. Werding and V. Franssen, "The Belgian Juge d'Instruction and the EPPO Regulation: (Ir)reconcilable?" European Papers, vol. 6, No. 1, 2021, available at:

adaptation. In particular, it is argued that the EPPO was created as an organisation that must operate within the national legal framework of the Member States without requiring them to change the way in which their criminal investigations are organised. Moreover, the approach regarding customs-related offences seems to be justified by the customs authorities' pre-existing autonomy and the specificities of the customs legal framework, which the EDPs or EP are not familiar with.

As described in Section 3.1 above, SI presents a similar dual system of investigations, divided between those led by the investigative judge and those led by the public prosecutor. In the context of the adaptation of its system to the EPPO Regulation, SI chose to completely exclude the investigation traditionally led by investigative judges from the prerogatives of the EDPs/EP. Pursuant to Articles 165.a(1) and 170(6) of the Criminal Procedure Act, the 'judicial investigation', normally led by the investigative judge for national offences in cases where intrusive measures should be carried out, is not conducted in the context of proceedings under the EPPO Regulation, and the EDPs/EP should file an indictment without such prior investigation. A judicial investigation cannot even be opened by the investigative judge in EPPO cases. It results that the range of investigative prerogatives of the EDPs/EP is limited to the 'pre-trial' investigation, corresponding to less intrusive measures, such as the seizing of objects or obtention of data from public authorities. It should be noted that, in the context of the 'pre-trial' investigation, pursuant to Article 165.a of the Criminal Procedure Act, the EDPs/EP can still ask the investigative judge to execute certain investigative measures, such as the hearing of witnesses.

In EL, Articles 4 and 7 of Law 4786/2021 provide that the EPPO is responsible for investigating, prosecuting and bringing to judgment EPPO cases and give EDPs the same prerogatives as national prosecutors. However, as mentioned above, pursuant to Article 243 of the Code of Criminal Procedure, national public prosecutors are competent only in the context of preliminary investigations led for serious criminal offences and for the investigation of non-serious offences. Moreover, national law provides that the Judiciary Council 'decides to refer the accused to the hearing of the competent court, when it finds that there is sufficient evidence to support a charge against him for a certain act'. The legislation does not provide explicitly that the provisions regarding the powers of the investigative judge and the Judiciary Council do not apply to investigations falling within the EPPO's competence. Hence, depending on the seriousness of the offence, the investigations of PIF cases may also be fully led by investigative judges, instead of the EDPs/EP and the decision to prosecute, refer or dismiss the case is out of their control.[76]

In addition to the Member States that give an important role to investigative judges, MT presents a similar situation with regard to the role of the inquiring magistrate. As stated above, inquiring magistrates, as part of the Court of Magistrates, lead the investigation of offences that fall within the jurisdiction of a higher tribunal, which is the case for the offences within the

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https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2021_1_7_Articles_SS1_2_ALaura_CAWerding_VFranssen_00473.pdf (last accessed on 28 November 2022). A.L. Claes and Vanessa Franssen, "When EPPO meets customs: A clash of enforcement strategies and procedural safeguards?" Jean Monnet Network on EU Law Enforcement Working Paper Series No. 09/22, p.14 available at: https://jmn-eulen.nl/wp-content/uploads/sites/575/2022/05/WP-Series-No.-09-22-When-EPPO-meets-customs-A-clash-of-enforcement-strategies-and-procedural-safeguards-Claes-Franssen.pdf (last accessed on 28 November 2022).

[76] Please note that, after the temporal scope of the national research, Law 5026/2023 was passed on 28th February 2023. In particular, articles 48 to 57 of Law 5026/2023 amended Law 4786/2021 and reduced the role of investigative judges and the Judiciary Council in the context of EPPO proceedings. Greek investigative judges are competent to authorise pre-trial detention and to review indictments. The Judiciary Council does not intervene anymore with regard to the decision to prosecute from the Permanent Chamber. See ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 5026, Υποβολή των δηλώσεων περιουσιακής κατάστασης (πόθεν έσχες) και οικονομικών συμφερόντων – Ρυθμίσεις για την ενίσχυση της Ευρωπαϊκής Εισαγγελίας – Λοιπές επείγουσες ρυθμίσεις. (Law 5026/2023 on Submission of declarations of assets (whereabouts) and financial interests – Arrangements to strengthen the European Public Prosecutor's Office – Other urgent arrangements), available at https://ministryofjustice.gr/wp-content/uploads/2023/03/Nomos_5026_2023.pdf (last accessed on 31 May 2023).

competence of the EPPO. Maltese legislation has not been adapted to grant the prerogatives of the inquiring magistrate to the EDPs/EP when investigating PIF offences. This is all the more problematic because, pursuant to the Maltese Constitution, the inquiring magistrates act independently and their investigations are deemed to remain secret. As a result, EDPs/EP do not even have access to the investigation before the inquiring magistrate considers it finalised, which causes additional delays. However, it may be noted that, with regard to prosecution, Article 628D (1) and (2) of the Criminal Code provides that EDPs have the same powers than the Attorney General and the Executive Police.

Furthermore, the role of the Attorney General in CY is less severe than in the other Member States, but may still pose a risk to the EDPs/EPs competence to investigate and prosecute PIF offences. In CY, Article 5(2) of Law 2(I)/2021 mentions that EDPs lead the criminal investigation. However, the discretionary powers granted to the Attorney General by Article 113 of thConstitution have not been amended to adapt to the EPPO competence for the investigation and prosecution of PIF offences – it should be noted, however, that Article 2(2) of the Cypriot Constitution maintains that no provision shall be deemed as invalidating the primacy of EU law. Therefore, it is considered that the Attorney General must facilitate the work of EDPs/EP as they are conducting their tasks. Nevertheless, there is the chance that the Attorney General could exercise their investigative and prosecutorial powers to the detriment of the EDPs/EPs. In light of this risk, there is currently a legislative proposal pending in the Cypriot House of Representatives aiming to clarify that the Attorney General shall relinquish their powers in the cases within the EPPO's competence.

3.3 Overarching compliance issues resulting from the role of investigative judges and other national authorities

In light of the above, it appears that the approaches taken by several Member States with regard to the role of investigative judges and other national authorities **cause overarching issues with regard to the implementation of the EPPO Regulation**.

First of all, the fact that, in certain cases, investigative judges and other national authorities retain the powers to investigate or prosecute PIF offences, **conflicts with the general objectives and tasks of the EPPO**, as defined by the EPPO Regulation. Even though all participating Member States grant investigative and prosecuting powers to the EDPs/EP, pursuant to **Article 4**, the EPPO shall be responsible for and have all the necessary prerogatives to investigate, prosecute and bring to judgment any PIF offences. A lack of compliance of national law with the EPPO Regulation has been identified in the cases of BE, CY, EL,[77] MT and SI, as described above. Indeed, the lack of adaptation of the pre-existing legal systems in these countries may lead to a high number of EPPO cases that cannot be investigated or prosecuted by the EPPO. Furthermore, the role that investigative judges and other national authorities are taking within the investigation and prosecution of EPPO cases in certain cases generally questions the external independence of the EPPO, pursuant to Article 6(1), in these countries. This is the case, in particular, where the investigation and prosecution of EPPO cases are in the hands of administrative authorities that belong to the executive. See Section 4.1.3 below for further information on the issues regarding the independence of the EPPO.

With regard to the EPPO's tasks more specifically, the role of the investigative judges and other national authorities in certain Member States **hinders the powers of investigation of**

[77] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

the EPPO exercised by the EDPs/EPs, as described under Articles 26-33 of the EPPO Regulation. In particular, pursuant to **Article 28(1),** the EDPs can either undertake the investigation measures on his/her own or instruct the competent authorities in his/her Member State. Additionally, **Article 30(1)** lists a number of investigative measures which Member States shall ensure that the EDPs are entitled to order or, at least, request. In this regard, it should be noted that Article 28(1) mentions that investigations shall be conducted in accordance with national law and Recital 15 states that the EPPO Regulation 'is without prejudice to Member States' national systems concerning the way in which criminal investigations are organised.' Hence, it should be reminded that the intervention of investigative judges or other national authorities within the investigation of PIF offences is not, per se, in contradiction with the Regulation. The EDPs can of course order national authorities (such as police investigation services) to execute investigative measures and request other authorities, such as investigative judges, to order/authorise such measures. Beyond this aspect, national court authorities may also exercise control over the investigation carried out by the EPPO. Indeed, **Article 30(5)** provides that 'the EDPs may only order the [investigative] measures […] where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective' and clarifies that 'the procedures and the modalities for taking the measures shall be governed by the applicable national law.' Additionally, according to Recital 88, the EPPO Regulation 'does not exclude the possibility for national courts to review the validity of the procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law.' This idea is also enshrined under **Article 42(1)** of the EPPO Regulation, with regard to judicial review. Indeed, judicial control may take place ex-ante, where the EDPs request national authorities to authorise the measure, or ex-post, where the courts review the legality of investigative acts after their execution.

Hence, the role of investigative judges and other authorities, when limited to the control of certain investigative acts, is not contrary to the EPPO Regulation. This is the case for example in FR, where the 'judge of liberties and detention' is an independent and impartial judge who intervenes when the fundamental rights of a person are likely to be affected in the course of an investigation. As per Articles 696-113 to 696-128 of the French Code of Criminal Procedure, the judge of liberties and detention is competent to authorise or review certain investigation acts performed by the EDPs/EP, in particular when involving pre-trial detention. In ES, the 'judge of guarantees' assumes a similar role and must authorise the investigative measures that may affect fundamental rights, such as interception of communications or entry and search of a domicile (Article 42(1) of the Organic Law 9/2021). The same applies in LU with the investigative judge. In this context, it should be clarified that the Luxembourgish judges are entitled to control the legality of the investigative measures under national law, and not their opportunity or proportionality. This is explicitly stated in Article 136-48(3) of the Code of Criminal Procedure. Therefore, the lead of the investigation stays in so far with the EDPs/EP. Furthermore, in these Member States, the decision of the judge ordering or refusing the requested measure may be appealed against by the EDPs/EP (or any person concerned).

However, compliance issues appear in cases where investigative judges or other authorities not only exercise some control but **take the lead in the investigations and have exclusive competence when it comes to the investigation and/or prosecution of certain PIF offences or the use of certain coercive measures.** In light of the description of the national legal frameworks made above, such issues have been observed in BE, EL,[78] MT and SI. Depending on the type of investigation, the investigative judge (in BE, EL, SI), the inquiring magistrate (in MT) or customs authorities (in BE) are taking the lead in the investigations of

[78] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

PIF offences. These systems stem from the idea of an impartial judge being in charge of the investigation to ensure the protection of fundamental rights and liberties and, hence, generally apply to the most intrusive coercive investigative measures, during which there are higher risks for the rights of the accused or the witnesses. For example, in MT, the inquiring magistrate will take the lead in investigations when the following investigative measures are required: the search of premises, land, means of transport, private home, clothes and any other personal property or computer system; obtaining the production of stored computer data; or the interception of electronic communications. This also consequently results in Maltese legislation not being in accordance with **Article 30(1)(a),(c),(e)** of the EPPO Regulation. It should be also highlighted that in the case of BE, the types of investigative measures that are excluded from the EPPO's powers are not only determined by the level of intrusiveness or seriousness of the offence but also depend on the type of offence. Indeed, as explained above, EDPs/EP cannot undertake any investigative measures (even the least intrusive ones) with regard to customs-related PIF offences.

Additionally, it should be noted that, when investigations are led by investigative judges or other national authorities, it impacts the prerogative of the EP to conduct the investigations personally, pursuant to **Article 28(4)** of the Regulation (see further information under Section 4.4.1.2 below).

To a lesser extent, the role of investigative judges and other national authorities in certain Member States also **causes issues with regard to the prosecution and alternative to prosecution of EPPO cases**. As per **Article 35(1)** of the EPPO Regulation, 'when the handling EDP considers the investigation to be completed, they shall submit a report to the supervising EP, containing a summary of the case and a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure.' In turn, the supervising EP forwards those documents to the competent Permanent Chamber, which takes the decision to either prosecute, refer or dismiss the case, apply a simplified prosecution procedure or reopen the investigation, in line with **Article 10(3)** of the Regulation. Recital 78 furtherly indicates that '[t]his Regulation requires the EPPO to exercise the functions of a prosecutor, which includes taking decisions on a suspect or accused person's indictment and the choice of the Member State whose courts will be competent to hear the prosecution. The decision whether to indict the suspect or accused person should in principle be made by the competent Permanent Chamber on the basis of a draft decision by the European Delegated Prosecutor, so that there is a common prosecution policy.'

Following the considerations made above with regard to the investigation, it should be considered that the involvement of investigative judges or other national authorities in the prosecution of PIF offences is not necessarily contrary to the EPPO Regulation. As long as the decision to prosecute, refer or dismiss the case is made by the EPPO, Member States are allowed to introduce an intermediate phase prior to trial, during which national authorities review the EPPO's decision. As specified in Recital 66 of the EPPO Regulation, the 'EPPO should be guided by the legality principle, whereby the EPPO applies strictly the rules laid down in this Regulation relating in particular to competence and its exercise, the initiation of investigations, the termination of investigations, the referral of a case, the dismissal of the case and simplified prosecution procedures.' Moreover, according to Recital 81, '[t]aking into account the legality principle, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground bars prosecution, or where no simplified prosecution procedure has been applied.' In light of this, a pre-trial phase aiming at controlling the legality of the decision to prosecute and the admissibility of evidence set out at the national level would not conflict with the Regulation. For example, in PT, the Code of Criminal Procedure foresees a facultative pre-trial phase that is intended for a judicial confirmation of the decisions of the EDPs/EP to prosecute, refer or dismiss the case. This phase does not grant any discretionary powers to

the judge to determine whether the EPPO can proceed with the indictment but is limited to reviewing whether there is sufficient evidence.

However, compliance issues are observed when **the decision to prosecute, refer or dismiss the case is made by an investigative judge or another national authority**. In particular, the national legal frameworks in BE, EL[79] and SI were found not to be in full compliance with Article 35(1) of the EPPO Regulation. In BE, for customs-related PIF offences, the customs authorities are the ones leading the investigations and are also drafting the final investigation report and making a proposal on the decision to prosecute or not. The EDPs/EP are not bound by this proposal but are, nonetheless, in a difficult position to overrule such a proposal as they are not leading the investigations. In SI, while the EPPO can, in theory, take the decision to prosecute, this power is hindered by the fact that EDPs/EP cannot conduct a 'judicial' investigation. Indeed, considering the very limited investigative powers granted to the EDPs/EP, there is a risk of the EDP not being able to gather the relevant evidence to complete the investigation, submit a report to the supervising EP and prepare a draft decision on whether to prosecute. If such a report is not prepared by the EDP, the Permanent Chamber will not be in a position to decide on the prosecution, hence conflicting with the Regulation. Moreover, in EL, the lack of compliance results from the authority of the Judiciary Council to make the decision on whether to prosecute before a national court or to consider the referral of the case, dismissal, or simplified prosecution procedure.[80] With regard to prosecution, it should also be underlined that the role of investigative judges or other national authorities also **impacts the line of command between the central office of the EPPO and the EDPs**. Indeed, the Permanent Chamber reviews the proposal of the EDP and takes the final decision. Hence, the positioning of other national authorities, such as customs authorities proposing whether to prosecute, when circumventing or bypassing the EDPs, interrupts this chain of command and, thus, weakens the supervision of the Permanent Chamber in relation to the investigation and prosecution.

To conclude, the role of investigative judges and other national authorities in some Member States is causing issues when they prevent the EDPs/EP from dealing independently with EPPO cases, i.e. by circumventing their power to lead investigations and/or take the final decision with regard to prosecution. These compliance issues are of particular importance as they affect the overall tasks and independence of the EPPO. These situations, resulting from the role of the investigative judges and other national authorities, can be explained by the national criminal law systems in place prior to the implementation of the EPPO. However, it should be noted that other Member States, that initially presented similar inquisitorial systems, have taken different national legislative approaches to adapt to the EPPO Regulation, resulting in compliant systems. Hence, solutions exist to ensure the proper implementation of the EPPO's prerogatives within national criminal proceedings usually led by investigative judges or other national authorities.

[79] Ibid.

[80] Ibid.

4. Compliance issues by Chapter of the EPPO Regulation

This Chapter will discuss the compliance issues observed amongst the Member States for each relevant chapter of the EPPO Regulation. The relevant chapters covered are Chapters II, III, IV, V, VI, VIII, IX, and XI. Under each Chapter, an overview of the situation in the Member States will be provided in relation to the compliance of national law with those Articles of the Regulation where data was collected. The Chapter will also provide an in-depth analysis of the specific compliance issues identified for Articles 4, 6(1), 24(1)-(3), 25(6), 28(1), (2) and (4), 29(1), 39(1) and (2), and 42(2).

4.1. Chapter II – Establishment, tasks and basic principles of the EPPO

4.1.1. Overview across the 22 Member States

This section will discuss the compliance issues and trends observed amongst the Member States in relation to Chapter II on the establishment, tasks and basic principles of the EPPO. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 4, 5(4)-(6)** and **6(1)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of partial or non-compliance in each Member State.

The subsequent Sections 4.1.2 and 4.1.3 will provide an in-depth analysis of the specific issues identified under **Articles 4** and **6(1)** of the Regulation respectively.

Table 1 – Chapter II on the establishment, tasks and basic principles of the EPPO – Overview of the compliance status per Member State

Member State	Chapter II provisions				
	Art. 4	Art. 5(4)	Art. 5(5)	Art. 5(6)	Art. 6(1)
AT					
BE					
BG					
CY					
CZ					
DE					
EE					
EL					
ES					
FI					
FR					
HR					
IT					
LT					
LU					
LV					
MT					
NL					
PT					
RO					
SI					
SK					

Article 4 outlines the tasks and responsibilities of the EPPO, specifically, that the EPPO shall undertake investigations, carry out acts of prosecution and exercise the functions of a prosecutor in the competent courts of the Member States until the case has been finally disposed of. The laws of six Member States (CY, EL, FI, FR, LU, and NL) were found to be of partial compliance and three Member States (BE, MT, and SI) were found to be in non-compliance with the EPPO Regulation.

In these Member States, issues have been identified in relation to the role that national authorities take in the investigation or prosecution of PIF cases, the limitations posed on the EDPs/EP to represent the EPPO before higher national courts, as well as difficulties relating to the EP's prerogatives as per Article 28(4) of the Regulation. For a detailed analysis of these compliance issues under Article 4, see Section 4.1.2 below.

Article 5 concerns the basic principles of the activities of the EPPO. Article 5(4) specifically lays down the requirements of impartiality of the EPPO's investigations and its duty to seek all relevant evidence, whether inculpatory or exculpatory. Under this sub-Article, the laws of three Member States were found to be in non-compliance (BE, MT and SI). The laws of BE, MT and SI were found to be in non-compliance due to the EDP/EP's inability to conduct their own investigation in some cases (BE and MT) and the EDP/EP's lack of power to initiate and/or conduct prosecutorial investigations (SI). I

Article 5(5) prescribes the EPPO to open and conduct investigations without undue delay; under this Article, the laws of three Member States were found to be in partial compliance (BE, MT, and SI). BE, MT, and SI have similar issues resulting from the existence of an investigative judge (BE and SI) or inquiring magistrate (MT) whose power conflicts with the EPPO when it comes to opening and conducting investigations, as further described in Section 3.3 above.

Article 5(6) requires competent national authorities to actively assist and support the investigations and prosecutions of the EPPO. Under Article 117 of the Regulation, each Member State shall designate the authorities that are competent for the purposes of implementing the Regulation. Information on these authorities shall be notified simultaneously to the ECP, the Council and the Commission; this would include those competent national authorities who actively assist and support the investigations and prosecutions of the EPPO under this Article. Article 5(6) is likely to be considered directly applicable in many Member States; however, with this in mind, legislation was found to be in partial compliance in two Member States (MT and RO). In MT and RO, the issue results from the lack of notification under Article 117 of certain competent national authorities which, under national law, have the power to actively assist and support investigations and prosecutions – specifically, in MT, the Magistrates' Court and, in RO, the National Anticorruption Directorate.

Of those Member States found to be in full compliance, some of these Member States (BG, DE, EE, EL, ES, FR, LV, NL, and SI) were found to experience practical issues with this provision despite its direct applicability. For instance, in EE, the interviewed EDP explained that the main limitation is the sharing of limited existing resources of the law enforcement agencies between domestic procedures and the EPPO investigations, which could lead to a potential conflict of priorities. Additionally, all EPPO criminal proceedings are placed on the same level as criminal proceedings in the view of the national investigative authorities; as such, there is no restriction on the powers of national authorities to actively conduct, assist and support the pre-trial proceedings in the EPPO proceedings. Furthermore, in LV, the EDPs indicated that the lack of one specific structural unit supporting the EPPO has resulted in a lack of support to carry out analytical work, given that EPPO cases are also mostly related to the need for financial flow analysis, research and analysis of company structures and transactions. Similar problems were identified in ES, where it was identified that the Spanish police provides insufficient support to the EPPO. This may result from the lack of 'assigned units' of the Judicial Police and the General Intervention of the State Administration, that, conversely, exist to support the national Anti-Corruption Prosecutor's Office. To improve the

assistance provided by the Judicial Police, the creation of 'assigned units' may allow prosecutors to work more rapidly and with specialists.

Finally, under Article 6(1), the Regulation outlines the independence of the EPPO. Under this Article, the laws of three Member States were found to be in partial compliance (AT, BE and MT)) and two in non-compliance (LV and NL). For these Member States with laws found to not be in full compliance with Article 6(1), this will have a knock-on effect on their formal compliance with the EPPO Regulation. For a detailed analysis of these compliance issues under Article 6(1), please see Section 4.1.3 below.

4.1.2. Tasks and responsibilities of the EPPO: Specific issues identified under Article 4

As mentioned above, Article 4 sets out the main responsibilities and tasks of the EPPO. The legislation of eight Member States was considered not to be in full compliance with this provision. Considering the importance of this Article with regard to the overall compliance of national systems with the EPPO Regulation, this section will further analyse the issues identified across the Member States.

Article 4 states that the 'EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.' As such, Article 4 describes the main tasks of the EPPO, which centre around: 1) investigation, 2) prosecution, and 3) bringing to judgement, as explicitly mentioned in Article 86 TFEU. These tasks shall be exercised for the criminal offences falling under the material competence of the EPPO, as defined under Article 22 (see Section 4.3.1 below). Article 4 poses the basis of the EPPO's main responsibilities that are further described throughout the EPPO Regulation. Hence, a lack of compliance under Article 4 has a knock-on effect on the overall implementation of the EPPO Regulation, and, conversely, compliance issues identified under specific provisions, when particularly serious, may conflict with the general tasks established by Article 4.

Regarding, first, the powers of the EPPO to investigate PIF offences, the laws of several Member States (BE, EL, MT, and SI) were found not to be in compliance due to other national authorities retaining the lead of investigations in EPPO cases. As explained under Section 3.3 above, in these Member States, investigative judges (in BE, EL,[81] and SI), inquiring magistrates (in MT) or customs authorities (in BE) have the competence to lead EPPO investigations, for certain types of offences or investigative measures.

Similarly, when it comes to the prosecution of EPPO cases, some Member States' national law was found to conflict with the EPPO Regulation when the final decision to prosecute, refer or dismiss a case is in the hands of national authorities, instead of the Permanent Chamber of the EPPO. For example, as provided in Section 3.2 above, this is the case of BE, where the final decision to prosecute can be made either by the EDPs, or the customs authorities, depending on the offence.

Lastly, several national legal frameworks (BE, CY, FI, FR, LU, and NL) were found not to be compliant with the EPPO's power to bring cases to judgment and a exercise the functions of a prosecutor in the competent courts of Member States. In particular, these Member States do not allow the EDPs/EP to exercise the functions of prosecutor in front of the national highest

[81] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

courts. In CY, the EDPs have to request the Attorney General to challenge the decision before the Supreme Court. Therefore, the EDPs/EPs cannot exercise their functions before the Supreme Court. Similarly, in FI, the Prosecutor General is the only competent authority regarding the prosecution of ministers; hence, for these individuals, the EPPO's competence to represent a case is limited. In LU, it is interesting to note that neither national prosecutors nor EDPs can act before the Constitutional Court. However, a legal reform project has been issued to introduce the possibility for all parties to legal proceedings (therefore, including EDPs) to be admitted and plea before the Constitutional Court [82]. Similarly in FR, neither the national public prosecutors nor the EDPs/EP can intervene in front of the Constitutional Council. Furthermore, BE, FR and LU present a similar situation with regard to the function of prosecutor in front of their Court of Cassation. While they can file a cassation appeal and submit their observations, the EDPs/EPs cannot represent the EPPO before the Court of Cassation. Indeed, the General Prosecutor's Offices at the Court of Cassation in these Member States have the exclusive power to exercise the functions of a prosecutor before these higher courts. Therefore, the same limitations apply to national public prosecutors.

Hence, while the laws of all participating Member States generally ensure that the EPPO can perform its tasks, compliance issues remain where the EPPO's prerogatives are limited with regard to certain offences, investigative measures or in front of specific courts. Article 4 posing the basis of the EPPO's responsibilities, the Member States presenting the most serious issues under this article were found to not be in compliance with many other provisions of the Regulation, as outlined in the sections below.

4.1.3. Independence: Specific issues identified under Article 6(1)

As outlined above, **Article 6(1)** provides that the EPPO should be independent. The legislation of 5 Member States was found to not be in full compliance with the Regulation. A lack of full compliance with Article 6(1) will have a knock-on effect on the overall execution of the tasks of the EPPO.

Article 6(1) provides that '[t]he EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks.'

The importance of the independence of the EPPO is further stressed by **Recital 16** of the Regulation. This specifically provides that '[s]ince the EPPO is to be granted powers of investigation and prosecution, institutional safeguards should be put in place to ensure its independence as well as its accountability towards the institutions of the Union.'

It should be additionally noted that **where national law is not in full compliance with Article 96(7) of the Regulation, it will likely be in violation of Article 6(1) too.** Article 96(7) of the Regulation provides that '[t]he European Prosecutors and European Delegated Prosecutors shall not receive in the exercise of their investigation and prosecution powers, any orders, guidelines or instructions other than those expressly provided for in Article 6(1)'.

[82] Chambre des Deputés, Projet de Loi 7323B, 18 March 2022, Document 7323B/05 (Chamber of Deputies, Bill 7323B, 18 March 2022, Document 7323B/05), available at: https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&id=7323B (last accessed on 21 August 2022).

As mentioned, Article 6(1) provides that the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO, should not take instructions from any person external to the EPPO. However, in some instances, other national authorities maintain their investigative powers to the detriment of the EDPs/EPs. It should, firstly, be acknowledged that **judicial oversight and/or review of the EPPO's acts and decisions by a national authority is not, as such, a violation of the EPPO's independence.** For example, in a case where a national judge denies an investigative measure requested by an EDP/EP under Article 30(1), this is not an issue of independence **provided that the EPPO remains in control of the proceedings**. An example of a situation where judicial oversight can instead constitute a **breach of the EPPO's independence is where the investigative judge leads the investigations and prosecutions involving the PIF offences**. Furthermore, in some Member States, **the customs authorities have** not only administrative investigative powers and the power to impose administrative sanctions, but also **the power to investigate and prosecute customs offences.** Hence, even though the EPPO is not receiving instructions in some cases, the EPPO is hampered in the exercise of its tasks, and cannot exercise any power or direction over the national authorities. This means that, in some circumstances, the EPPO cannot act in the interest of the Union as a whole, as prescribed in Article 6(1) of the Regulation. For more details on which Member States have retained such powers for investigative judges and other national authorities, see Section 3.3.

Beyond cases where judicial or administrative authorities take the lead in investigations and prosecutions of PIF offences, **there are likewise problematic instances where the agreement of other national authorities is required before the EPPO can execute its tasks** under Article 4 of the Regulation. Three instances of this kind were identified in the Member States. In LV, the pre-existing legislation that provides that the instructions, commands and orders of the Prosecutor General shall be mandatory for all prosecutors has not been amended to exclude the EDPs; hence, the latter are in theory also bound by decisions from the Prosecutor General. Nonetheless, it can be noted that no issues have been observed in practice with regard to the independence of the EPPO. In BE, the Minister of Justice has the power to order the public prosecutor's office to initiate prosecutions in specific cases (the so-called 'positive injunction right'). The national legal framework has not been adapted to exclude this prerogative in EPPO cases. However, the interviewee explained that the Minister has not exercised this power in practice, either in EPPO cases so far or in national cases in the last twenty years or so. Of these two examples, the situation in BE – if and when the Minister were to exercise the positive injunction right – would have a wider consequence in relation to the risk of political pressure on the EPPO. In cases with instructions coming from persons external to the EPPO, especially bodies of executive power, the requirement of such an order to initiate certain prosecutions could result in the EDPs no longer acting in the sole interest of the European Union. Dutch law was found to be in non-compliance with this Article too, because the legislation requires the Board of Prosecutors General to check the decision of the EPPO to use certain investigative techniques. The EDPs/EP must obtain this permission from the Board of Prosecutors General in order for the measure to be executed; this applies when the EDPs/EP intend to apply special investigative techniques of using civilians for infiltration purposes and for controlled deliveries.

There are also **instances where reporting is required to national authorities, which may compromise the independence of the EPPO.** Two Member States were identified to have provisions stipulating such a requirement. In AT, the Legal Protection Commissioner, who is appointed by the Minister of Justice, reports annually on their tasks to the Minister of Justice, and this report contains detailed information on EPPO proceedings. This reporting capacity means that the politically appointed Legal Protection Commissioner will have the right to access the case files of the EPPO which, thus, may affect the needed independence of the EPPO from national authorities. Similarly, in BE, there are reporting obligations of the EDPs or EP under national law, which mean that the Minister of Justice can be in a position to order the

public prosecutor's office to initiate certain prosecutions (as per the 'positive injunction right'). The use of reporting in both contexts allows the Minister of Justice to potentially exert political influence on the execution of the EPPO's tasks under Article 4 via their insight into the EPPO's working practices; this may constitute a risk to the EPPO's external independence.

In MT, it is required **at the compilation of evidence stage that the Attorney General periodically reviews cases**; this includes EPPO cases. The court shall order a record of the inquiry to be transmitted to the Attorney General. The inquiry itself should take place for a month and can be extended for a further period when necessary and approved by the President of Malta. The review by the Attorney General would take place at this stage.

Overall, the independence of the EPPO is crucial for ensuring the proper execution of the EPPO's tasks under Article 4 of the Regulation. Where national authorities are involved in the investigations and prosecutions of PIF offences, there is a risk that the personnel of the EPPO is prevented from acting in the Union's interest. Also, any political influence on the EPPO's activities would, as a result, undermine its legitimacy. In EPPO cases with a political dimension – for example, those involving corruption of public officials – this risk is particularly stark. Conversely, some compliance issues identified with regard to specific provisions may also have a knock-on effect on the EPPO's independence as enshrined in Article 6(1).

4.2. Chapter III – Structure, status and organisation of the EPPO – Overview across Member States

This section will discuss the compliance issues and trends amongst the Member States in relation to Chapter III on the status, structure, and organisation of the EPPO. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 12(4), 13(1)-(3)** and **17(1)-(2), (4)-(5)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of (partial) non-compliance in each Member State.

Table 2 - Chapter III on the status, structure, and organisation of the EPPO – Overview of the compliance status per Member State

Member State	Chapter III provisions							
	Art. 12(4)	Art. 13(1)	Art. 13(2)	Art. 13(3)	Art. 17(1)	Art. 17(2)	Art. 17(4)	Art. 17(5)
AT								
BE								
BG								
CY								
CZ								
DE								
EE								
EL								
ES								
FI								
FR								
HR								
IT								
LT								
LU								
LV								
MT								
NL								

PT								
RO								
SI								
SK								

Article 12(4) indicates that in cases where national law provides for the internal review of certain acts within the structure of a national prosecutor's office, the acts of the EDPs shall be exclusively reviewed by the EPs, based on the internal rules of procedure of the EPPO. National law was found to be in non-compliance with this provision in two Member States (MT and NL). In MT, at the compilation of evidence stage, as the law stands, EPPO cases are periodically reviewed by the Attorney General following an order from the court, which, therefore, conflicts with the competence of the EP to review the acts of EDPs. In NL, the legislation requires the Board of Prosecutors General to check the decision of the EPPO to use certain investigative techniques. The EDP/EP must obtain this permission from the Board of Prosecutors General in order for the measure to be executed; this applies when the EDP/EP intends to apply special investigative techniques of using civilians for infiltration purposes and for controlled deliveries by virtue of a generic provision which is applicable to these investigative techniques.

Article 13 refers to the status, competence and powers of the EDPs. Article 13(1) deals with the role, powers and responsibilities of the EDPs – the laws of three Member States (BE, MT and SI) were found to be in partial compliance with this Article. The partial compliance identified in BE, MT and SI relates to either the role of the investigative judge (BE and SI) or the inquiring magistrate (MT), which causes limitations when the EDPs are exercising their investigative powers, considering that the investigative judge/inquiring magistrate may be responsible to initiate and conduct the investigation and prosecute the EPPO-related offences. In BE, as well as the investigating judge, the specialised customs official, and not the EDP or EP, is entitled to initiate the proceedings and bring the case before the trial court for customs offences, which also results in issues of compliance.

Article 13(2) provides for the number of EDPs that there should be in each Member State, indicating how to establish how many they should be as well as the functional and territorial competences between them; under this Article, the laws of three Member States (EL, LU, and RO) were found to be in non-compliance. In EL, the finding of non-compliance regards the number of EDPs, for which the final decision is made by the Greek Minister of Justice after consulting the ECP, while the Regulation provides that the ECP should, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of EDPs. Alternatively, in LU, the non-compliance resulted from the law's clear reference to the appointment of two Luxembourgish EDPs, which may prejudice future agreements were the number of Luxembourgish EDPs to be redetermined. Finally, in RO, the implementing law explicitly refers to the EPPO's territorial division, which provides that the EDPs shall remain in the post and staff structure of the prosecutor's office from which they came and shall, therefore, work in București, Cluj-Napoca, Iași and Timișoara; this territorial division could not be changed without an amendment to the law.

The laws of all 22 Member States are in full compliance with Article 13(3), which states that EDPs may also exercise functions as national prosecutors if these do not prevent them from fulfilling their obligations under the Regulation.

Article 17 refers to the appointment and dismissal of EDPs. Article 17(1) regulates the appointment of the EDPs, who shall be appointed for a renewable term of 5 years and provides that the College shall appoint the EDPs nominated by the Member States and can only reject candidates if they do not fulfil the criteria referred to in Article 17(2). The law of one Member State was found to be in partial compliance (IT). In IT, national law is partially compliant due

to the fact that the national provision[83] unduly limits the duration of the EDPs mandate by stating that the role can only be exercised for a maximum period of 10 years rather than for a renewable term of five years; thus, meaning that in IT the term of an EDP is limited to one renewal following the first 5-year term.

Article 17(2) stipulates that, from the time of their appointment until dismissal, EDPs must be active members of the public prosecution service or judiciary of the Member State which nominated them, possess the necessary qualifications and practical experience of their national legal system, and their independence must be beyond doubt. Under Article 17(2), the law of one Member State was found to be in partial compliance (BG) with this provision. In BG, partial compliance results from the provision in the law of an extra criterion provided for the age of candidates which is not envisaged by the Regulation.

Under Article 17(2), it should be noted that there is an uncertainty concerning whether national law should provide the option for EDPs to be active members of both the public prosecution service and judiciary, or either the public prosecution service or judiciary. For the purposes of this overview, full compliance of national law with the Regulation can result from the implementation of either or both of these options in national law. This is considering that from an overview of all the Member States, it seems as though the choice of either public prosecutors or judges generally depends upon who usually exercises such role in the legal system in question. The national law of twelve Member States participating in the EPPO (BE, BG, EE, ES, FI, FR, IT, LU, LV, NL, SI, and SK) provided that EDPs can be active members of the public prosecution service or judiciary. On the contrary, the national law of nine Member States (AT, CY, CZ, DE, EL, HR, LT, PT, and RO) was found to only allow EDPs to be appointed from members of the public prosecution service. No Member States limited the appointment of EDPs to solely the members of the judiciary. However, the appointment procedure in MT is exceptional because, as agreed before their appointment, the EDPs/EPs come from the Maltese Police Force. The reasoning behind this is that before 2020, the Maltese Police Force was in charge of both investigation and prosecution, rather than the Attorney General's Office.

Article 17(4) outlines that when a Member State decides to dismiss, or take disciplinary action against an EDP, for reasons not connected to their responsibilities under the Regulation, the Member State must inform the ECP before taking such action. In cases where the dismissal is connected to the responsibilities under the Regulation, the Member State must gain the consent of the ECP. The law of one Member State was found to be in non-compliance (SI). In SI, non-compliance results from the national law providing that the competent national disciplinary body informs the EPPO about the commencement of disciplinary proceedings against the EDP, rather than the intention to take a disciplinary sanction against them. Furthermore, the consent of the ECP is not stipulated as a requirement for disciplinary action connected to the EDPs' responsibilities under the Regulation.

Finally, the laws of all Member States were found to be in full compliance with Article 17(5), which lays down the obligation for the Member States to inform the ECP in case an EDP resigns, their services are no longer necessary to fulfil the duties of the EPPO, or they are dismissed or leave the position for any other reason.

[83] Decision of the College of the European Public Prosecutor's Office of 3 May 2021 on the appointment of fifteen European delegated prosecutors of the EPPO in the Italian republic, available at: https://www.eppo.europa.eu/sites/default/files/2021-05/2021.034_Decision_appointment_EDPs_IT_15.pdf (last accessed on 13 January 2023), Article 8.

4.3. Chapter IV – Competence and exercise of the competence of the EPPO

4.3.1. Competence of the EPPO – Overview across Member States

This section will discuss the situation and trends amongst the Member States in relation to Section 1 on the Competence of the EPPO as contained in Chapter IV on the competence and exercise of the competence of the EPPO. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 22(1)-(4)** and **23** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of partial or non-compliance in each Member State.

Table 3 – Chapter IV on competence of the EPPO – Overview of the compliance status per Member State

Member State	Chapter IV Competence and exercise of the competence of the EPPO – Section 1 Competence of the EPPO				
	Art. 22(1)	Art. 22(2)	Art. 22(3)	Art. 22(4)	Art. 23
AT					
BE					
BG					
CY					
CZ					
DE					
EE					
EL					
ES					
FI					
FR					
HR					
IT					
LT					
LU					
LV					
MT					
NL					
PT					
RO					
SI					
SK					

Article 22 concerns the material competence of the EPPO. **Article 22(1)** provides that the EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union as provided in the PIF Directive. With regard to VAT fraud, the EPPO is competent when the latter is connected to the territory of two or more Member States and involves a total damage of at least EUR 10 million. The law of one Member State (FR) was found to be in **partial compliance** with Article 22(1). This is because, in FR, the French Code of Criminal Procedure does not refer to all the offences within the scope of the PIF Directive, which may hinder the reporting of the cases falling within the EPPO's competence. In particular, it does

not refer to the violation of public tender rules, unlawful taking of interest by a public agent and, in relation to customs offences, smuggling and fraudulently importing or exporting tobacco.

The laws of all 22 Member States were found to be in **full compliance** with **Article 22(2)**, stipulating that the EPPO shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA if the focus of criminal activity of the criminal organisation is one of the offences within the EPPO's competence (see Article 22(1) above).

The laws of all 22 Member States were found to be in **full compliance** with **Article 22(3)**, which provides that the EPPO shall also be competent for any other criminal offence that is inextricably linked to criminal conduct that falls under paragraph 1; such competence may only be exercised in compliance with Article 25(3).

The laws of all 22 Member States were found to be in **full compliance** with **Article 22(4)**, which provides that the EPPO shall not be competent for criminal offences concerning national direct taxes, including offences inextricably linked thereto.

Under **Article 23**, it is provided that the EPPO shall be competent under Article 22 where such offences were committed: 1) in whole or in part within the territory of one or several Member States; 2) by a national of a Member State, 3) or were committed outside the territory of one or several Member States by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence. The only Member State with national law that was found to be in **partial compliance** was RO. In RO, there is an obligation to obtain the authorisation of the Prosecutor General within the Court of Appeal or the Prosecutor General of the Supreme Court of Cassation and Justice if the case is to be initiated as a criminal offence committed by a Romanian national or legal entity outside of RO for the criminal offences as provided under Article 22(3) of the Regulation.

In light of the above, it should be emphasised that the material competence of the EPPO mostly concerns offences that are defined in the **PIF Directive** or that are inextricably linked to these PIF offences as stipulated in Article 22 of the Regulation. Thus, the way in which these offences are defined and understood is crucial to the scope of operation of the EPPO.

Since the legislative instrument that outlines these offences is a Directive, the Member States[84] had to transpose the provisions of the PIF Directive into their national laws as they deemed fit (i.e. to introduce specific separate measures that concern only the subject matter of the PIF Directive or to update their existing criminal code/legislation). In this context, it can be noted that significant differences exist across Member States regarding the delineation of PIF offences and rules applicable to limitation periods.[85]

This lack of harmonisation amongst the legal systems of the Member States regarding the criminalisation of PIF crimes **may lead to non-aligned practices on the handling of the PIF offences amongst the Member States, despite the fact that the transposition of the PIF Directive and the national legal frameworks relevant to Article 22 of the EPPO Regulation were found to be compliant in the majority of Member States**. This lack of uniformity on how the PIF offences are defined in the Member States may also lead to differing understandings of the scope of operation and material competences of the EPPO (as these

[84] The PIF Directive applies to all EU Member States with the exception of Denmark due to their opt-out based on the Protocol (No 22) on the position of Denmark annexed to the TFEU, available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F22 (last accessed on 14 April 2021).

[85] Study to support an implementation report on the basis of Article 18(4) of Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (JUST/2021/PR/JCOO/CRIM/0058) and Second report on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, COM(2022) 466, available at https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0466/COM_COM(2022)0466_EN.pdf (last accessed on 31 May 2023)

two concepts are inherently interlinked) and can significantly hinder the practical work of the EPPO.

4.3.2. Exercise of competence of the EPPO

4.3.2.1. Overview across Member States

This section will discuss the compliance issues and trends amongst the Member States in relation to Section 2 on the Exercise of Competence of the EPPO as contained in Chapter IV on the competence and exercise of the competence of the EPPO. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 24(1)-(7)** and **25(1)-(4), (6)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of partial or non-compliance in each Member State.

The subsequent sections will provide an in-depth analysis of the specific issues identified under **Article 24(1)-(3)** (Section 4.3.2.2) and **Article 25(6)** (Section 4.3.2.3) of the Regulation.

Table 4 – Chapter IV on exercise of competence of the EPPO – Overview of the compliance status per Member State

Member State	Chapter IV Competence and exercise of the competence of the EPPO – Section 2 Exercise of the competence of the EPPO											
	Art. 24(1)	Art. 24(2)	Art. 24(3)	Art. 24(4)	Art. 24(5)	Art. 24(6)	Art. 24(7)	Art. 25(1)	Art. 25(2)	Art. 25(3)	Art. 25(4)	Art. 25(6)
AT												
BE												
BG												
CY												
CZ												
DE												
EE												
EL												
ES												
FI												
FR												
HR												
IT												
LT												
LU												
LV												
MT												
NL												
PT												
RO												
SI												
SK												

Article 24 refers to the reporting, registration and verification of information. **Article 24(1)** provides that the IBOAs and the competent national authorities shall report any criminal conduct within the EPPO's competence without undue delay. These competent national authorities should have been notified to the ECP, to the Council and to the Commission in accordance with Article 117. For Article 24(1), the laws of five Member States (BG, EL, FR, IT,

and LT) were found to be in partial compliance and of seven Member States (BE, CY, CZ, ES, FI, MT, and PT) were found to be in non-compliance.

For the majority of these Member States, two groups of compliance issues were identified: 1) it is provided in law that the national authorities should submit to another national authority before reporting to the EPPO (BE, CY, CZ, ES, FI, HR, MT, and PT), or 2) national legislation, or administrative guidance, provides two different options of reporting, either directly or through an intermediary (BG, LT, and RO). For a detailed analysis of these compliance issues under Article 24(1)-(3), see Section 4.3.2.2 below.

Article 24(2) refers to when a national judicial or law enforcement authority initiates an investigation into a criminal offence for which the EPPO could exercise its competence, or where during the investigation, it appears to such an authority that an investigation concerns such an offence, that authority should inform the EPPO without undue delay so that the EPPO can decide whether to exercise its right of evocation. Under this Article, the laws of three Member States (EL, LT, and RO) were found to be in **partial compliance** and those of seven Member States (BE, CY, CZ, ES, FI, MT, and PT) were found to be in **non-compliance**. For all these Member States, except for BE, the compliance issues under Article 24(2) are the same as under Article 24(1). For a detailed analysis of the compliance issues under Article 24(1)-(3), see Section 4.3.2.2 below.

Article 24(3) provides that when a national judicial or law enforcement authority initiates an investigation in respect of an offence defined in Article 22 and considers that the EPPO could not exercise its competence, it shall inform the EPPO. Under this Article, the laws of three Member States (EL, LT and RO) were found to be in **partial compliance** and seven Member States (BE, CY, CZ, ES, FI, MT, and PT) were found to be in **non-compliance.** All these Member States have the same compliance issues under Article 24(3) as provided under Article 24(2). For all these Member States, except for BE, the compliance issues under Article 24(2) are the same as under Article 24(1)**.** For a detailed analysis of the compliance issues under Article 24(1)-(3), see Section 4.3.2.2 below.

The laws of all 22 Member States were found to be in **full compliance** with **Article 24(4)**, which stipulates that the report to the EPPO shall contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about victims, suspects and any other involves persons.

In accordance with **Article 24(5)**, the EPPO shall also be informed of cases where an assessment of whether the criteria in Article 25(2) are met is not possible. Under this Article, the national law of one Member State (PT) was found to be under **partial compliance** and two Member States (CY and MT) were found to be in **non-compliance**. In terms of the Member State where national law was found to be in partial compliance, in PT, no procedures for the transmission of information foreseen were set up under Article 24(5) which, therefore, might lead to disregarding the obligation to inform the EPPO. In terms of the Member States where national law was found to be in non-compliance, for both CY and MT, the national authorities should report the case to another national authority which should then report the case to the EPPO. Specifically, in CY, it is the Attorney General who shall report to the EPPO, as provided in Article 7(1) of Law 2(I)/2021. Subsequently, in MT, the situation is ever-so more complex with a chain of notifications required before the submission of the report to the EPPO – the inquiring magistrate, once finished with their investigation, sends the report to the Attorney General, who sends it to the police, who then inform the EPPO.

The laws of all 22 Member States were found to be in **full compliance** with **Article 24(6)**, which provides that the information provided to the EPPO shall be registered and verified in accordance with its internal rules of procedure.

Under **Article 24(7),** it is provided that where the EPPO decides that there are no grounds to initiate an investigation or exercise its right to evocation, the reasons shall be noted in the case management system. The EPPO should then inform the authority that reported the conduct, as well as the victims and if provided by national law, any other persons who reported the criminal conduct. One Member State (PT) was found to be in **partial compliance** with this provision. PT notified, under Article 117 of the EPPO Regulation, the public prosecutor's office as the only competent authority under Article 24(7) when it comes to reporting such conduct, but the national legislation outlines that the DIAP and the DCIAP will have to receive the case back after consultation; therefore, imposing an additional requirement on the EPPO to report the conduct to DIAP and DCIAP, as well as the public prosecutor's office.

Article 25 refers to the exercise of the competence of the EPPO. **Article 25(1)** stipulates that the EPPO shall exercise its competence by initiating an investigation under Article 26 or using its right of evocation under Article 27 – in such circumstances, the national authorities should refrain from exercising their own competence. This Article was found to be in **partial compliance** in one Member State (BE) and **non-compliance** in two Member States (MT and SI). In BE and MT, the issue results from the limitations in the legal system preventing the exercise of the EPPO's competence. In BE, the customs officials are competent to initiate and conduct the investigation and prosecute the EPPO-related customs offence. The non-compliance in SI results from the fact that the EDP/EP can neither initiate nor execute prosecutorial investigation because national law does not provide the necessary procedural competences of state prosecutors (as explained under Article 4 above) nor do state prosecutors (also the EDPs/EPs) have the means to carry them out. Similarly, in MT, the non-compliance results from the existence of the in genere inquiry which takes place for all PIF crimes, meaning that the inquiring magistrate retains the power to investigate an offence.

The laws of all 22 Member States were found to be in **full compliance** with **Article 25(2).** This Article provides that where an offence falls within the scope of Article 22 or is likely to cause damage to the Union's financial interests of less than EUR 10 000, the EPPO may only exercise its competence if: (a) a case has repercussions at the Union level, or (b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of committing the offence.

The laws of all 22 Member States were found to be in **full compliance** with **Article 25(3)**. Under this Article, it is outlined that the EPPO shall refrain from exercising its competence and shall refer the case without undue delay to the national authorities if: (a) the maximum sanction provided for by national law for an offence is equal to or less severe than the maximum sanction for an inextricably linked offence, or (b) there is a reason to assume that the damage caused, or likely to be caused, to the Union's financial interests does not exceed the damage caused, or likely to be caused, to another victim.

The laws of all 22 Member States were found to be in **full compliance** with **Article 25(4).** This provides that the EPPO may, with the consent of the competent national authorities, exercise its competences in cases which would be excluded under Article 25(3)(b) (see above for more information) if it appears the EPPO is better placed to prosecute.

Under **Article 25(6)**, the competent national authorities shall decide on the attribution of competences concerning prosecution at national level if there is a disagreement between the EPPO and national authorities over the question of whether the criminal conduct falls within the scope of Article 22(2) or (3), or Article 25(2) or (3). Therefore, the Member States must specify the national authority that will decide on the attribution of competence. Article 25(6) should be read in conjunction with Article 42(2)(c) which lays down that the CJEU shall have jurisdiction to give preliminary rulings on the interpretation of Articles 22 and 25 of the EPPO Regulation in case of conflict of competence between the EPPO and the competent national authorities.

National law was found to be in partial compliance with this provision in five Member States (ES, DE, FI, FR, and LU) and non-compliance in fifteen Member States (BE, BG, CY, CZ, EE, EL, HR, IT, LT, LV, MT, NL, PT, RO, and SI). Of the Member States where national law was found to be in **partial compliance**, this was because either one of the two authorities notified as the competent authority under Article 25(6) is not a 'court' or 'tribunal' (and, therefore, cannot lodge a request for a preliminary ruling to the CJEU) or the decision of such authority is subject to judicial review only upon request of one of the two parties to the conflict. Of the Member States where national law was found to be in **non-compliance**, the reason for this was that the competent national authority is not considered to be a 'court' or 'tribunal', hence it is not a judicial authority competent to lodge a request for a preliminary ruling to the CJEU in accordance with the established case-law of the CJEU. For a detailed analysis of the compliance issues under Article 25(6), see Section 4.3.2.3 below.

4.3.2.2. Reporting, registration and verification of information: Specific issues identified under Article 24

As referred to above, **Article 24** refers to the reporting, registration and verification of information. It was found that the national law of over half the Member States was noted to not be in full compliance with this provision of the Regulation. Specifically, in light of the vast issues resulting in partial/non-compliance under these subparagraphs, this section will focus on the compliance issues amongst the Member States concerning **Articles 24(1), (2)** and **(3)** of the Regulation.

Article 24(1) provides that: '[t]he institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent under applicable national law shall without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Article 22, Article 25(2) and (3).'

To begin, some alternative interpretations of Article 24(1) are outlined. Firstly, an interpretation of how to read Article 24(1) can be found in the Decision of the College of the EPPO of 21 April 2021. This outlines some guidance for the Member States in implementing Article 24(1) into their national law. The Decision envisages that the channel of communication of the criminal report should be directly and exclusively to the EPPO. This aims to prevent interference with the prerogatives of the EPPO and its investigative actions. The exclusive line of reporting also aims to prevent the risk of parallel investigations and their negative consequences, as well as a serious glitch to the mechanism of exchange of information foreseen by the Regulation.

Secondly, there is Recital 51 of the Regulation which provides an alternative interpretation. In particular, Recital 51 stipulates that 'the national authorities [...] should follow the existing reporting procedures and have in place efficient mechanisms for a preliminary evaluation of allegations reported to them.' This Recital indicates that, despite it being ideal for the information to be directly sent to the EPPO with no intermediary, continued adherence to the existing reporting procedures and mechanisms may avoid an undue delay.

The law of over half of the participating Member States (BE, BG, CY, CZ, EL, ES, FI, FR, HR, IT, LT, MT, PT, and RO) was found to **not** be in full compliance with Article 24(1) of the Regulation. The trends identified amongst these Member States, as well as those found to be in full compliance (AT, DE, EE, LU, LV, NL, SI, and SK), will be discussed in light of the above.

The bulk of national law that was identified as not in full compliance with the Regulation was identified in those Member States where it was provided, in law, that the **national authorities should submit to another national authority before reporting to the EPPO**. This was the case in BE, CY, CZ, ES, FI, HR, MT, and PT.

In five of these Member States (BE, CZ, FI, and PT), it is **the national prosecutor's office that should report the case to the EPPO**, thereby meaning that the national authorities

should submit the report to them rather than directly to the EPPO. For example, in BE, Article 156/1(3) of the Judicial Code provides that the public prosecutor, general prosecutor, or federal prosecutor should inform the EDP and, in FI, Section 7, Subsection 1 of Act 66/2021 provides that a prosecutor must notify the EDP.

In PT, as well as Article 4 of Law Number 112/2019 stipulating that it is the Public Prosecutor's Office's responsibility to report to the EPPO, **the national prosecutors within the Regional Departments of Criminal Investigation and Prosecution ('DIAPs') and the Central Department of Criminal Investigation and Prosecution ('DCIAP') must obtain the agreement of their immediate superior before forwarding the case to the EPPO**. The lack of compliance is related to the model of operation of the national public prosecutor's office, where it is required, in case of any errors, for the immediate superior to review the case. However, when it comes to Article 24 of the Regulation, the authorities of the Member States competent under applicable national law must be able to directly report to the EPPO. This is to avoid the chance that cases could be filtered out and ensure that there is no undue delay. The extra layer of reporting in PT creates a further risk that the decision by the national prosecutor to report to the EPPO is rejected by their immediate superior.

In three of these Member States (CY, HR, and MT), the **national authorities should report the case to another national authority which should then report the case to the EPPO.** For instance, in CY, it is the Attorney General who shall report to the EPPO, as provided in Article 7(1) of Law 2(I)/2021. Similarly, in HR, the national authorities should notify the State Attorney's Office. Finally, in MT, the situation is ever-so more complex with a chain of notifications required before the submission of the report to the EPPO – the inquiring magistrate, once finished with their investigation, sends the report to the Attorney General, who sends it to the police, who then inform the EPPO.

In ES, there are **multiple issues affecting the direct reporting to the EPPO by the different national authorities**. First, the national prosecutors, in practice, are expected to report through the 'contact point' of the Chief Prosecutor of the Anticorruption Prosecutor's Office; this is despite the fact that the implementing law (Article 18 of the Organic Law 9/2021) provides that when the national authorities become aware of a criminal offence that may fall within the EPPO's competence, they should communicate it to them without undue delay. It can additionally be noted that, in accordance with Article 18 of the Organic Law 9/2021, the Judicial Police must report to the General Public Prosecutors Office in parallel to the report to the EPPO. The need for national authorities to report to other national authorities may result in cases within the EPPO's competence being filtered out. For example, in the case of national prosecutors, if they report to the Anticorruption Prosecutor's Office, the Anticorruption Prosecutor's Office may incorrectly decide that the case falls within the competence of the national authorities and, thus, opt not report to the EPPO. As well as the risk of cases being filtered out, the need to report to another national authority is likely to result in undue delay in reporting cases to the EPPO.

Furthermore, in ES, there are issues with regard to cases involving the management of EU funds. The national law mentions the obligation to report to the national authorities if they suspect fraud, but does not mention reporting to the EPPO. In practice, cases involving the management of EU funds may be sent to the national authorities who subsequently may fail to acknowledge the EPPO's competence and, instead, potentially choose to initiate the investigation at the national level. In addition, the national law may cause undue delays in investigations; this is because reports may first be made to a national authority, before the national authority reports to the EPPO.

The national law of three Member States (BG, RO, and LT) was found not to be in full compliance due to **national legislation, or administrative guidance, which provides two different options of reporting, either directly or through an intermediary**. This situation may result in a lack of certainty and, thus, an undue delay. The same risk, as stipulated above,

may be replicated in relation to the national authorities failing to acknoweldge the possibility of the EPPO's competence and, thus, choosing to initiate an investigation at the national level. As of the specific situation in each Member State, in BG, Article 24(1) of the Regulation is directly applicable into national law; however, when reporting a crime, the official website of the Bulgarian Ministry of Justice encourages national authorities to send their report to either the Office of the EDPs of BG or to the national authorities designated as competent to send alerts to the EPPO.[86] Similarly, in LT, the national authorities are allowed to send their reports to either the EPPO or the national Public Prosecutor's Office; unlike BG, however, in LT, this is provided via national legislation rather than administrative guidance. Finally, in RO, Article 21 of the Implementing Law provides that the law enforcement authorities should immediately refer the matter to the EPPO; however, pre-existing national law provides that the prosecutors should refer cases involving some criminal offences under the EPPO's competence to the National Anticorruption Directorate, who then will have to report to the EPPO any cases incorrectly referred to them.

There are three Member States (EL, FR, and IT) whose national law was found to not be in compliance for **reasons beyond those outlined above.** In EL, Law Article 42(2) of Law 4786/2021 stipulates that any Greek authority must immediately and directly report to the EPPO which, prima facie, is in compliance with the Regulation. However, the provision is placed within the 'Transitional Provisions' Chapter, which only applies to those cases that were outstanding when the national implementing measure was enacted. Meanwhile, in FR, the issue does not relate to the procedure for reporting the investigation of a criminal offence by a national competent authority to the EPPO; rather, it relates to French law not covering all the offences targeted by the PIF Directive. For example, it does not refer to any public tender offences, nor to the unlawful taking of interest by a public agent. Finally, in IT, there is a 30-day refrain deadline which means that the EPPO has 30 days to decide whether to initiate an investigation before the national authority starts its investigations.

In light of the fact that half of the Member States were found not to be in full compliance with Article 24(1), it may be helpful to consider those approaches taken by the Member States to ensure that their national law was in full compliance. **Most of the Member States found to be in full compliance with Article 24(1) introduced either no implementing legislation or chose to reference the provision in their explanatory memorandum, with a clear focus on direct applicability.** These Member States included AT, DE, EE, LU, LV, NL, and SI. For instance, in DE, no provision was introduced to implement Article 24(1); however, in the explanatory memorandum to the European Public Prosecutor Act, there is a reference made to the need for national authorities to notify the German EDP or the EPPO directly, rather than sending to another authority to notify the EPPO.

Meanwhile, in LU, the approach was to **refer explicitly in national legislation to Article 24 of the Regulation.** The Luxembourgish Code of Criminal Procedure was amended with the purpose of implementing the Regulation; Article 136-7(1) CCP refers explicitly to Article 24(1), providing that reports, as provided for in Article 24(1) of the Regulation, shall be sent directly to the EPPO. The approach means that the Regulation is directly applicable in LU, with the explicit reference to the Regulation in national law ensuring that the national authorities are aware that they should directly notify the EPPO.

However, it should be noted that the focus on direct applicability could result in practical problems, especially in case the national authorities are not aware that they should directly and exclusively report to the EPPO as per Article 24(1) of the Regulation. In both the examples

[86] These national authorities are: any prosecutor of the Prosecutor's Office of the Republic of Bulgaria; any investigator of the National Investigation Service and of the regional investigation departments at the regional prosecution offices; the Ministry of Interior, in particular the National Police General Directorate, the General Directorate for Combating Organised Crime, and the Border Police General Directorate; and the National Customs Agency, in particular the Central Customs Directorate.

of DE and LU above, national legislation or an explanatory memorandum indicates the need for direct notifications to the EPPO. However, in EE and LV, national legislation was found to be in full compliance despite no explicit reference was made in national legislation, nor in any supplementary guidance or explanatory memoranda, on the fact that notifications should be directly and exclusively made to the EPPO. In EE, the overall approach to ensuring compliance is focused on the importance of training and educating the national authorities on the EPPO's role. This approach is open to some risks, but if continued and eventually engrained in the national authorities, it may yield successful results. The interviewed EDP confirmed that this training was ongoing and they were unaware of any impediments in practice. In LV, the general approach to EU Regulations is to introduce only the most necessary changes into the national legislation, leaving the rest to the direct applicability of the Regulation. Similar to EE, the interviewed EP provided that they were unaware of any problems with reporting by the national authorities in practice.

Article 24(2) provides that: '[w]hen a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence in accordance with Article 22, Article 25(2) and (3), or where, at any time after the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that an investigation concerns such an offence, that authority shall without undue delay inform the EPPO so that the latter can decide whether to exercise its right of evocation in accordance with Article 27.' **Article 24(3)** provides that: '[w]hen a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence as defined in Article 22 and considers that the EPPO could, in accordance with Article 25(3), not exercise its competence, it shall inform the EPPO thereof.'

The law of ten Member States (BE, CY, CZ, EL, FI, HR, LT, MT, RO, and PT) was found to **not** be in full compliance with Article 24(2) and (3) of the Regulation.

Articles 24(2) and 24(3) both concern the reporting obligation of the judicial and law enforcement authorities competent to investigate criminal offences. Nevertheless, the reasoning for **the lack of compliance of national law with Articles 24(2) and (3), in the majority of Member States, is the same as under Article 24(1).** This is the case for CY, CZ, EL, FI, HR, LT, MT, PT, and RO. Therefore, the trends outlined above are equally applicable under Article 24(2) as they are under Article 24(1) of the Regulation.

It should be noted, however, that despite the similarity between the issues identified in relation to Article 24(1) and 24(2), the issues under Article 24(2) are more problematic in practice. This is with consideration to the police and the investigative judges in charge of the investigation in some of the Member States (see Sections 3.2 and 3.3 above for more information on investigative judges and other national authorities). Both of these bodies are not used to handing the power of investigation to another authority. BE was found to not be in compliance with Article 24 on the basis of the role of the investigative judge who will conduct a judicial inquiry for investigations that require more extensive judicial investigative measures. Once the investigative judge opens a judicial investigation, they are in charge of the investigation and act independently in order to gather explanatory and incriminatory evidence. As the investigative judge is used to conducting their investigation under national law, it can be imagined that they would be reluctant in practice to hand over the case to the EPPO should it fall under their competence. This is different for Member States, such as DE, where the prosecutor undertakes the investigation and, therefore, it would feel more natural to hand over the case to another prosecutor in the form of the EDP/EP should it fall within the EPPO's competence.

As to the specific legal compliance issues identified, only BE's national legislation was not in compliance under Article 24(2) for a different reason than under Article 24(1). This is because of the **failure of national law to provide a reporting obligation on the investigative judge.** In accordance with Article 117, the competent national authorities under Article 24(2), amongst

others, should have been notified to the ECP, to the Council and to the Commission. For BE, the reason provided under Article 24(1) still results in a lack of compliance under Article 24(2). However, in the case of judicial investigation, the system does not expressly impose a reporting obligation on the investigative judge. This implies that the investigative judge must submit to the public prosecutor in order to notify the EPPO.

To conclude, the principal reason for national law not complying with Article 24 of the Regulation is the need for one national authority to submit its report to another national authority before notifying the EPPO of its potential competence. This increases the risk of cases being filtered out: the national authority that under national law should notify the EPPO may fail to do so, incorrectly determining that the case does not fall within the EPPO's competence. Should the national authorities report directly to the EPPO, the EPPO will instead be empowered to make such a decision on whether the case falls within its competence. In addition to this risk, there is also the risk of an undue delay, with the additional step of another national authority deciding whether or not to submit the case to the EPPO.

It may be useful to consider those Member States where national law was found to be in compliance with the Regulation. Those Member States relied on direct applicability, focusing on the importance of practical implementation when it comes to Article 24 – it needs to be ensured that the competent national authorities understand the cases that may fall within the competence of the EPPO so that, in practice, they can comply with Article 24 by reporting these cases, without undue delay, directly to the EPPO.

4.3.2.3. Conflict of competence: Specific issues identified under Article 25(6)

As mentioned in the preceding section, **Article 25(6)** stipulates that '[i]n the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2), or (3) or Article 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall specify the national authority which will decide on the attribution of competence.

The Consolidated Version of College Decision 029/2021 (hereinafter the 'College Decision') stipulates that '[i]n the absence of a specific procedure established by the Regulation, the EPPO shall comply with the rules established by the national law regarding the resolution of conflicts of competence and address the authority specified by the concerning Member State as the appropriate to decide on the attribution of competence.'

However, Recital 62 offers further guidance, stating that: **'[t]he notion of competent national authorities should be understood as any judicial authorities** which have competence to decide on the attribution of competence in accordance with national law.' In order to determine whether a body amounts to a judicial authority and, thus, a 'court' or 'tribunal', the following factors shall be taken into account: (1) whether the body is established by law; (2) whether it is permanent; (3) whether its jurisdiction is compulsory; (4) whether its procedure is inter partes; (5) whether it applies rules of law; and (6) whether it is independent.[87]

An overall level of ambiguity is observed with regard to the wording under Article 25(6). It is only when the Article is read in conjunction with Article 42(2) that it is clear that the competent national authority needs to be a court. This is because Article 42(2) stipulates that '[t]he Court

[87] See Judgement of 6 July 2000, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, C-407/98, ECLI:EU:C:2000:367, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0407 (last accessed on 24 March 2023).

of Justice shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning […] (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.' Thus, the national authority pursuant to Article 25(6) vested with the power to settle disputes between the EPPO and the national prosecution has an obligation to refer a preliminary ruling pursuant to Article 267 TFEU should there be any uncertainty concerning the interpretation of the EU law. In order to do so, it has to qualify as a 'court' or 'tribunal'. For more on the compliance issues identified with regard to Article 42(2), see Section 4.5.2 below.

As mentioned above, the vast majority of the Member States' legislation is not fully compliant with Article 25(6) of the Regulation.

In all twenty Member States whose laws were deemed not fully compliant (BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PT, RO, and SI), the reason for non-compliance was that **the competent authority selected by the Member State to resolve the conflicts of competence between the EPPO and national prosecutors cannot refer the matter to the CJEU for a preliminary ruling**, as it does not amount to a 'court' or 'tribunal'. The vast majority of the Member States (BE, BG, CZ, DE, EL, ES, FI, HR, IT, LT, NL, PT, RO, and SI) whose legislation was not compliant with the Regulation had **selected a higher national prosecutorial body as the competent authority to resolve said conflicts**, which does not satisfy the aforementioned criterion of independence. This can be exemplified by EL and NL, where the competent national authorities are, respectively, the Board of Prosecutors-General of the Public Prosecution Service and the Prosecutor of the Supreme Court (or the Deputy Prosecutor to whom they may assign the case).

Meanwhile, in EE and LV, the national competent authority to solve disputes between the national prosecution authorities and the EPPO is the Prosecutor General. In both Member States, this is the authority competent to decide on the conflict of competence for national offences. In CY, the national competent authority is the Attorney General, which is the same authority that may be involved in the dispute.

MT is the only Member State, which has not notified a higher national prosecutorial body as the competent authority. Pursuant to the notification, the designated competent authority is the Maltese Police Force. Given that the Police cannot refer a preliminary question to the CJEU, it does not amount to a 'court' or 'tribunal' in accordance with Article 267 TFEU.

Alternatively, in DE and FI, the lack of full compliance stems from the fact that the authority notified as competent to decide on the conflicts of competence and, hence, dealing with the interpretation of EU law is not a judicial authority, which renders it unable to refer the matter directly to the CJEU. In DE, the Federal Public Prosecutor General is the competent authority, whose decisions can be subjected to judicial review before the Federal Court of Justice which, in turn, can refer the matter to the CJEU. It is for the EPPO or Federal Public Prosecutor General to decide whether to send an appeal to the Federal Court of Justice. Should there be an appeal, the German court can then lodge a request for a preliminary ruling to the CJEU. On the contrary, if the matter is not referred to the Federal Court of Justice, no reference can be made to the Court of Justice by the Federal Public Prosecutor General. In the same vein, in FI, the Prosecutor General shall resolve a disagreement on the competence between the EPPO and the national prosecution authority under Article 25(6). The Decision of the Prosecutor General will, in every case, be sent for review to the District Court of Helsinki which, in turn, can refer a preliminary question to the CJEU. However, as is the case with DE, the national authority originally deciding on the conflict of competence cannot directly refer it to the CJEU, which is not compatible with the Regulation.

Additionally, it should, however, be noted that, in three Member States (ES, FR, and LU), only **one of the two authorities notified by the Member States under Article 117 as the competent authority under Article 25(6) is not able to lodge a request for a preliminary ruling to the CJEU**. For instance, in FR, in cases where a conflict arises between the EPPO

and an investigative judge, the Court of Cassation has been designated as the competent body to decide whether the national prosecution authorities or the EPPO should exercise competence. However, in cases where there is a conflict of competence between the EPPO and a public prosecutor, French law designates the General Public Prosecutor (attached to a Court of Appeal) as the competent authority to solve such conflicts of competence. Similarly in LU, if a conflict arises between the EDP and the national prosecutor, the State Prosecutor General is the designated national authority to solve this conflict. Where the conflict arises between the EDP and an investigative judge, the competence to decide lies with the Council Chamber of the Appellate Court. Finally, in ES, the competent authority to decide on conflicts of competence between the EPPO and national prosecutors is the Spanish State Prosecutor's Office. However, if a conflict of competence arises between the EPPO and a Spanish investigating judge, the Criminal Chamber of the Supreme Court will decide and will be able to request preliminary rulings from the CJEU.

Having the national prosecutor's office as the national competent authority to decide on conflicts of competence between the EPPO and the national prosecution authorities effectively means the matter cannot be referred to the CJEU for a preliminary reference, as required under Article 42(2). As settling the dispute requires an interpretation of EU law, the Regulation stipulates that the CJEU, pursuant to Article 267 TFEU, has jurisdiction to give a preliminary ruling on the interpretation of the aforementioned provision of the Regulation. Furthermore, in cases where this competence has been conferred to a prosecutorial authority, granting the solving of conflicts to a national authority which itself is indirectly involved in the dispute with the EPPO, as it belongs to the same administrative structure as the national prosecution, can blatantly result in bias and lack of impartiality.

The bias and lack of impartiality resulting from such a situation can be exemplified by the Spanish criminal case, Ayuso, which involved a conflict of competence between the Anticorruption Prosecutor's Office and the EPPO that was left to be decided by the State Prosecutor General – the hierarchical superior to the former. Firstly, this situation causes problems due to the principle of hierarchy that operates in the Spanish State Prosecutor's Office, as per Article 124 of the Spanish Constitution, which allows the Prosecutor General to give instructions to their subordinates. Furthermore, the Prosecutor General is appointed by the Head of State upon the proposal of the Government, thereby raising questions about their impartiality. This situation indicates that decisions by the Prosecutor General to solve conflicts of competence may be influenced by political interests. Secondly, as Article 42(2) obliges for a court decision under national law in order to allow for a preliminary reference, the Spanish law is in contravention of the Regulation as the Attorney General does not amount to a 'court' or 'tribunal.'

The wording of the aforementioned College Decision could give insight as to why the vast majority of the Member States have not chosen a court or tribunal as the national competent authority to handle disputes between the EPPO and the national prosecution. The College Decision stipulates that in the absence of a specific procedure enshrined in the Regulation, the EPPO shall comply with the rules established by the national law regarding the resolution of conflicts of competence and address the authority specified by the concerning Member State as the appropriate one to decide on the attribution of competence.

As there is no explicit procedure laid down in the Regulation, the above-mentioned Member States had selected the appropriate national authority responsible for resolving conflicts, pursuant to their national law, which in this case was a higher national prosecutorial body.

The national legislation of AT and SK was found to be compliant with Article 25(6) of the EPPO Regulation. In these Member States, the competent national body to decide disputes between the EPPO and the national prosecution authorities is the Supreme Court. Thus, in these cases, the national authority satisfies the criteria for a 'court/tribunal' and can directly submit a preliminary question to the CJEU.

Thus the approach under AT and SK legislation could serve as a good practice, which could act as an incentive for the remaining Member States to follow suit.

Overall, non-compliance with Article 25(6) stems from the fact that the majority of the Member States have selected a higher prosecutorial body as the competent national authority to deal with conflicts between the EPPO and the national prosecution. This, in turn, could arise from the wording under Article 25(6) and the Member States having identified the national authority they deem appropriate, due to an absence of a concrete procedure laid down under the Regulation. As mentioned previously, the identification of a higher prosecutor has further implications on the independence and impartiality of the latter, since such a high-level prosecutor belongs to the same administrative structure as the national prosecution office that is directly involved in the conflict and, therefore, cannot quality as 'court' or 'tribunal'.

4.4. Chapter V – Rules of procedure on investigation measures, prosecution, and alternatives to prosecution

4.4.1. Rules on investigations

4.4.1.1. Overview across Member States

This section will discuss the compliance issues and trends amongst the Member States in relation to Section 1 on rules on investigations as contained in Chapter V on investigation measures, prosecutions and alternatives to prosecution. For the Study, data was collected regarding the compliance of national law with **Articles 26(1) - (5), 27(1) - (3), 27(5), (7), 28(1), (2), (4)**, and **29(1) - (2).** The table below presents an overview of the compliance status per Member State for each Article and sub-Article covered, before outlining the reasoning behind the finding of partial or non-compliance in each Member State.

The subsequent sections will provide an in-depth analysis of the specific issues identified under **Articles 28(1), (2)** and **(4)** (Section 4.4.1.2) and **Article 29(1)** (Section 4.4.1.3) of the Regulation.

Table 5 - Chapter V on rules of procedure of investigation measures, prosecutions, and alternatives to prosecution – Overview of the compliance status per Member State

Member State	Chapter V Rules of procedure on investigation measures, prosecutions, and alternatives to prosecution – Section 1 Rules on investigations														
	Art. 26(1)	Art. 26(2)	Art. 26(3)	Art. 26(4)	Art. 26(5)	Art. 27(1)	Art. 27(2)	Art. 27(3)	Art. 27(5)	Art. 27(7)	Art. 28(1)	Art. 28(2)	Art. 28(4)	Art. 29(1)	Art. 29(2)
AT															
BE															
BG															
CY															
CZ															
DE															
EE															
EL															
ES															
FI															
FR															
HR															

IT															
LT															
LU															
LV															
MT															
NL															
PT															
RO															
SI															
SK															

Article 26 governs the initiation of investigations and allocation of competences within the EPPO. **Article 26(1)** empowers the EDPs in a Member State, in accordance with their national law, to initiate an investigation and note it in the case management system. The laws of three Member States were found to be in **partial compliance** (BE, MT, and SI). In MT and SI, the reason for partial compliance is the impediments in national law for initiating an investigation. In MT, the EDP is responsible for the investigation as well insofar as it has the power to instruct the police on investigative activities. In practice, this is not the case and the inquiring magistrate conducting the investigation acts independently from the EDP. In BE, national law is partially compliant with Article 26(1) regarding the customs framework., as the specialised customs official, and not the EDP or EP, is entitled to initiate the investigation. Additionally, investigations that require more extensive and intrusive measures are led by the investigative judge. It can also be noted that, although it does not seem to be applied in practice, Belgian law provides that, in specific cases, the Minister of Justice can order the public prosecutor's office to initiate certain prosecutions. National law does not explicitly provides that this does not apply to offences for which the EPPO has competence. Hence, the national legal framework constitutes a risk as it allows, in theory, the Minister of Justice to order the initiation of certain prosecutions with regard to PIF offences.

Article 26(2) stipulates that when the EPPO decides to initiate an investigation, it shall 'without undue delay inform the authority that reported the criminal conduct in accordance with Article 24(1) or (2).' The national law of one Member State (ES) was found in **partial compliance** with this provision. The reason for this finding is that Spanish legislation requires that, in addition to the national authorities, the EPPO also informs the General Public Prosecutor's Office. National law should not impose any additional burdens on EDPs, as this hampers a prompt exchange of information.

Article 26(3) grants the Permanent Chamber the power to instruct an EDP, if no investigation has been initiated by the EDP, to initiate an investigation, pursuant to the conditions under paragraph 1. SI is the only Member State where national law was found to be in **partial compliance** with this provision. The provision of the Regulation concerns the power of the EPPO to initiate the investigation; while under Slovenian law, an EDP (or national state prosecutor) cannot initiate and carry out prosecutorial investigation and may only exercise limited investigative powers.

The laws of all 22 Member States were found to be in **full compliance** with **Article 26(4).** This provision states that, in principle, a case must be initiated and handled by the EDP of the Member State where the focus of the criminal activity is, or, in the event of several connected offences that fall within the competences of the EPPO have been committed, the Member State where the bulk of the crimes took place; deviation from the rule is only permitted pursuant to specific criteria.

Article 26(5) governs the rules that apply if the Permanent Chamber decides to reallocate the case to an EDP in another Member State and merge and split cases and choose the EDP handling it. The national law of one Member State, namely BE, was found to be in **non-compliance** with the provision. In BE, there is no express possibility under Belgian law for an EDP to withdraw a case from an investigative judge when one oversees the investigation.

Article 27 governs the EPPO's right of evocation. **Article 27(1)** stipulates that when the EPPO receives complete relevant information, it shall take the decision on whether to exercise its right of evocation within five days and shall inform the national authorities of that decision. In certain circumstances, the ECP may extend the time limit up to five days and shall inform the national authorities. Under this provision, the national law of one Member States (MT) was found to be in **partial compliance** and one Member State (BE) was found to be in **non-compliance**.

In MT, the national law was found to be in partial compliance because the police need an inquiry magistrate to preserve evidence or appoint experts, which can hinder the EPPO's right of evocation, as the Magistrate's investigation can take years.

Of the Member State where national law was found to be in **non-compliance,** in BE, this non-compliance results from the Belgian legislator not laying down a system where, after the appointment of an investigative judge, the case will be transferred to an EDP. An investigative judge cannot be forced to follow the request to withdraw the case subsequent to evocation by the EDP or EP.

Article 27(2) stipulates that the national authorities shall refrain from taking any decision under national law that could potentially preclude the EPPO from exercising its right of evocation. BE is the only Member State where national law was found to be in **non-compliance** with this provision. The reason for this finding is that no specific provision applicable to the investigative judge exists in relation to the obligation under Article 27(2), namely that national authorities should refrain from taking any decisions that can preclude the EPPO from exercising its right of evocation.

Article 27(3) states that should the EPPO become aware that an investigation falling within its competence has already been commenced by the competent authorities of the Member State, it shall inform them without delay. The EPPO then shall take a decision within the timeframe under Article 27(1) whether to exercise its right of evocation. The national law of BE was found to be in **non-compliance** with this provision. The reason remains the same as for the previous sub-provision, the investigative judge cannot be forced to transfer the cases to an EDP.

Article 27(5) states that where the EPPO exercises its right of evocation, the competent national authorities should transfer the file to the EPPO and refrain from conducting further acts of investigation regarding the same crime. The national law of two Member States (BE and CY) was found to be in **non-compliance** with this provision. Regarding BE, there is no provision in the national law that requires the investigative judge to transfer the file to the EPPO when a judicial inquiry is ongoing. In CY, the non-compliance of national law with the Regulation stems from the fact that in practice criminal investigation is conducted solely by the Police and the Economic Crime Unit. Therefore, even if the EPPO evokes the case, the national authorities may still conduct criminal investigations, hence conflicting with the obligation to refrain from carrying out further acts of investigation regarding the same offence.

Article 27(7) requires that, during the course of proceedings, national authorities inform the EPPO of any information that may cause the EPPO to reconsider its decision not to exercise competence. It also enables the EPPO to exercise its right of evocation after receiving such information, provided that a national investigation has not been finalised and an indictment had not been submitted to court. The national law of two Member States (BE and ES) were found to be in **non-compliance** for two distinct reasons.

In BE, the reason for non-compliance of national law with the Regulation is that the term 'indictment' is not easy to implement into national law, since under Belgian law a public prosecutor cannot directly revert the case to a criminal court in case of judicial inquiry. Furthermore, in the event of a judicial inquiry, without an established legal procedure, the investigative judge, in light of new information, cannot be forced to accept evocation and is not obliged to transfer the case to an investigative judge specialising in EPPO issues. In ES, non-

compliance with the Regulation results from the additional obligation, under national law, to inform the State Public Prosecutor's Office, which is in contravention of the provision of the Regulation which stipulates that the national authorities solely inform the EPPO.

Article 28 lays down the conditions for undertaking an investigation. **Article 28(1)** permits the EDPs, in accordance with the EPPO Regulation and national law to conduct the investigation and other measures on their own or to instruct the national authorities in their Member State. The laws of four Member States were found to be in **partial compliance** (BE, EL,[88] MT and SI) due to the prerogatives given to investigative judges or other national authorities to investigate PIF offences, in certain cases. For a detailed analysis of the compliance issues under Articles 28(1), (2) and (4), see Section 4.4.1.2 below.

Article 28(2) requires that the national authorities during the proceedings take urgent measures pursuant to national law to ensure investigations led by the EPPO are conducted effectively. The national law of one Member State (BE) has been found to be **partially compliant** with this provision, while, in SI, the national law was found to be **non-compliant**. For a detailed analysis of the compliance issues under Articles 28(1), (2) and (4), see Section 4.4.1.2 below.

Article 28(4) enables the supervising EP to take a reasoned decision to conduct the investigation personally upon the approval of the competent Permanent Chamber. It also lists out the alternative criteria for personally undertaking the investigation or other measures or by instructing the competent authorities of the relevant Member State. While the provision can be considered directly applicable in some Member States, compliance issues were raised in a few. One Member State's national law, namely BE, was found in **non-compliance** with this provision, while three Member States' (EL, MT, and SI) national law was found to be in **partial compliance**. While some Member States failed to explicitly grant such powers to the EPs, compliance issues in other Member States result from the limitations imposed on EPPO investigations, which consequently affect the EP's powers. For a detailed analysis of the compliance issues under Articles 28(1), (2) and (4), see Section 4.4.1.2 below.

Article 29 governs the rules on lifting privileges and immunities. **Article 29(1)** allows the ECP to make a reasoned written request to lift the immunity of persons protected by immunity or privilege under national law if such protection poses an obstacle to the investigation of the EPPO. The national laws of all 22 Member States were found to be in compliance with this provision. It should be noted that there is no uniform or harmonised approach amongst the Member States for the lifting of privileges and immunities as this depends on their national law. Consequently, the ability of the ECP to request the lifting of a privilege or immunity does not guarantee that a privilege or immunity will be lifted. The national laws of six Member States (BE, FR, LU, NL, RO, and SK) present some restrictions as to the prosecution of specific individuals protected by a privilege or immunity under national law. For more information on the restrictions presented by these Member States and their consequences for Article 29(1), see Section 4.4.1.3 below.

Article 29(2) enables the ECP to make a reasoned written request to lift the immunity of persons protected by immunity or privilege under Union law if such protection poses an obstacle to the investigation of the EPPO. The national law of one Member State, namely ES, was found to be **non-compliant** with this provision of the Regulation. This is because national law does not differentiate between immunity under national and Union law. The Spanish law demands in both cases that the ECP addresses the Spanish judge of guarantees to obtain the authorisation to prosecute the person. Thus, the lifting immunity under Union law would have

[88] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

to be applied before a national authority, which is in direct violation of Protocol (No. 7) on the privileges and immunities of the European Union.

4.4.1.2. Conducting the investigation: Specific issues identified under Article 28

As mentioned above, **Article 28** sets out the general rules to conduct EPPO investigations. The national law of four Member States (BE, EL,[89] MT, and SI) was found to not be in full compliance with the EPPO Regulation. Considering that Article 28 delineates one of the core tasks of the EPPO, the situation observed across the Member States is further analysed in this section.

Pursuant to **Article 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. Those authorities shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them […].' Recital 30 also states that 'the investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber. Where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO.'

Further, it should be recalled that, as stated in Recital 15, the EPPO Regulation 'is without prejudice to Member States' national system concerning the way in which criminal investigations are organised'. Additionally, Recital 69 specifies that 'the EPPO should rely on national authorities, including police authorities, in particular for the execution of coercive measures. Under the principle of sincere cooperation, all national authorities and the relevant bodies of the Union, including Eurojust, Europol and OLAF, should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case.'

In line with the above, in all Member States, the EDPs can rely on and instruct competent national authorities to undertake the necessary investigative measures. In particular, this concerns the interaction of the EPPO with the national police investigation services. For example, in RO, Article 4(1) of Law 06/2021 states that the EDPs/EP have the same powers as national prosecutors which include, pursuant to Article 324(3) of the Code of Criminal Procedure, the power to delegate, by prosecutorial order, certain investigative measures to the criminal investigation bodies.

However, as described in Section 3.3 above, issues have been observed in BE, EL,[90] MT and S,I due to the fact that **certain types of investigations are led by other national authorities**.

Article 28(2) establishes that 'at any time during the investigations conducted by the EPPO, the competent national authorities shall take urgent measures in accordance with national law

[89] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

[90] *Ibid.*

necessary to ensure effective investigations even where not specifically acting under an instruction given by the handling European Delegated Prosecutor. The national authorities shall without undue delay inform the handling European Delegated Prosecutor of the urgent measures they have taken.' Belgian legislation was found to be non-compliant with this provision due to the fact that, in principle, it does not allow national authorities, such as the judicial police, to take investigative measures without prior instruction of a public prosecutor or the investigative judge. Hence, there is no legal basis for allowing national authorities to take urgent measures in the context of EPPO investigations. On the other hand, in SI, while the EPPO can conduct, pre-trial investigations and instruct the police, Articles 165.a(1) and 170(6) of the Criminal Procedure Act state that court investigations cannot be conducted for EPPO proceedings. Therefore, if required, national authorities cannot take any urgent measures that correspond to judicial investigation, which is not compliant with this provision of the Regulation.

While the EDPs have a predominant role in the investigations, **Article 28(4)** states that '[i]n exceptional cases, after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally, either by undertaking personally the investigation measures and other measures or by instructing the competent authorities in his/her Member State, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution by reasons of one or more of the following criteria:

(a) the seriousness of the offence, in particular in view of its possible repercussions at Union level;

(b) when the investigation concerns officials or other servants of the Union or members of the institutions of the Union;

(c) in the event of failure of the reallocation mechanism provided for in paragraph 3.

In such exceptional circumstances Member States shall ensure that the European Prosecutor is entitled to order or request investigative measures and other measures and that he/she has all the powers, responsibilities and obligations of a European Delegated Prosecutor in accordance with this Regulation and national law. The competent national authorities and the European Delegated Prosecutors concerned by the case shall be informed without undue delay of the decision taken under this paragraph.'

With regard to point (a), Recital 59 specifies that a 'particular case should be considered to have repercussions at Union level, inter alia, where a criminal offence has a transnational nature and scale, where such an offence involves a criminal organisation, or where the specific type of offence could pose a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence.'

Parallel to the compliance issues under Article 28(1), the same Member States (BE, EL, MT and SI) are not compliant with Article 28(4). Indeed, **when investigations are led by national authorities, both the EDPs and the EP are prevented from undertaking investigative measures**.

In some Member States, there are no provisions explicitly stating that the EP can take over the EDP's powers, responsibilities, and obligations. As such, Article 28(4) could be considered to be **directly applicable** in some Member States with the EPs taking over from the EDPs in exceptional circumstances regardless of what is specifically outlined in the national legislation.

In light of the issues observed regarding Article 28(4), it is worth noting that some of the **Member States that were found to be in full compliance** have introduced general provisions to clarify that any references to the EPPO in their legislation encompass both the EDPs and the EP. This is the case of SK, for example, where the general Section 10(1) of the Code of Criminal Procedure relating to the bodies active in criminal proceedings has been amended. It now provides that 'where matters falling within the competence of the European Public

Prosecutor's Office are concerned, the Public Prosecutor shall also mean the Chief European Prosecutor, the European Prosecutor, the European Delegated Prosecutor and the Permanent Chambers'. Other compliant Member States chose to include a direct reference to Article 28(4) in their legislation. An illustration of this approach can be found in LU where Article 136-6 of the Code of Criminal Procedure provides that 'the European Public Prosecutor who, in accordance with Article 28(4) of the aforementioned Regulation (EU) 2017/1939, decides to personally investigate, prosecute and bring to trial the perpetrators and accomplices of the criminal offences referred to in Article 26(4) bis of this Code, shall enjoy the jurisdiction and powers conferred on European Delegated Prosecutors'.

To conclude, while the EPPO investigations have to be carried out in line with the national rules applicable to criminal proceedings, the line is drawn where the EPPO needs to retain the lead of investigations. The EDPs/EP can order investigative measures to law enforcement authorities and can request authorisations from investigative judges, but it is important that they keep the direction of the investigations.

4.4.1.3. Immunities and privileges: Overview of the situation under Article 29(1)

Article 29 of the EPPO Regulation titled 'Lifting privileges or immunities' governs the rules under which the lifting of privileges or immunities possessed by specific individuals can be permissible for the sake of facilitating an investigation of the EPPO.

More specifically, **Article 29(1)** states that if an EPPO investigation involves individuals protected by a privilege or immunity under national law and where such protection inhibits the conduction of a proper investigation by the EPPO, the ECP can request the lifting of the privilege or immunity. Such a request must be made in writing, presenting in detail the reasons for such a request, and must be submitted to the relevant national authorities of the respective Member State. The entire process of lifting any privilege or immunity will be governed by the national procedure established within the relevant Member State.

To understand the different legal features amongst the Member States, regarding Article 29 of the Regulation, it is essential to first explain the importance of the concept of affording privileges and/or immunity to certain individuals. Certain individuals are afforded privileges and immunities to carry out functions and responsibilities entrusted to them by a public entity, in a smooth and unhindered manner.[91] Such privileges or immunities entail that the person to whom they are awarded is officially granted exemption from liability (prevention of prosecution) and such exemptions vary in scope, duration and significance, carrying different degrees of protection.[92] In addition to privileges and immunities, specific individuals may be brought to prosecution via special procedures. Within the framework of functional necessity, privileges and immunities are increasingly provided for officials (such as Heads of State, senior governmental officials, diplomats, Members of the European Parliament, etc.), on several grounds (to exercise functions free from outside constraints or pressures, to ensure the protection of national independence, to safeguard the fulfilment of functions and purposes, to freely carry out common/national interests, etc.).[93]

[91] Reinisch, International Organizations Before National Courts (Cambridge, Cambridge University Press, 2000).

[92] Bekker, The Legal Position of Intergovernmental Organisations – a Functional Necessity Analysis of their Legal Status and Immunities (Martinus Nijhoff, Dordrecht, 1994).

[93] Martin Hill, "Immunities and Privileges of International Officials: The Experience of the League of Nations" (1948), 42(2) The American Journal of International Law 520.

All Member States were found to be compliant with Article 29(1) of the Regulation. Yet, after a closer look at the wording of **Article 29(1),** it is easy to identify why this provision was relatively easy to implement into the national law of the Member States as it is directly applicable. **The provision only indicates that the ECP should submit a request for the lifting of a privilege or immunity in accordance with the procedures laid down by the relevant national law, which would thus imply that Member States should then follow their own national procedures to proceed with the lifting** of privileges and immunities if they deem that it is appropriate and permissible under their national law, with the restrictions, limitations, and peculiarities that their process entails. There is no obligation for the Member States to introduce new provisions or amend existing legislation on the lifting of privileges/immunities, to correctly implement the provisions of Article 29. As such, there is no uniform or harmonised approach amongst the Member States for the lifting of privileges and immunities as this depends on their national law.

Consequently, the ability of the ECP to request the lifting of a privilege or immunity **does not guarantee that a privilege or immunity will be lifted and, if that is the case, a related EPPO investigation will be affected accordingly.** On the one hand, if the privilege or immunity is lifted, the relevant persons could be prosecuted by the EPPO. On the other hand, if the national authorities decide not to lift the privilege or immunity, the EPPO would not be able to exercise its competence to investigate the persons potentially involved in crimes within the EPPO's competence and the case would have to be dismissed in accordance with Article 39(1)(d).

Most legal systems set out some specific rules or immunities for the prosecution of specific individuals. Some interesting examples of rules presenting restrictions as to the prosecution of specific individuals protected by a privilege or immunity can be found in the national laws of BE, NL, RO, LU and FR.

In BE, for federal Ministers, Ministers of the Governments of the Regional and Language Communities and magistrates, the EDPs/EP will have to follow the specific privileged jurisdiction procedure. This entails proceedings before the Court of Appeal and potentially the need for prior authorisation by the relevant government body. However, the specific privileged jurisdiction procedure requires the intervention of the Supreme Court before which the EDPs/EP are not competent to act (please note that this results in a lack of compliance under Article 4 – see Section 4.1.2 for more information).

In NL, Dutch national law grants very limited immunities with the sole exception being those who participate in deliberation in the Parliament. Their immunity entails exemption from criminal prosecution. According to Dutch law, this immunity cannot be lifted. Further, under Dutch law, there is a subset of offences (labelled 'public duty offences') for which a particular group of defendants (Government Ministers, Secretaries of State and Members of Parliament) must stand trial before the Supreme Court in the first and only instance. In such cases, the prosecution is carried out by the Prosecutor General at the Supreme Court, which the EP or EDP cannot substitute (please note that this results in a lack of compliance under Article 4 – see Section 4.1.2 for more information).

In RO, members of the Parliament have immunity under Article 72(2) of the Constitution. They may not be searched, detained, or arrested without the consent of the Chamber to which they belong, following a hearing. The criminal proceedings may be only undertaken by the Public Prosecutors' Office of the High Court of Cassation and Justice. This requirement could hinder the EPPO's competence should the Chamber not consent to the ECP's request to lift the immunity.

In LU, the Luxembourg Constitution outlines specific provisions and processes regarding the authorisation of investigation and prosecution of state officials depending on the position they hold and, thus, permits the lifting of immunities under certain conditions. For example, as it relates to Members of the Government, the Parliament holds absolute discretionary power on whether such a case would be pursued. If the ECP requested the lifting of immunity for one of the Members of the Luxembourgish Government, in accordance with Article 29(1) of the Regulation, the outcome of this request would depend on the decision of the Luxembourgish Parliament, which could vote against the lifting of the immunity. Thus, the EPPO's competences could be hindered as an independent process of the Luxembourgish Parliament would take precedence over the EPPO's request for the lifting of immunity.

More distinctively in FR, the immunities for the President of the French Republic and the French Ombudsman and his/her assistants cannot be waived. These limitations are outlined in the French Constitution, they apply to any prosecutor and do not introduce specific restrictions on the EPPO's powers. However, the fact that these immunities cannot be waived will deprive any chance of the EPPO prosecuting such persons for committing crimes within their competence and result in the dismissal of the case.

To conclude, it should first be recalled that Article 29(1) provides for the ECP to be able to request the lifting of an immunity/privilege under national law in accordance with the national procedures; this means that **the examples laid out above are all in full compliance with the Regulation. However, such immunities are likely to affect the EPPO's competence** to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union. Even where a person protected by immunity has committed a criminal offence affecting the financial interests of the Union, should the national procedure fail to be successful, the Permanent Chamber will have to dismiss the case in accordance with Article 39(1)(d) of the Regulation.

4.4.2. Rules on investigation measures and other Measures – Overview across Member States

This section will discuss the compliance issues and trends amongst the Member States in relation to Section 2 on rules on investigation measures and other measures as contained in Chapter V on investigation measures, prosecutions and alternatives to prosecution. For the Study, data was collected regarding the compliance of national law with **Articles 30(1)-(5), 31(1)-(6),** and **33(1)-(2).** The table below presents an overview of the compliance status per Member State for each Article and sub-Article covered, before outlining the reasoning behind the finding of partial or non-compliance in each Member State.

Table 6 - Chapter V on rules of procedure of investigation measures, prosecutions, and alternatives to prosecution – Overview of the compliance status per Member State

Member State	Chapter V Rules of procedure on investigation measures, prosecutions, and alternatives to prosecution – Section 2 Rules on investigation measures and other measures																		
	Art. 30(1)	Art. 30(1) (a)	Art. 30(1) (b)	Art. 30(1) (c)	Art. 30(1) (d)	Art. 30(1) (e)	Art. 30(1) (f)	Art. 30(2)	Art. 30(3)	Art. 30(4)	Art. 30(5)	Art. 31(1)	Art. 31(2)	Art. 31(3)	Art. 31(4)	Art. 31(5)	Art. 31(6)	Art. 33(1)	Art. 33(2)
AT																			
BE																			
BG																			
CY																			
CZ																			

DE
EE
EL
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FI
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HR
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LT
LU
LV
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NL
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RO
SI
SK

Article 30 governs the rules on investigative measures and other measures. **Article 30(1)** requires that Member States enable the EDP to order or request a list of investigation measures in instances where the offence subject to investigation is punishable by up to 4 years of imprisonment. The national laws of three Member States (BE, MT, and SI) were found to be in **partial compliance** with the provision. In these Member States, partial compliance of national law with the Regulation stems from EDPs being prevented from ordering or requesting investigative measures. In BE, certain investigative measures require the intervention of an investigative judge either by way of prior authorisation in a mini-judicial inquiry[94] or in the context of a judicial investigation, in which case the investigative judge will take the lead. In these instances, the EDPs or EP would not be fully entitled to undertake an investigative measure or request it to be undertaken, especially if the investigative judge would refuse the measure. In SI, the EPPO can merely direct police and some other national authorities to execute investigative measures and propose that investigating judges execute some specifically listed individual investigative measures. Finally, in MT, the EPPO cannot order or request investigative measures due to the in-genere inquiry which is led by the inquiring magistrate.

Article 30(1)(a) concerns the search of, inter alia, premises. One Member State's national law, namely BE, was found to be in **partial compliance** with the provision of the Regulation. In BE, such measures require the prior authorisation of the investigative judge and in some instances the investigative judge takes the lead in the investigation, meaning that the EPPO cannot directly undertake or request said investigative measures. The national law of another Member State, namely MT was found to be in **non-compliance** with the Regulation. In MT, it is the inquiring magistrate that takes the lead in such searches and, thus, non-compliance is reached.

Article 30(1)(b) concerns obtaining the production of any relevant object or document either in its original form or in some other specified form. The national law of one Member State, namely MT was found to be in **partial compliance** with this sub-provision. The partial compliance of Maltese law with the Regulation stems from national law hindering the EDPs' obtaining of investigative measures.

[94] The mini-judicial inquiry (FR: *mini-instruction*) is regulated under Article 28septies of the Code of Criminal Procedure. It empowers the public prosecutor (or EDP) to implement investigative measures within the criminal investigation (with, in some cases, prior authorisation to be obtained from the investigative judge). It is applied for less intrusive measures that do not require a fully-fledged judicial inquiry, which is then fully conducted by the investigative judge.

Article 30(1)(c) covers the production of stored computer data. One Member State, namely MT, has been found to be in **non-compliance** with this provision. While the national law provides for the measure contained in the sub-provision, EDPs do not take the lead in investigations as this is reserved for the inquiring magistrate.

Article 30(1)(d) governs the freezing of instrumentalities or proceeds of crime. All Member States have been found **fully compliant** with this provision.[95]

Article 30(1)(e) concerns the interception of electronic communications to and from the suspect or accused person. The national law of two Member States, namely ES and MT, were found to be in **non-compliance** with the provision. In ES, this results from legislation stipulating that the judge of guarantees has the power to conduct the investigations and in MT, this stems from the inquiring magistrate leading the investigations.

Article 30(1)(f) governs the track and trace of an object by technical means, consisting of controlled deliveries of goods. The laws of four Member States (BE, IT, MT, and PT) were found to be **partially compliant** with this provision and one Member State, namely SI was found to be **non-compliant**. In BE, certain investigative measures, depending on the extent of the tracing, require prior authorisation by the investigative judge who can either authorise the measure (i.e., mini-judicial inquiry) or take the lead over the investigation (i.e., judicial inquiry). In such case, the EPPO cannot directly undertake or request investigative measures, especially if the investigative judge would refuse the measure. As the investigative judge is empowered to take over the investigations, this goes beyond the limitations permitted under Article 30(3). In MT, partial compliance stems from the inquiring magistrate having the power to lead investigations. In IT, partial compliance stems from the fact that 'controlled delivery' has not been transposed into national law. Similarly, in PT, partial compliance was concluded as national law fails to describe either the requirements for such measure to be ordered/requested or authorised or what specific measures could be taken and, therefore, it is not clear whether the controlled deliveries of goods would be possible under PT's current legal framework. In SI, non-compliance is due to investigative measures of tracking and tracing objects by technical means not being provided by Slovenian law. Investigative measures of controlled delivery can be executed only in a manner by which the prosecutor orders surveillance of a person or persons who are carrying, transporting, or moving the delivery. In such cases, technical equipment which determines the position and movement of the person under surveillance is placed on the vehicle used by them. Thus, it is not possible to (legally) track and trace objects by technical means.

Article 30(2) states that the investigation measures listed in the preceding sub-provision may be subject to conditions pursuant to national law if the national law provides for restrictions regarding certain persons that may be bound by an obligation of confidentiality. The laws of all 22 Member States were found to be **fully compliant** with this provision.

Article 30(3) allows the Member States to limit their application of points (e) and (f) of Article 30(1) to specific serious offences; however, it requires that should the Member State make use of this option, the EPPO shall be notified of the relevant list of specific serious offences pursuant to Article 117. The laws of two Member States (DE and MT) were found to be in **partial compliance** with this provision. DE was found in partial compliance as the notifications under Article 117 were deemed incomplete. Meanwhile, MT failed to notify its use of the limitation under Article 117.

Article 30(4) provides that EDPs should be able to request or order any other measures that are available in their Member State that are available to prosecutors under national law in

[95] Please note that MT is in full compliance with Article 30(1)(d) because the EDP can request the courts to issue monitoring orders, investigation orders, attachment orders and freezing orders. *Prima facie*, evidence is enough in such a situation for the courts to issue such interim measures.

similar cases, in addition to the measures already mentioned in Article 30(1). The laws of two Member States (BE and MT) were found to be in **partial compliance** with this provision. In BE, this is due to the investigative judge having the power to lead the investigation or authorise it. In MT, partial compliance arises from EDPs not being given the same investigative powers as prosecutors.

Article 30(5) allows the EDPs to only order the measures under Article 30(1) and (4), where they have reason to believe that said measure can be fruitful in providing information or evidence to the investigation and there are no less intrusive measures available. The law of one Member State (ES) was found to be **non-compliant**. In ES, the law attributes the leading role to the judge of guarantees and, hence, the EDP cannot always decide on the level of investigative measures, which is in contravention of the Regulation.

Article 31 governs the rules on cross-border investigations. **Article 31(1)** requires that, where a measure needs to be carried out in a Member State different to the Member State of the handling EDP, the latter EDP decides on the adoption of the necessary measure and assigns it to an EDP located in the Member State where the measure needs to be undertaken. The national laws of all 22 Member States were found to be **fully compliant** with this provision.

Article 31(2) permits the handling EDPs to assign any measures which are available to them, and requires the EDPs to inform their supervising EP if they assign an investigation measure to one or several EDPs from another Member State. The national laws of all 22 Member States were found to be **fully compliant** with this provision.

Article 31(3) requires the assisting EDP to obtain authorisation in accordance with national law if judicial authorisation is required under the law of the assisting EDP. The law of one Member State, namely SI, was found to be in **partial compliance**. The reason for this is that the EDP cannot execute investigations but can propose to the investigating judge to execute investigative measures within the judge's competence, thus, hindering the assisting EDP from obtaining the authorisation. It is interesting to note that AT is the first Member State to send a preliminary question to the CJEU regarding the interpretation of the EPPO Regulation on this provision, specifically asking for the clarification of the extent of judicial review regarding coercive investigative measures in cross-border investigations within the EPPO regime.

Article 31(4) stipulates that the assisting EDP shall carry out the assigned measure or instruct the national authority to undertake it. The laws of two Member States (BE and SI) were found in **partial compliance**. In these Member States, partial compliance stems from the EDP not having the power to solely lead the investigations. In BE, this would be the power of the investigative judge and in SI, the EDP can solely propose to the investigative judge to execute certain investigative measures.

Article 31(5) provides a list of scenarios in which the assisting EDP needs to inform his supervising EP and consult with the handling EDP to resolve the issue bilaterally. The laws of all 22 Member States were found to be **fully compliant** with this provision.

Article 31(6) empowers the assisting EDP to have access to the applicable legal instruments on mutual recognition or cross-border cooperation, with the approval of the EP, if the assigned measure is available in a cross-border situation covered by such legal instruments. The laws of all 22 Member States were found to be **fully compliant** with this provision.

Article 33 governs the rules on pre-trial arrest and cross-border surrender. **Article 33(1)** enables the handling EDP to order or request the arrest or pre-trial detention of the suspect or accused person pursuant to national law. Belgian national law was found to be in **non-compliance** with this provision of the Regulation. An arrest warrant or pre-trial detention requires a 'judicial inquiry', hence falling under the category of measures that are fully led by the investigative judge. In such cases, the EDPs/EP cannot even request the measures to be carried out.

Article 33(2) stipulates that in the event that it is necessary to arrest and surrender a person who is not located in the Member State in which the handling EDP is acting, the latter shall issue or request the competent authority of the relevant Member State to issue a European Arrest Warrant. In line with the reasoning provided above regarding Article 33(1), Belgian law was found to be in **non-compliance** with this provision. This stems from national law assigning such requests to the investigative judge and excluding the EDPs/EP.

4.4.3. Rules on (alternatives to) prosecution

4.4.3.1. Overview across Member States

This section will discuss the compliance issues and trends amongst the Member States in relation to Sections 3 and 4 concerning the rules on (alternatives to) prosecution as contained in Chapter V on rules of procedure on investigation measures, prosecutions, and alternatives to prosecutions. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 35(1)-(3), 36(1), (3), (5), (7), 37(1)-(2),** and **39(1)-(4)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of any partial or non-compliance in each Member State.

The subsequent Section 4.4.3.2 will provide an in-depth analysis of the specific issues identified under **Article 39(1)** and **(2)** of the Regulation.

Table 7 – Sections 3 & 4 on rules on (alternatives to) prosecution forming part of Chapter V on rules of procedure of investigation measures, prosecutions, and alternatives to prosecution – Overview of the compliance status per Member State

Member State	Chapter V Rules of procedure on investigation measures, prosecutions, and alternatives to prosecution – Sections 3 & 4 Rules on (alternatives to) prosecution											
	Art. 35(1)	Art. 35(2)	Art. 35(3)	Art. 36(1)	Art. 36(3)	Art. 36(5)	Art. 36(7)	Art. 37(1)	Art. 37(2)	Art. 39(1)	Art. 39(2)	Art. 39(3)	Art. 39(4)
AT													
BE													
BG													
CY													
CZ													
DE													
EE													
EL													
ES													
FI													
FR													
HR													
IT													
LT													
LU													
LV													
MT													
NL													
PT													
RO													
SI													
SK													

Article 35 refers to the termination of an investigation. **Article 35(1)** provides that when the EDPs consider the investigation complete, they shall submit a report to the supervising EP, containing a summary of the case and a draft decision on whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure. The supervising EP shall forward those documents to the Permanent Chamber accompanied by his/her own assessment if they consider it to be necessary. When the Permanent Chamber takes a decision as proposed by the EDPs, they shall pursue the matter accordingly. Under this Article, the national laws of two Member States (BE and SI) were found to be in **partial compliance**, while one Member State (EL[96]) was found to be in **non-compliance**.

Of those Member States where national law was found to be in **partial compliance,** two distinct issues were identified. In BE, in customs-related PIF cases, the specialised customs official drafts a report for the EDP or EP and proposes how the case should continue – the EDP/EP are not bound by this proposal but nevertheless, they are in a difficult position to overrule such a proposal. Meanwhile, in SI, the EPPO is unable to conduct judicial investigations or request the investigation to be initiated and carried out, rendering it difficult for the EDP/EP to decide whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure.

Greek law was found to be in **non-compliance** with this provision of the Regulation due to the existence of an additional authority or body preventing the EPPO from having a decisive say on whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure. In EL, this authority is the Judiciary Council which makes the decision on whether to prosecute before a national court or to consider the referral of the case, dismissal, or simplified prosecution procedure. The Greek law implementing the Regulation does not refer to whether or not in EPPO cases, the Judiciary Council would continue to make such decisions, nor have there been any cases which show what occurs in practice.[97]

The laws of all 22 Member States were found to be in **full compliance** with **Article 35(2)**, which provides that if the Permanent Chamber considers that it will not take the decision as proposed by the EDP, it shall, where necessary, undertake its own review of the case file before taking a final decision or giving further instructions to the EDP.

The laws of all 22 Member States were found to be in **full compliance** with **Article 35(3).** This Article stipulates that, where applicable, the report of the EDP shall also provide sufficient reasoning for bringing the case to judgment either at a court of the Member State where the EDPs are located or, in accordance with Article 26(4), at a court of a different Member State that has jurisdiction over the case.

Article 36 concerns the prosecution before the national courts. **Article 36(1)** states that when the EDP submits a draft decision proposing to bring a case to judgment, the Permanent Chamber shall, following the procedures in Article 35, decide on this draft within 21 days; the Permanent Chamber cannot decide to dismiss a case if a draft decision proposes bringing a case to judgement. The laws of two Member States (BE, and EL) were found to be in **non-compliance** with this provision. The reason that Greek law was found to be in non-compliance with this provision was the same as under Article 35(1) – there is an intermediate phase where the Judiciary Council, rather than the Permanent Chamber, makes the final decision on whether to prosecute, refer the case, dismissal, or simplified prosecution procedure. Alternatively, in BE, the situation with the customs-related PIF cases results in non-compliance

[96] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

[97] Ibid.

for the same reasons as found under Article 35(1); however, under Article 36(1), there is also a judicial body involved which takes the final decision on the prosecution of the case before the national courts and is not required to follow the decision of the Permanent Chamber.[98]

Under **Article 36(3)**, it is provided that where one Member State has jurisdiction over the case, the Permanent Chamber shall decide to bring the case to prosecution in the Member State of the handling EDP. However, the Permanent Chamber may, considering the report under Article 35(1), decide to bring the case to prosecution in a different Member State if justified under Article 26(4) and instruct the EDP of that Member State accordingly. The law of one Member State (BE) was found to be in **non-compliance** with this provision; this is because, in judicial inquiries, a judicial body takes the final decision on the prosecution of the case before the national courts and is not required to follow the proposal of the EDPs (or EP). Therefore, the pre-trial court could still decide to prosecute in BE a case that the Permanent Chamber requested to transfer to another Member State.

All 22 Member States were found to be in full compliance with **Article 36(5),** which provides that once a decision on the Member State in which the prosecution shall be brought has been taken, the competent national court within that Member State shall be determined by national law.

Article 36(7) stipulates that following the judgment of the court, the EDP shall submit a report including a draft decision on whether to lodge an appeal to the competent Permanent Chamber and await its instructions. Where it is impossible to await those instructions, the EDP shall be entitled to lodge the appeal without prior instructions and submit the report without delay. The Permanent Chamber shall then instruct either to maintain or withdraw the appeal. The same procedure shall apply when the handling EDP would take a position that would lead to the dismissal of the case. The laws of two Member States (CY and ES) were found to be in **partial compliance** with this provision. In ES, the law is non-compliant with this provision because if the trial takes place before the Supreme Court and the accused person is granted a privilege, there is no possibility of lodging an appeal. In CY, there is a specific national provision explicitly providing for the possibility of the EPPO to lodge an appeal only via the Attorney General, meaning that national law applies in the sense that the EDP has to request that the Attorney General lodges an appeal.

Article 37 concerns the admission and assessment of evidence before national courts. The laws of all 22 Member States were found to be in **full compliance** with **Articles 37(1)** and **(2)**. Article 37(1) provides that evidence presented by the EPPO prosecutors or the defendant to a court shall not be denied admission on the basis that the evidence was gathered in another Member State or in accordance with the law of another Member State, while Article 37(2) provides that the power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by the Regulation.

Article 39 refers to the dismissal of the case. **Article 39(1)** provides that where the prosecution has become impossible, the Permanent Chapter shall, based on the report provided in accordance with Article 35(1), decide to dismiss the case against a person on any of the following grounds: (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person, unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of in relation to the same facts; or (g) the lack of relevant evidence. This provision is one that may be considered to be directly applicable by the Member States and, therefore, this should be borne in mind when considering the below assessments. Under this Article, the laws of three Member States were

[98] Ibid.

found in non-compliance (BE, EL[99] and IT). The national law of these Member States was found to be in **non-compliance** due to the intervention of a national body, rather than the Permanent Chamber, in deciding whether a case should indeed be dismissed. For a detailed analysis of the compliance issues under Article 39(1), see Section 4.4.3.2 below.

Article 39(2) provides that a decision in accordance with paragraph 1 should not bar further investigations on the basis of new facts which were not known to the EPPO at the time of the decision and become known after the decision. The decision to reopen investigations shall be taken by the competent Permanent Chamber. National law was found to be in partial compliance with this provision in three Member States (NL, SI, and SK) and non-compliance in five Member States (BE, EE, HR, IT, and RO). Of these Member States, two distinct issues resulting in a lack of full compliance were identified: 1) the court/judge has to approve the reopening of a case on the basis of new facts (BE, IT, NL, RO, and SK), and 2) national law places a high level of importance on the principle of ne bis in idem (EE, HR, and SI). For a detailed analysis of the compliance issues under Article 39(2), see Section 4.4.3.2 below.

Article 39(3) refers to cases where the EPPO is competent in accordance with Article 22(3), in which the EPPO shall dismiss a case only after consultation with the national authorities referred under Article 25(6). Then, if applicable, the Permanent Chamber shall refer the case to the competent national authorities in accordance with Articles 34(6), (7) and (8). The laws of all 22 Member States were found to be in compliance with this provision.

The laws of all 22 Member States were found to be in compliance with **Article 39(4).** This Article provides that where a case has been dismissed, the EPPO shall officially notify the competent national authorities and shall inform the relevant IBOAs, as well as, where appropriate, the suspects or accused persons and the crime victims, of such dismissal. The dismissed cases may also be referred to OLAF or the competent national administrative or judicial authorities for recovery or administrative follow-up.

4.4.3.2. Dismissal of cases: Specific issues identified under Article 39

As referred to above**, Article 39** refers to the dismissal of the case. It was provided that the national law of several Member States was found to not be in full compliance with this provision of the Regulation. Specifically, in light of the vast issues resulting in partial/non-compliance under these subparagraphs, this section will focus on the compliance issues amongst the Member States concerning **Articles 39(1)** and **(2)** of the Regulation.

Article 39(1) provides that: '[w]here prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case against a person on account of any of the following grounds: (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person, unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts; (g) the lack of relevant evidence'.

When it comes to Article 39 on dismissal of the case and the rules on prosecution in general, it is important that the EPPO respects the right to a fair trial, the rights of the defence and the

[99] Ibid.

presumption of innocence, as enshrined in Articles 47 and 48 CFREU. This is outlined in Recital 83 of the Regulation.

It should be noted that under Article 42(3) of the Regulation, the decision to dismiss a case in so far as it is contested directly on the basis of Union law can be reviewed by the CJEU. This Article provides that: '[b]y derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall be subject to review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU.'

Recital 81 of the Regulation provides that '[t]he grounds for dismissal of a case are **exhaustively** laid down in this Regulation.' From this Recital, it could be presumed that the EPPO can only dismiss cases under the grounds provided under Article 39(1). Nevertheless, it could also be interpreted in the sense that, under Article 39(1), dismissal can be decided either on the grounds provided by the EPPO Regulation or any other grounds provided by national law. If interpreted in such a way, it would, therefore, also mean that Article 42, paragraph 1, may apply when dismissing the case on the basis of grounds provided under national law.

National law was found not to be in full compliance with Article 39(1) of the Regulation because a **national authority was found to be empowered to make the final decision on whether to dismiss the case**. For example, in BE, the public prosecutor has a wide discretion to dismiss national cases, as per Article 28 quarter of the Criminal Procedural Code, which is not limited to the grounds under the Regulation – where an EPPO case is linked with a national case, dismissal can only take place after consultation with the relevant public prosecutor and in case of judicial investigation,[100] the intervention of a pre-trial tribunal or court is required. Similarly, in EL, Article 313 of Law 4620/2019 vests the Judiciary Council with the authority to dismiss a case, with no distinction made in the national law for cases within the competence of the EPPO.[101] Like both BE and EL, in IT, Article 416 of the Italian Code of Criminal Procedure provides that the EDP/EP, at the end of investigations, has to ask for the accused to be brought to judgment, and the Italian judicial authority will then make the final decision to dismiss the case. As such, even in the case where the EDPs/EP suggest the dismissal of an EPPO case, the judge is in a position to impose that prosecution is carried out.

CZ provides an interesting example of a Member State that was **found to be in full compliance with Article 39 even though there are national authorities involved** in the process of deciding whether to dismiss a case. Aligning with the considerations made in Section 3.3 above with regard to the decision to prosecute, the national authorities may be involved in the decision to dismiss a case, as long as the final decision is within the hands of the EPPO. In the CZ, Section 185 et seq of the Code of Criminal Procedure provides for a preliminary hearing to take place. However, the preliminary hearing does not give the power to the Czech judicial authority to determine if the EPPO can proceed with the dismissal. The preliminary hearing only enables the judicial authority to check and ask the prosecutor to repair any deficiencies of the indictment from the Czech law perspective. Alternatively, it enables the judicial authority to refer the case to another competent court or authority (if required under Czech law). Therefore, the national court does not have the power to impose the prosecution nor to dismiss the case.

Article 39(2) provides that: 'A decision in accordance with paragraph 1 shall not bar further investigations on the basis of new facts which were not known to the EPPO at the time of the

[100] In BE, the judicial inquiry takes place for investigations that require more extensive intrusive measures and is led by the investigative judge. For more on the judicial inquiry in BE, see Chapter 3.

[101] Please note that the situation in EL has been amended by Law 5026/2023, passed on 28th February 2023, after the temporal scope of the national research.

decision and which become known after the decision. The decision to reopen investigations on the basis of such new facts shall be taken by the competent Permanent Chamber.'

Under Recital 83 of the Regulation, it is emphasised that the activities of the EPPO should also be exercised in full compliance with Article 50 CFREU, which protects the right not to be tried or punished twice in criminal proceedings for the same offence (ne bis in idem), ensuring that there will be no double jeopardy as a result of the prosecutions brought by the EPPO.

The national law of several Member States (BE, EE, IT, NL, RO, SI, and SK) was found to **not** be in compliance with Article 39(2) of the Regulation.

The majority of the Member States (BE, IT, NL, RO, and SK) were found not to be in compliance because **a court/judge has to approve the reopening of a case on the basis of new facts**, thus, preventing the Permanent Chamber from making such a decision. In BE, in accordance with national law, in case of an investigative judge-led investigation,[102] the decision to reopen the case will be taken by the pre-trial court, which is independent and is not required to follow the decision of the Permanent Chamber on the existence of new facts. Similarly, in NL, Article 255 of the Code of Criminal Procedure allows for the reopening of a case which has been provisionally closed due to dismissal with a formal notification. In situations where the suspect was not formally notified of the dismissal, the case can be reopened. However, in a case where they were notified, national law requires an investigative judge to consent to the reopening of the case. IT provides another example of a Member State that requires a judge to consent to the reopening of the case. Under Article 414 of the Code of Criminal Procedure, for a case to be reopened, the prosecutor has to ask the preliminary hearing judge who will make the decision to reopen the case. In RO, a decision to reopen a criminal case must be decided within 3 days by the national judge of the preliminary chamber who makes the final decision on whether or not cases should be re-opened. The existence of a time limit in RO makes the lack of compliance even more likely that a case cannot be reopened, and may make the Permanent Chamber's decision to reopen even more difficult. Meanwhile, in SK, it is not a specific judge that has to decide but rather a court in general. National law requires a court to decide whether to permit the renewal of proceedings on the basis of new facts coming to light. This means that should the Permanent Chamber want to reopen a case, the EDP would need to submit to the court for the resumption of proceedings, which will then decide whether to grant permission.

In all of these cases, it is possible that the national authorities could consent on the basis of the decision of the Permanent Chamber; however, it is unclear and uncertain whether the direct applicability of the Regulation would allow this to happen in practice.

In some Member States (EE, HR, and SI), **national law provides a strict application of the principle of *ne bis in idem* meaning that a case could not be reopened under national law on the basis of new facts.** Firstly, in EE, Section 366(5) KrMS only allows the reopening of the case on the basis of new evidence if a crime was committed in the course of the first proceedings, such as perjury, evidence manipulation, etc. This is in line with the Estonian Constitution which enshrines the principle of ne bis in idem, specifically that '[n]o one may be prosecuted or sentenced for a second time for an act in respect of which they have been the subject of a final conviction or acquittal pursuant to the law'. Therefore, in EE, no investigation, including those within the competence of the EPPO, can be reopened under any circumstances solely on the revelation of new facts. Similarly, in SI, the principle of ne bis in idem is applied strictly in accordance with national law. This means that in accordance with Article 10(1) of the Criminal Procedure Act, once a final court decision has been imposed, this cannot be reopened by either state prosecutor or any other person, including EDPs/EPs. It

[102] In BE, the judicial inquiry takes place for investigations that require more extensive intrusive measures and is led by the investigative judge. For more on the judicial inquiry in BE, see Chapter 3.

should be noted that the dismissal of a criminal report does not qualify as a final court decision and can be reopened by a state prosecutor, and thus also the EDP/EP. Meanwhile, in HR, the principle of ne bis in idem is also strictly applied in accordance with national law – although, it is less certain whether this would be bypassed due to direct applicability in cases within the EPPO's competence. Article 503 of the Criminal Procedure Act provides only one exceptional circumstance for the reopening of a case – where the dismissal has been a result of a criminal offence committed by a state attorney or whose victim was the state attorney. Beyond this one exceptional circumstance, it is not possible to reopen a case under national law.

All the above Member States are **not** in full compliance with the Regulation, due to the strict application of the principle of ne bis in idem, which prevents the reopening of a case in all circumstances where new facts have come to light (including for those cases that fall within the EPPO's competence).

To conclude, under Article 39(1), national law was found to not be in compliance because the **national authority was found to be empowered to make the final decision on whether to dismiss the case.** In these Member States, there is a risk that this national authority could overrule the Permanent Chamber's decision to dismiss the case. The intervention of a national authority, however, does not always result in a lack of compliance, provided they only check the decision and do not make the final decision on dismissal.

Subsequently, under Article 39(2), national law was mainly found to not be in compliance on the basis that **a court/judge has to approve the reopening of a case on the basis of new facts.** This means that the Permanent Chamber cannot make a decision to reopen a case without the approval of a national court/judge. There may, therefore, be an issue should the national court/judge disagree with the Permanent Chamber and bar the reopening of the case. Furthermore, there may be a barrier to reopening the case in some Member States with a particularly **strict interpretation of the principle of ne bis in idem.** In those Member States, national law does not allow for the reopening of the case in light of new facts. This may prevent the Permanent Chamber from reopening a case in those Member States considering that it is not permitted under national law.

4.4.4. Rules on simplified procedures – Overview across Member States

This section will discuss the situation and trends amongst the Member States in relation to Section 4 concerning the rules on simplified procedures as contained in Chapter V on rules of procedure on investigation measures, prosecutions, and alternatives to prosecutions. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 40(1) - (3)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of any partial or non-compliance in each Member State.

Table 8 - Section 5 on rules on simplified procedures forming part of Chapter V on rules of procedure of investigation measures, prosecutions, and alternatives to prosecution – Overview of the compliance status per Member State

Member State	Chapter V Rules of procedure on investigation measures, prosecutions, and alternatives to prosecution – Section 4 Rules on simplified procedures		
	Art. 40(1)	Art. 40(2)	Art. 40(3)
AT			
BE			
BG			
CY			
CZ			
DE			
EE			
EL			
ES			
FI			
FR			
HR			
IT			
LT			
LU			
LV			
MT			
NL			
PT			
RO			
SI			
SK			

Article 40 refers to the rules on simplified prosecution procedures. **Article 40(1)** states that if national law provides for a simplified prosecution procedure aiming at the final disposal of a case, the EDP may propose to the Permanent Chamber to apply that procedure. **Article 40(2)** provides that the Permanent Chamber shall decide on the proposal of the EDP by taking into account the following: (a) the seriousness of the offence, based on the damage caused; (b) the willingness of the suspected offender to repair the damage caused by the illegal conduct; and (c) the use of the procedure should be in accordance with the provisions of the Regulation. Finally, **Article 40(3)** stipulates that if the Permanent Chamber agrees with the proposal, the EDP shall apply the simplified procedure in accordance with national law and register it in the case management system. Then, when the procedure has been finalised, the Permanent Chamber shall instruct the EDP to act with the view to finally disposing of the case.

The laws of all 22 of the Member States examined were found to be in **full compliance** with the aforementioned provisions of the Regulation.

4.5. Chapter VI – Procedural safeguards

4.5.1. Overview across Member States

This section will discuss the situation and trends amongst the Member States in relation to Chapter VI on procedural safeguards. For the purpose of the Study, data was collected in relation to the compliance of national law with **Articles 41(3)** and **42(1) - (4), (8)** of the Regulation. The table below provides an overview of the compliance status per Member State for each Article and sub-Article covered, before looking at the reasoning behind the finding of partial or non-compliance in each Member State.

The subsequent Section 4.5.2 will provide an in-depth analysis of the specific issues identified under **Article 42(2)** of the Regulation.

Table 9 - Chapter VI on procedural safeguards – Overview of the compliance status per Member State

Member State	Chapter VI Procedural safeguards					
	Art. 41(3)	Art. 42(1)	Art. 42(2)	Art. 42(3)	Art. 42(4)	Art. 42(8)
AT						
BE						
BG						
CY						
CZ						
DE						
EE						
EL						
ES						
FI						
FR						
HR						
IT						
LT						
LU						
LV						
MT						
NL						
PT						
RO						
SI						
SK						

All 22 Member States are in **full compliance** with **Article 41(3),** which requires that all procedural rights need to be made available to the suspect/accused person as well as all other persons involved in the proceedings of the EPPO.[103]

Article 42 refers to the judicial review of the procedural acts of the EPPO. The laws of all 22 Member States were found to be in full compliance with **Article 42(1)**, which stipulates that

[103] These include the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request such measures on behalf of the defence.

procedural acts of the EPPO intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts; this also applies to failures of the EPPO to adopt such procedural acts as required under the Regulation.

Article 42(2) refers to the fact that the CJEU shall have the jurisdiction to give preliminary rulings concerning: (a) the validity of procedural acts of the EPPO; (b) the interpretation or the validity of provisions of Union law; and (c) the interpretation of Articles 22 and 25 of the Regulation in relation to any conflict of competence between the EPPO and the competent national authorities. National law was found to **not** be in full compliance with this provision in t Member States (BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PT, RO, SI). In the vast majority of Member States (BE, BG, CY, CZ, DE, EE, EL, ES, FI, HR, IT, LT, LU, LV, MT, NL, PT, RO, SI), these issues result from the fact that the authority or one of the authorities assigned to resolve conflicts of competence between the EPPO and competent national authorities is not a 'court' or 'tribunal' for the purposes of Article 267 TFEU and, therefore, cannot submit a preliminary reference to the CJEU. For a detailed analysis of the compliance issues under Article 42(2), see Section 4.5.1.1 below.

The laws of all 22 Member States are in **full compliance** with **Article 42(3)**, which provides that by derogation from Article 42(1), the decisions of the EPPO to dismiss a case shall be subject to the review of the CJEU.

Article 42(4) provides that the CJEU shall have jurisdiction in any dispute relating to compensation for damage caused by the EPPO. The laws of all 22 Member States are in **full compliance** with this provision.

The laws of all 22 Member States are in **full compliance** with **Article 42(8)**, which provides that Article 42 is without prejudice to judicial review by the CJEU of decisions of the EPPO that affect data subjects' rights.

4.5.2. Judicial review: Specific issues identified under Article 42(2)

As mentioned in the preceding section, **Article 42(2)** stipulates that the CJEU shall have the jurisdiction to give preliminary rulings concerning the validity of procedural acts of the EPPO; the interpretation or the validity of provisions of Union law; and the interpretation of Articles 22 and 25 of the Regulation in relation to any conflict of competence between the EPPO and the competent national authorities.

Specifically, **Article 42(2)** provides that: '[t]he 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.'

Thus, Article 42(2)(c) essentially requires the competent authority under Article 25(6) deciding on the attribution of competences between the EPPO and the national prosecution to be a judicial authority as the CJEU shall have jurisdiction to interpret EU acts pursuant to Article 267 TFEU. Please see Section 4.3.2.3 for more information.

Furthermore, Recital 88 provides that: '[t]he legality of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties should be subject to judicial review before national courts. In that regard, effective remedies should be ensured in accordance with the second subparagraph of Article 19(1) of the Treaty on European Union (hereinafter:

'TEU')[104] (…) As underlined in the case law of the Court of Justice, national courts should always refer preliminary questions to the Court of Justice when they entertain doubts about the validity of those acts vis-à-vis Union law.'

Given that the legislation of most of the Member States (BE, BG, CY, DE, CZ, EE, EL, ES, FI, FR, HR, IT, LT, LU, LV, MT, NL, PT, RO, and SI) was found to not be fully compliant with the provision of the Regulation, examination of the reasons for this is warranted. For all the Member States except for FR, **the reason for this stems from the competent national authorities for deciding on the attribution of competence under Article 25(6) not being able to refer the matter to the CJEU as required under Article 42(2)(c), as they are not a 'court' or 'tribunal'**. Please see Section 4.3.2.3 for more information. This can be exemplified by ES, where there is a delineation regarding the attribution of competence depending on who the conflict is with. In the event that a dispute arises between the National Prosecutor's Office and the EPPO, the Chief of the State Public Prosecutor's Office, as provided in the Organic Statute of the Public Prosecutor's Office, has the power to make such a decision. If there is a conflict between the European Public Prosecutor's Office and an investigative judge that is already investigating the case, the Criminal Chamber of the Supreme Court is vested with such responsibility, with a previous report from the Public Prosecutor's Office.

In order for a national body to amount to a court/tribunal, independence needs to be guaranteed – in ES, bias can arise as the Chief of the General Public Prosecutor's Office is in the same administrative structure as the Public Prosecutor, who is a party to the dispute (for more information on the situation in ES, please see Section 4.3.2.3).

Furthermore, as mentioned above, Recital 88 states that judicial review should be possible and effective remedies should be ensured as the procedural acts of the EPPO produce legal effects vis-à-vis third parties. This is not the case in instances where the national authority does not amount to a judicial authority. Similarly, as with Article 25(6), the issue is that a national body is essentially deciding on the validity of EU acts without having recourse to review by the CJEU.

In FR, most decisions made by the EPPO in the context of *flagrante delicto* or preliminary investigations cannot be challenged/reviewed before trial. As a result, no preliminary reference to the CJEU can be made before trial.

While, essentially, a preliminary question can be sent to the CJEU should there be any uncertainties on the interpretation of the Regulation, the national authorities in DE and FI which determine the attribution of competence in case of a dispute between the EPPO and the national prosecution authority are not judicial authorities. Therefore, the issues concerning impartiality remain the same as under Article 25(6). Impartiality is also affected as the Federal Public Prosecutor General, and Prosecutor General, in DE and FI, respectively, belong to the same hierarchy as the Public Prosecutors, which are parties to the conflict.

In light of the fact that the vast majority of the Member States were found not to be in full compliance with Article 42(2), **it may be useful to consider the approaches taken by the Member States to ensure that their national law was in full compliance**. Two Member States, namely AT and SK, have chosen to rely on the direct applicability of the provision, as the Supreme Court refers preliminary questions to the CJEU and can be expected to do so in the context of the Regulation should any issues of interpretation arise. These are the only two Member States that assigned judicial authorities, specifically their national supreme courts, as the competent authorities under Article 25(6) to decide upon the attribution of competences.

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[104] Article 19(1), second paragraph, TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

To conclude, the lack of full compliance with Article 42(2) stems from the national authority competent under Article 25(6) to handle disputes between the national prosecution and the EPPO not being a court or tribunal in most Member States. As the competent national authority cannot submit a preliminary ruling pursuant to Article 267 TFEU, this is in contravention of Article 42(2) of the Regulation.

4.6. Chapter VII – Processing of information – Overview across Member States

The following section will examine the trends amongst the Member States regarding Chapter VII, which governs the processing of information; namely **Articles 43(1) - (2)** and **45(1) - (3)**. The table below presents an overview of the compliance status per Member State for each Article and sub-Article; the reasoning behind the finding of partial or non-compliance in each Member State follow.

Table 10 - Chapter VII on the processing of information – Overview of the compliance status per Member State

Member State	Chapter VII Provisions				
	Art. 43(1)	Art. 43(2)	Art. 45(1)	Art. 45(2)	Art. 45(3)
AT					
BE					
BG					
CY					
CZ					
DE					
EE					
EL					
ES					
FI					
FR					
HR					
IT					
LT					
LU					
LV					
MT					
NL					
PT					
RO					
SI					
SK					

Article 43 refers to the EPPO's access to relevant information. **Article 43(1)** grants the EPPO the right to obtain any relevant information stored in national criminal investigation and law enforcement databases and other relevant registers of public authorities pursuant to the same conditions that are applicable under national law in comparable cases. Under Article 43(1), the laws of 2 Member States were found to be in **partial compliance** (IT and MT). In IT, while there are no conditions under national law that explicitly prevent the EPPO from obtaining information from national databases, such access is not automatic but mediated by request to

the 'judicial police' or other police forces or offices, hence why national law is only in partial compliance. Regarding MT, the reason for partial compliance is that the inquiring magistrate's procedure is deemed to be secret by nature, and thus EDPs and EPs would not have access to the relevant information in the magisterial inquiry.

Additionally, although there are no limitations provided in national law, issues have been noted in practice in ES with regard to access to national databases. This regards, first, the database *Punto Neutro Judicial* from the Council of the Judiciary that includes, for example, information related to tax. A formal agreement has been signed with the Council of the Judiciary to grant the EPPO access to the database. However, in practice the EPPO still does not have full access to these data. This is due to the fact that each single national authority sharing data within this database has to sign specific agreements for the access of their data by the EPPO, causing delays in the effective implementation of the agreement. Additionally, issues exist in practice regarding the database from the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (Sepblac). In this case, the difficulties of access for the EPPO seem to relate to technical issues.

Article 43(2) enables the EPPO to obtain any relevant information which falls within its competence and is stored in databases and registers of the IBOAs. The laws of all 22 Member States were found to be in **full compliance** regarding Article 43(2).

Article 45 concerns the EPPO's case files. **Article 45(1)** provides that the handling EDP shall open a case file, should the EPPO decide to open an investigation or exercise its right of evocation in accordance with the Regulation. The law of one Member State (CY) was found to be in **partial compliance** with the Regulation. This stems from the requirement that only the Attorney General or Prosecutor under his command is empowered to open a case file. Thus, the EPPO has to request that the Attorney General or Prosecutor under his command opens the case.

Article 45(2) prescribes that the handling EDP shall manage the case file pursuant to the law of their Member State. The law of one Member State was found to be **partially compliant** (BE). In BE, the investigative judge grants access to prosecutors to the case file in judicial inquiries. Furthermore, the investigative judges cannot be forced to grant access to said file, as they remain independent.

Article 45(3) states that the cases management system of the EPPO includes all information and evidence from the case file which can be stored electronically to allow the Central Office to conduct its functions pursuant to the Regulation. Furthermore, the provision requires that the handling EDP ensures that the content of information always reflects the case file. The laws of all 22 Member States were found to be **fully compliant** with this provision.

4.7. Chapter IX – Financial and staff provisions – Overview across Member States

This section examines the trends and situation across the 22 Member States in relation to Chapter IX on Financial and Staff provisions, namely **Articles 96(6)** and **96(7).** The table below gives an overview of the compliance status per Member State for each Article and sub-Article. An account of the reasons for partial compliance and non-compliance in each Member State follows.

Table 11 - Chapter IX on financial and staff provisions – Overview of the compliance status per Member State

Member State	Chapter IX Provisions	
	Art. 96(6)	Art. 96(7)
AT		
BE		
BG		
CY		
CZ		
DE		
EE		
EL		
ES		
FI		
FR		
HR		
IT		
LT		
LU		
LV		
MT		
NL		
PT		
RO		
SI		
SK		

Article 96 includes a variety of provisions. Pursuant to **Article 96(6),** the EDPs shall serve as Special Advisors in line with Articles 5, 123 and 124 of the Conditions of Employment.[105] The provision also requires that the competent national authorities provide said Special Advisors with resources and equipment that are necessary for them to fulfil their duties. Furthermore, the competent national authorities are obliged to ensure that adequate arrangements are put in place so that the EDPs' rights concerning social security, pension and insurance coverage under the national scheme are maintained and that the total remuneration of an EDP is not lower than what it would be had the prosecutor remained a national prosecutor. The law of one Member State was found to be in non-compliance (BE) and the law of another was found to be in partial compliance, namely CY.

In CY, national law was found to be in partial compliance. With regard to the career or status of an EDP in the national prosecution system, the evaluation system for career and promotion purposes requires the Attorney General to evaluate all the employees annually; this score is then taken into consideration for promotion purposes.

Only Belgian national law was found to be in **non-compliance** with Article 96(6). This is due to the limited regulation of the EDPs' statute on the national level, which in turn has prevented

[105] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1962R0031:20140101:en:PDF (last accessed on 13 December 2022).

adequate arrangements being put in place relating to social security, pension, and insurance coverage.

Article 96(7) stipulates that EPs and EDPs should not receive any orders, guidelines, or instructions other than the ones referenced in Article 6 when exercising their investigation and prosecution powers. The law of one Member State was found to be in **partial compliance** (BE) and one Member State was found in **non-compliance** (LV). In BE, the non-compliance issue is related to the right of the Minister of Justice to order the public prosecutor's office to initiate certain prosecutions (the so-called 'positive injunction right'), which makes national law incompatible with the Regulation. The national legal framework has not been adapted to exclude this prerogative in EPPO cases, although the interviewee explained that, in practice, such a right has not been exercised by the Minister in EPPO cases and, for the last twenty years or so, the right has also not been exercised in national cases. In LV, the national provision provides that the instructions, commands, and orders of the Prosecutor General shall be mandatory for all prosecutors, which is contrary to the fact that the EPs and EDPs should not receive any orders, guidelines or instructions from any person external to the EPPO. Nonetheless, it can be noted that no issues have yet been observed in practice.

4.8. Chapter XI – General provisions – Overview across Member States

The following section discusses the situation across the Member States regarding Chapter XI, which covers General provisions; namely **Articles 106(1), 106(2), 108(2), 108(3), 108(4), 108(5)** and **113(6).** The table below gives an overview of the compliance status per Member State for each Article and sub-Article.

Table 12 - Chapter XI on general provisions – Overview of the compliance status per Member State

Member State	Chapter XI provisions					
	Art. 106(1)	Art. 108(2)	Art. 108(3)	Art. 108(4)	Art. 108(5)	Art. 113(6)
AT						
BE						
BG						
CY						
CZ						
DE						
EE						
EL						
ES						
FI						
FR						
HR						
IT						
LT						
LU						
LV						
MT						
NL						

PT						
RO						
SI						
SK						

Article 106 (1) states that the EPPO shall have the legal capacity that is granted to legal persons pursuant to national law.

Article 108 refers to the obligation of confidentiality and professional secrecy. **Article 108(2)** requires that any person who is involved or assists in carrying out the functions of the EPPO at the national level be bound by an obligation of confidentiality pursuant to the applicable national law. **Article 108(3)** stipulates that said obligation of confidentiality should extend to persons mentioned in paragraphs 1 and 2, once they have left office or employment and after the termination of their activities. **Article 108(4)** states that said obligation should be applicable to all information received by the EPPO, pursuant to applicable national law or Union law, provided that it has not already been lawfully made public. **Article 108(5)** stipulates that investigations conducted under the authority of the EPPO shall be protected by the rules on professional secrecy pursuant to applicable Union law; and requires that any individual that is involved or assists in the carrying out the functions of the EPPO is bound to respect professional secrecy pursuant to the applicable national law.

Article 113(6) requires that the national courts of the Member States of the European Union competent to handle disputes concerning the contractual liability of the EPPO shall be determined in reference to Regulation No 1215/2012.[106]

The laws of all 22 of the Member States examined were found to be in **full compliance** with the aforementioned provisions of the Regulation.

[106] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215 (last accessed on 6 April 2023).

5. Conclusions

The findings of this Study were based on the data collected on the national legal frameworks of the Member States with regard to their implementation of the EPPO Regulation. The Study took into account both the national legislation implementing the Regulation, as well the wider national legal systems, to assess whether the choices made for the implementation of the provisions of the Regulation – including where there was no national implementing legislation and the Member State relied upon direct applicability and/or previous legislation – were in conformity with the EPPO Regulation.

The Study found that the Member States have taken different approaches to implementation. Some Member States chose to implement the Regulation via the introduction of new national procedures, replacing old procedures that would encroach upon the competence, and impede the functioning, of the EPPO. The choice to introduce new procedures, for instance, occurred in some inquisitorial systems (such as FR and LU) where keeping the role of an investigative judge would have hindered the power of the EPPO to undertake investigations, carry out prosecutions, and bring cases to judgment. Meanwhile, other Member States chose to maintain their existing procedures, relying on the direct applicability of the EPPO Regulation. This was more often the case in adversarial systems where criminal investigations and prosecutions are led by national public prosecutors and where, therefore, providing the EDPs/EPs with the same powers as national public prosecutors would comply with the Regulation.

The different approaches taken to implementation highlight the fact that, despite the direct applicability of the Regulation, the successful functioning of the EPPO Regulation is reliant upon the national law of the Member States. Our Study found various compliance issues, resulting from either the lack of or incorrect adaption of national law, which has or may have an adverse impact on the tasks of the EPPO.

The legislation of the Member States was found to be in full compliance with the majority of the provisions of the Regulation. However, a few overarching compliance issues were detected.

The first overarching compliance issue relates to the independence of the EPPO (Article 6(1) of the Regulation). This is an issue that may result in wider consequences with regard to the Member States' overall compliance with the Regulation. Multiple instances were identified where national political authorities or politically appointed individuals are required to be consulted on matters involving the EPPO. This may result in the personnel of the EPPO being prevented from acting in the interest of the Union. In addition, any political influence on the EPPO's activities would, as a result, undermine its legitimacy. In particular, the risk is particularly stark in those EPPO cases with a political dimension.

The second overarching compliance issue relates to reporting. This is an issue that may result in wider consequences with regard to the Member States' overall compliance with the Regulation and was observed as an issue in the majority of Member States. Under Article 24(1)-(3), many instances were identified where national authorities report to other national authorities *before* they report to the EPPO. This may result in delays in the launch of investigations on crimes affecting the financial interests of the Union by the EPPO, or in a worst-case scenario, in cases where national authorities start to investigate such offences – rather than the EPPO – due to the failure to inform the EPPO accordingly.

The third overarching compliance issue is where decisions on conflicts of competence are made by high-level members of the same authority that is directly or indirectly involved in the conflict itself (e.g. Prosecutor General). This non-compliance issue was observed in almost all the Member States. The national competent authority to solve conflicts of competence under Article 25(6) should not be the same authority, or connected to the authority, which is involved in the conflict and should be a 'court' or 'tribunal' within the meaning of Article 267 TFEU, so

that it can submit a preliminary reference to the CJEU on any questions regarding the interpretation of the Regulation.

The fourth overarching compliance issue involves situations where the EPPO has chosen to exercise its competence, but it may not still fully exercise its tasks, due to the remaining conflicting powers of national authorities, such as investigative judges. This is an issue that may result in wider consequences with regard to the Member States' overall compliance with the Regulation. These situations primarily arise in those Member States where the traditional inquisitorial system was not properly adapted to implement the EPPO Regulation. This issue has a knock-on effect on the compliance of national law with various provisions of the EPPO Regulation, due to the lack of compliance with the tasks of the EPPO under Article 4 of the Regulation. The inability of the EPPO to exercise these tasks may also impact its independence.

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